Newspaper headlines show all too well how pre-teenage children become involved with the legal process: *Two Children in Car As Stabs Kill Mother,* *Bail Revoked for Teachers in Preschool Abuse Case,* *Child Testifies in Murder Trial,* *Mr. T Persuades 7-Year-Old Boy to Testify During Sex Abuse Case,* *Use of Child Witnesses Sparks Concerns,* and so on. Children may be witnesses to accidents, crimes, or other events of legal significance; they may be in-

† Professor Teply thanks his children, Robert, age eight, and Benjamin, age five, for their helpful insights. Dr. Perry likewise expresses appreciation to her children, Kristen, age nine, and Laura, age seven, for their helpful insights.

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1. The focus of this article is on children age twelve and younger. Unless otherwise stated, references to "children" herein are to that age group.

2. *Omaha World Herald*, Oct. 17, 1974, at 6, col. 7 (a two-year-old child and his four-year-old brother apparently witnessed their mother being stabbed nine times, twice in the throat; investigators were unable to interview the younger child, but the older child told them that his parents had argued in the car before the stabbing; their father was arrested on suspicion of homicide).


4. *Omaha World Herald*, Apr. 7, 1984, at 44, col. 5 (seven-year-old testified in a first-degree murder trial that she saw her step-father break her mother's car window with a "big stick"; then she heard "something go boom" and her mother "fell over"; the child's mother and step-father were in the midst of divorce proceedings at the time of the shooting).

5. *Omaha World Herald*, Jan. 24, 1985, at 37, col. 3 (NBC-TV star encourages child witness to testify at trial about preschool sexual abuse incidents; child undergoes weekly therapy as a result of the incidents).

6. *Omaha World Herald*, Nov. 7, 1983, at 3, col. 1 (raising concerns about the integrity of the legal system and possible psychological harm to the "thousands of children called into court each year").

7. See, e.g., *Rueger v. Hawks*, 150 Neb. 834, 846, 36 N.W.2d 236, 244 (1949) (two children who were nearly six years old at the time of an automobile accident and nearly seven years old at the time of the trial allowed to testify about the details of the collision).

8. See, e.g., *Wheeler v. United States*, 159 U.S. 523, 524-26 (1895) (child who witnessed his father's murder was adjudged competent to testify; he was almost five when the murder took place and nearly five and a half when he testified).
jured parties or victims of alleged wrongdoing; their opinions may be relevant to legal decisions, such as the award or change of temporary or permanent custody; or they may be perpetrators of crimes. In circumstances such as these, lawyers need effective techniques of interviewing and witness examination to overcome communication barriers with children and to increase the likelihood of factual accuracy. At the same time, professionally responsible persons should be sensitive to the counseling and human aspects of contacts with such children, even when their testimony or opinions adversely affect the position of the lawyer's client.

Although lawyers come in contact with children in a variety of cases, they receive virtually no formal training in law school in dealing with children, despite participation in interviewing-counseling or trial practice courses. This article is designed to make available to lawyers the expertise of other professions skilled in dealing


10. See, e.g., Harrold v. Schluep, 264 So. 2d 431, 435 (Fla. Dist. Ct. App. 1972) (appellate court felt that it was “highly critical that the jury should have had the opportunity to view and hear” injured six-year-old bicyclist in a negligence action against a driver who claimed the bicyclist was contributorily negligent).

11. See, e.g., State v. Fairbanks, 25 Wash. 2d 686, 688-89, 171 P.2d 845, 846-47 (1946) (eight-year-old and nine-year-old girls permitted to testify in an indecent liberties prosecution; defendant accosted the girls and took them to his office; under the guise of playing “tickles,” “touch,” etc., he put his hand inside their underclothing and upon their private parts).


