

EIGHT CONSIDERATIONS FOR DRUG RELATED SAPCRs

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Drug tests have become a common place occurrence in family court cases. Rarely does a docket go by in my courtroom where drug testing is not requested. Listed below are some practical points about handling a case where substance abuse and testing are an issue.

It should be noted that much of the article includes my viewpoint on the involvement of drug testing in cases based on my years on the bench. It is very important that every litigator be familiar with the viewpoints of the judges he or she will appear before, since obviously jurists can differ in opinion about issues of this nature. Generally, when the article refers to Suits Affecting Parent Child Relationship (SAPCRs), I am referring to such suits that do not include a request for termination of parental rights.

1. Always visit with the client before all SAPCR hearings about drug usage.

Attorneys, at the first interview of a client, should always ask the client about drug and alcohol abuse history. Any drug usage should also be discussed again before any later hearings, since facts may change. Many clients will bristle at the suggestion of substance abuse, but others may give information that will be crucial to the planning of case strategy. I have seen many cases where the attorney is obviously unaware of substance abuse history of the client until the matter arises during a hearing or client tests positive for an illegal drug. There are commonly two effects of the attorney being unexpectedly educated about a client's drug abuse at a hearing or as a result of a drug test.

First, it destroys the case strategy and presentation. The attorney is presented with new, adverse facts with no time to perform an investigation or confer with the client. Any action, whether continuing with the present trial strategy or exploring new lines of questioning, could worsen the situation. If a drug abuse revelation occurs in the courtroom, counsel should always ask for a recess to confer with the client regarding what history exists and the proper manner in which to proceed in the case. Many times the client does not want to have that conversation and will deny even strong allegations. However, it is preferable to have that confrontation at the office rather than the courthouse.

Second, such a situation makes the client look like a liar and/or someone who is in denial about the extent of his or her drug abuse condition. If the client will not inform his or her attorney under the veil of the attorney-client privilege of the problem, then why would the court trust any representations made by the client at that hearing or any subsequent hearing? Persons abusing substances will often deny the abuse even when faced with positive test results, and this is normally an indicator of a serious problem.

Of course, the other side of the conversation pertains to whether the opposing party or any other important person in the case has a substance abuse problem. Part of this conversation should include the basis for the client's belief. Did the client hear the allegations from third parties? Is the belief merely speculation? Has the client actually seen or discussed substance abuse by or with the other party? If so, how much detail can he or she remember about what was seen or said? Did the client take any steps to address the problem of the other parent, or did the client allow the other parent long periods of time alone with the children in spite of the allegations? Who else is aware of the abuse? Skeptical questions to the client regarding allegations can help

the attorney formulate a more convincing case proving that the opposing party is drug abuser. Additionally, such a conversation can prepare the client for cross examination. Such questioning of the client can also flush out whether the client himself or herself is a drug abuser, especially since persons abusing drugs frequently make unfounded allegations against the other party.

2. Tests taken of the client's own volition prior to a hearing are of limited or no assistance.

Occasionally, an attorney will appear for a temporary order hearing with negative drug test, attempting to deflect any discussion as to whether the client has any drug abuse problem. This is normally not dispositive of the issue and can be a waste of money for the following reasons:

- If the test is a urine test, most drugs will not appear on the test unless they were taken in the past few days. A party that knows of the testing date can refrain from taking the drugs for a couple of weeks before the test and show clean for almost any drug except marijuana.
- If the test is a hair test, the party can engage in use of adulterants, such as those described in Mr. Turnage's materials, that will result in negative tests. Privately done tests allow the party to pick the testing date and arrange for the adulterants to take effect in time. This is also the case with urine testing.
- Use of a laboratory with which the court is not familiar raises trustworthiness questions. How were the samples collected? Who even gave the samples? Who is performing the tests? What procedures are they using?

Typically, a party coming to court with test results raises a red flag for the court that there may be an existing problem or at least a history of a problem. It is usually better to come to court offering to submit to testing of the court's choosing at a lab designated by the court in the event that allegations are made. The court possibly could order the opposing side to pay the costs.

3. Set the table for the next hearing when requesting a drug test of the opposing party.

When representing a party that believes the opponent has engaged in illegal drug usage these are some considerations prior to the first hearing:

- Does the court require a written motion to request drug testing at a hearing? Many courts do not require these, and an oral motion at the hearing will suffice. Other courts may not entertain the request unless such motion is on file and noticed for hearing.
- The requesting party should pay the costs of the test up front unless the opposing party already has restricted access to a child because of substance abuse. This offer would tell the court that the request is made on a good faith belief that drug abuse is occurring and that the request is not for purposes of harassment. Additionally, this insures the test happens. Often the person to be tested will appear at court for the next hearing saying that he/she had no money to pay for the test or that there was confusion about payment of the test fees.
- The requesting party should take testimony before the test from the person to be tested regarding drugs used, frequency, and the last time the drug was used. This will provide material for cross examination at a later hearing whether the test results are positive or

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"Is Your Client Urophobic, a Druggie or Just a Liar?"