14. According to practicing attorneys, this contact most often seems to occur in juvenile delinquency, neglect, abuse, divorce, criminal law, or tort cases. See generally Grisso & Lovinguth, Lawyers and Child Clients: A Call for Research, in THE RIGHTS OF CHILDREN 215, 216 (J. Henning ed. 1982) (suggesting that three circumstances probably account for most lawyer and child-client relationships—child neglect and custody disputes; children in institutional settings; and juvenile delinquency adjudications).

15. Legal interviewing and counseling texts generally do not address the special problems of interviewing children. The notable exception is Freeman and Weihofen's pioneering text, which discusses interviewing and counseling of both juvenile delinquents and children. See H. FREEMAN & H. WEIHOFFEN, CLINICAL LAW TRAINING 246-51, 458-63 (1972). Likewise, trial practice teaching materials focus on examining or cross-examining children only in a limited way, if at all. See, e.g., A. MORRILL, TRIAL DIPLOMACY §§ 4.28, 7.7(c) (2d ed. 1972) (brief discussion of cross-examination of child witnesses and establishing their capacity to understand and remember, but none of the cases prepared for "trial" practice involve child witnesses).
with children and the insights of experienced practicing attorneys. It specifically focuses on the potential pitfalls in interviewing and examining children in a legal setting and suggests ways of facilitating successful interviews, examinations, and cross-examinations. Part I provides a brief overview of the cognitive and moral stages of child development. Part II identifies some of the basic barriers of communication between children and legal professionals and suggests how those barriers can be overcome. Part III examines various problems of factual accuracy, often the principal concern in interviews and witness examinations. Part IV does two things: it briefly reviews when the law allows children to testify and then it focuses on techniques of examining and cross-examining children in depositions and at trial. Part V considers several other special problems that arise in legal interviewing and counseling of children.

I. OVERVIEW OF CHILD DEVELOPMENT

William James once suggested that infants enter this world in a state of "blooming, buzzing confusion." Now, however, it is understood that infants are governed by finely tuned perceptual and cognitive processes. Moreover, these processes develop and change in predictable ways, as detailed by the noted developmental psychologist Piaget. The first section of this Part presents an overview of these Piagetian stages of cognitive development. The second section then presents an overview of the stages of moral development. A general understanding of these two aspects of child development will be beneficial to any attorney who works with children.

A. STAGES OF COGNITIVE DEVELOPMENT

From birth until about age two, infants are in the sensorimotor stage. This stage is concerned primarily with their physical and motor interaction with the environment. During this stage, infants learn to (1) see themselves as different from the objects around them, (2) seek stimulation by lights and sounds, (3) prolong interesting experiences, (4) define things by manipulating them, and (5) record an object's existence in memory even when it is no longer visible. Although attorneys are unlikely to work with such infants, it is important to remember that older children may regress to this sensa-

16. W. James, Principles of Psychology 488 (1890).
19. The discussion of the Piagetian stages of development in this section is based on Inhelder and Piaget's work cited in note 18.
tion-bound stage after they have been severely traumatized.\textsuperscript{20}

The next stage, the \textit{preoperational} period, spans the years from two until about five or seven. First, during this stage children are markedly self-centered and incapable of adopting another person's viewpoint, either physically or mentally. Second, preoperational children can arrange objects or thoughts in a series, but they cannot draw inferences about nonadjacent components of the series. For example, such children may understand that "Bill is taller than Tom and Sam is taller than Bill," but they will be unable to deduce the answer to the question, "Who is the tallest?"\textsuperscript{21} Third, at this stage they are unable to see that objects alike in one respect may differ in others. Thus, all four-legged, furry creatures may be referred to as "doggies." Fourth, they reason \textit{transductively} (from one specific circumstance to the next), rather than inductively (from the specific to the general) or deductively (from the general to the specific). Using this "logic," they may reason that because the bathwater goes down the drain and because they are sitting in the tub, they too will disappear into the plumbing when the stopper is removed.\textsuperscript{22} Fifth, their preoperational thinking is irreversible. It is incomprehensible to them, for example, that some transgression on their part could be "undone." Sixth, their understanding of events is focused on present states or conditions. Their conception of time is too fragile to make inferences about what might have happened in the past "if . . ." or what could happen in the future "if . . . ." Seventh, children at this stage believe in \textit{animism}: that all things (animate or inanimate) are living and that they are endowed with intentions, consciousness, and feelings. Thus, they may admonish the parent not to cut their hair "because it [the hair] will feel so sad."\textsuperscript{23} Finally, preoperational children reach conclusions that are based upon vague impressions and perceptual judgments that often cannot be put into words. In part, this inability to communicate perceptions is a function of immaturity of the \textit{corpus callosum}, the bundle of white matter that connects the perceptual right hemisphere to the verbal left hemisphere of the

\textsuperscript{20} Pynoos and Eth point out that the symptoms that follow trauma frequently include "recurrent and intrusive recollections of the event, traumatic anxiety dreams, markedly diminished interest in activities, feelings of estrangement and constricted affect, fears of repeated trauma resulting in hypervigilant or avoidant behavior, decline in cognitive performance, and persistent feelings of guilt." Pynoos & Eth, \textit{The Child as Witness to Homicide}, 40 J. Soc. Issues, No. 2 1984, at 87, 90.


\textsuperscript{22} See id. at 218-20. This particular example frequently occurs with young children, including Dr. Perry's two daughters.

\textsuperscript{23} Laura Perry, at age 3, provided this illustration.
The multiple limitations of the cognitive capacities of pre-operational children, especially before age four, make a strong case that these young children should be unacceptable as witnesses. About the time children enter school, however, qualitative changes in cognitive processes appear. During the stage of concrete operations, usually lasting from about age six until puberty, children begin to use logical systems to organize their experiences. The pre-operational, impressionistic leaps from data to conclusions, characteristic of the previous stage, are replaced by mental strategies that encompass a series of small-scale, reversible steps, each of which can be judged as reasonable or unreasonable. They now can reason using complex logic as long as the assumptions underlying the reasoning process are not contradictory to their personal experience. They are not yet able to hypothesize about abstract, “what if?” situations. The concrete operational children are avid learners of facts. The more tangible or concrete the information, the better they relate to it. Moreover, at this stage they are immutably bound to rules, rituals, and doing things the “right” way. They want to categorize people, games, situations, and facts into separate and mutually exclusive mental pigeon holes. Thus, a person or event is either totally “good” or totally “bad”; grey shades on the continuum from good to bad do not exist for elementary school children. For this reason, friendships—and even family allegiances—are intense but ephemeral.

Because of these advances in logical reasoning and memory encoding strategies, six to twelve-year-old children should be considered better witnesses than younger children. On the other hand, they are not yet equipped to handle either abstract, hypothetical dilemmas or situations that require an assessment of relative ethics. Also, their fairweather friendships may make them fickle witnesses.

Only at the highest level of cognitive functioning, known as formal operations, can children cope effectively with abstractions. At this stage they can differentiate between the real (the “here and now”) and the possible. They become capable of hypothetico-deductive reasoning; “if . . . , then” statements can be analyzed through systematic exploration of logical alternatives. Solutions no longer are reached by mere trial and error, but rather are arrived at by mentally deducing all the possible outcomes, testing the alternatives, and then selecting the best answer. Unfortunately, this stage is not at

tainable until, at the earliest, about age eleven. Furthermore, many adults never achieve the complex reasoning abilities that constitute formal operations.

B. STAGES OF MORAL DEVELOPMENT

In addition to understanding basic cognitive processes, it is helpful for the attorney to be familiar with the stages of moral development. The qualitative changes that take place in moral development closely parallel those of cognition. While many theories of moral reasoning have been proposed, perhaps the most useful theory for attorneys is that outlined by Lickona. According to Lickona, individuals may progress through up to six levels of moral reasoning, each with its own definition of what is "right" and its own unique reasons for the child being "good":

1. During the preschool years, children believe that what is "right" is that they get their own way. Thus, children at this stage behave well in order to get rewards and to avoid punishments. (2) During kindergarten, children tend to feel that they should do what they are told. Being good, then, rests upon staying out of trouble. Children at this level, therefore, are quite susceptible to "coaching" by adults. Also, at this point, children judge the morality of the act based upon its magnitude rather than upon intentions. Thus, the child who breaks ten tea cups while trying to wash them is judged more severely than the child who breaks only one teacup in the process of obtaining forbidden treats. (3) As children move into the cognitive stage of concrete operations during the elementary school years, their conception of what is right also changes. At this stage, they continue to look out for themselves. In addition, however, they want to be fair to those who are fair to them. In this case, being good hinges upon "what's-in-it-for-me?" fairness or the "you-scratch-my-back-and-I'll-scratch-yours" philosophy. They may be quite willing to help the attorney if they see some benefits to themselves as well. (4) During the middle-to-upper elementary grades, morality is synonymous with "niceness," that is, with living up to the expectations of important adults. Children at this stage are eager to please, even at the expense of adult ethics. Thus, gaining ap-

26. Id. at 468.
proval from authority figures is, for them, better than stating objective truths. (5) During the teen years, a sense of responsibility to the social system as a whole develops. Individuals at this stage believe that they must be good in order to keep the system from falling apart and to maintain self-respect as someone who meets personal obligations. Explanations of our system of justice may be very useful to children at this stage. (6) It is only during the last stage that the adult may act consistently in accordance with principled conscience, that is, with respect for the rights and dignity of every individual person in support of a system that protects human rights.31

Thus, when children are asked to speak truthfully about events in a court of law, their responses may well depend upon their moral frame of reference. This knowledge can be especially beneficial in making determinations about qualifying children for giving testimony.

In sum, a general understanding of the cognitive and moral stages of child development can assist the attorney in several ways. First, it provides a basis for having reasonable expectations for the child. Second, it may be helpful in determining why a child is having trouble understanding questions or expressing himself. Third, knowing a child's developmental level may be useful both in deciding legal competency to testify and in considering how much weight to give the child's testimony. Finally, understanding the child's level of development can be essential in conducting a successful interview.

II. OVERCOMING COMMUNICATION BARRIERS

In any interview situation, a variety of circumstances and factors will promote effective communication; at the same time, others may hinder it.32 The lawyer's principal communication tasks in an interview are to minimize or avoid those situations that block, mislead, and discourage communication and to utilize or stress those skills that facilitate, encourage, and motivate.33 In this regard, lawyers

33. See J. RICH, INTERVIEWING CHILDREN AND ADOLESCENTS 25 (1968) (excellent resource on interviewing children and it is highly recommended). Rich explains:

A warm feeling towards the interviewer will motivate the child to communicate—fear, suspicion, or hostility will stop him from doing so; interest will help, boredom will hinder; an urgent desire to solve his problems will make the child want to talk about them, embarrassment will make him want to avoid discussion. The job of the interviewer is therefore to exploit those factors that increase communication (especially on the topics that are relevant) and minimize those that block communication.

Id.
must take special care in interviews with children. First, children ordi-
narily are not the initiators of the interview or the attorney-client rela-
relationship; thus, they are more likely to be involuntary partici-
pants. Second, they may have fundamental misconceptions about the
purpose of the interview and the role of the attorney in the legal pro-
cess. Third, they may fail to understand a lawyer's questions because
their cognitive and conceptual skills are not fully developed. Fourth,
for the same reasons, they may be unable to express themselves
clearly or to interpret facts properly. Fifth, because of their relative
immaturity and inexperience, they may be less able to deal with emo-
tional blocks or social pressures. Failure to be sensitive to these con-
siderations and to adjust an interview to take them into account can
cause a child to decide that, on balance, it is not worthwhile to com-
municate; further, it can lead to inaccuracies or distortions in the
information or opinions elicited; and ultimately it can cause inappro-
priate advice and unfortunate legal determinations.

A. OPENING THE INTERVIEW, DEALING WITH MISCONCEPTIONS, AND
   ESTABLISHING A GOOD WORKING RELATIONSHIP

It often is said that it is important “to get off on the right foot.”
This cliche summarizes a significant aspect of an interview with a
child in a legal setting. Often the beginning not only will affect the
entire course of the interview, but also it will be one of the key ele-
ments in setting the long-term relationship between the attorney and
the child. As in any interview, the goal at the outset of the interview
is to put the interviewee at ease and to establish a good working rela-
tionship. To do so requires an awareness of the differences be-
tween children and adults as interviewees and an effort to modify the
interview to take into account those differences.

One important difference is the lack of “common ground” be-
tween the attorney and the child. Attorneys often engage in “small
talk” at the outset of an interview, which has the laudable effect of
helping the interviewee relax and become used to talking with the
attorney. Concurrently, it aids in building rapport. Generally speak-
ing, it is easy for attorneys to engage in such conversations with other
adults because the topics arise naturally—the weather, sports, family,
job, etc. But special care must be taken in selecting the topic for such
conversations with children because, as Rich suggests, “[i]f an adult’s
concept of the child’s world is determined mainly by the points at
which that world impinges on the adult world, [the interviewer] is li-

34. Cf. id. (“the child will communicate only if, on balance, it is worth his while
to do so”).
able to bring up the wrong topics." For example, many adults unwittingly begin conversations with children by asking how they are doing at school. Another common variant is how they like school. Rich suggests that most children do not want to talk about school and that it is better to open the conversation with questions about their leisure activities or hobbies. In this regard, it is useful for the attorney to find out some information about the child’s leisure activities before the interview so that the attorney can direct the opening discussion to these activities. By listening carefully to what the child says, the attorney helps to build the child’s self-confidence and shows that the attorney is interested in what the child has to say.

Freeman and Weihofen also suggest that the attorney should not be unduly friendly with children at the outset of the interview because it may be disconcerting, especially when it is unexpected. Also it is best to avoid conduct which children might view as disrespectful, such as addressing them by a nickname without asking them what they like to be called.

In the beginning stage of the interview, a structural guide should be given that suggests in broad terms how the lawyer sees the interview progressing. For example, the lawyer might explain that the lawyer would like the child to describe certain events. Then the child will be asked some questions by the lawyer; after that, (if it is relevant) they will discuss how they can arrive at some solutions or the interview will be over. In addition, the child should be given a chance to give input, which may be accomplished by the attorney asking, “Is that okay?” or the like. It also provides an early opportunity to deal with any apparent hostility.

Another important difference between interviewing children and adults is the child’s limited knowledge of the law, the legal process, and the role of an attorney within that process. Through experience, common knowledge, and a mature cognitive system, adults ordinarily realize the “representative” function of an attorney: someone is the

36. J. Rich, supra note 33, at 42.
37. Rich notes that an adult would not think of opening a conversation with another adult by asking an equivalent question, “Are you successful in your job?” Id.
38. Id. Cf. Inker, Evidentiary Problems in Custody Trials, 6 Fam. Advoc., Spring 1984, at 16, 16 (quoting example of a judge establishing rapport with a seven-year-old boy by asking him in a low, almost confidential voice about whether the boy played baseball and the position he played).
39. See note 256 and accompanying text infra.
40. H. Freeman & H. Weihofen, supra note 15, at 458 (“Like anyone else, a child feels more at home in a situation that is familiar or at least expected. An unduly warm greeting may therefore be disconcerting. Advancing on him with outstretched hand and a toothy smile may take him aback”).
41. See id. (“If [the child] tells you his name is Edwin Jones, promptly addressing him as ‘Eddie’ may be taken as showing not friendliness but lack of respect”).
attorney's client, to whom the attorney owes undivided loyalty and who the attorney is obligated to represent zealously. In contrast, children may have only a vague understanding of the lawyer's position in the legal system. They have no "scorecard" to help them understand the intertwining roles of private attorney, policeman, prosecutor, and judge. It is even more confusing to them to attempt to comprehend the lawyer's multiple roles as defender, facilitator, negotiator, and counselor. Thus, if they are the accused, they will not fully comprehend the meaning and significance of the advocate on their behalf in the legal system.

It is, therefore, useful to explain in concrete terms, early in the interview, what the relationship of the attorney is to the child and why the interview is being conducted. For a young child witness to a car-pedestrian accident, for example, an attorney might simply say: 'I am a friend of Jimmy and his mother and father. I am helping them find out all about Jimmy's accident. I know you were with Jimmy just before the accident. It would be a big help to Jimmy if you could tell me exactly how the accident happened." If the attorney represented the child and his parents in this situation, the explanation would have to be more detailed: "I am a lawyer and my job is to help you and your parents find out whether the driver of the car that hit you was driving carefully enough. The law says that when the driver was not careful enough and hits someone, the driver has to pay for your injuries. To decide if the driver must pay, we need to find out all about the accident. It would be a big help if you could tell me exactly how the accident happened." In a guardian-ad-litem situation, the approach necessarily would be different. For example, the attorney could begin by asking the child, "Do you know your parents are getting a divorce, which means that your parents no longer will live together or be married to each other?" Once the attorney is sure that the child has some understanding of a divorce, the attorney then could explain that the child's parents "have to go to court to get a divorce and that the judge will know that your parents have children." The attorney then could explain that "the judge has sent me to talk with you to help the judge decide who you are going to live with after the divorce. So I would like to talk with you about your parents and how you feel about the divorce." These explanations, of course, should be adjusted according to the circumstances and the maturity of the child.

42. See Model Code of Professional Responsibility DR 7-101 (1981). See generally Grasso & Lovinguth, supra note 14, at 218-23 (good discussion of the problems children may have in understanding the lawyer-client relationship and the attorney's function).
This general approach has several benefits. First, it performs a socially valuable educational function. Second, it helps to build rapport to the extent that it conveys that the attorney is on "their side" (if that is the case). Third, by making it clear what the general purpose of the interview is, such as finding out information, learning their opinion, etc., it may help relieve some anxiety, at least that which is based on fear of the unknown. Fourth, it may clear up some misconceptions or counteract misinformation given to the child, assuming the child believes the attorney. Finally, it will facilitate a better understanding of what the attorney can do for the child or why the attorney needs the child's help, which thus offers some degree of motivation to cooperate.

In the course of this explanation, the attorney may include an assurance of confidentiality—if the child is the client. This assurance may encourage children to speak more freely, especially if they have some reason to be apprehensive (which usually is the case when they are accused of wrongdoing). It probably should be omitted, however, when they have no reason to be apprehensive or, of course, when confidentiality obligations do not apply (e.g., when they are witnesses).

Another important issue in interviewing children as opposed to adults is the general difficulty children have in assuming an active "client" role. Instead, they are likely to remain in the natural "child" role. To compound the problem, attorneys also have a natural tendency to assume the "parent" role rather than that of "counselor." In this skewed relationship, the "parent" (attorney) assesses, decides, judges, directs, and manipulates. The "child" (client), on the other hand, is passive, submissive, and docile. As in school, children are expected to listen and obey rather than retaining their independence, viewing the attorney as one who works for them, and considering themselves as "equals," as would an adult.

For most legal interviewing and counseling purposes, a parent-child relationship will be unproductive. It supplies only a low level of motivation to cooperate. Furthermore, "decisions" reached without a collaborative effort are judgments that reflect the attorney's values, which are not necessarily the same as the child's. Such deci-

43. See J. Rich, supra note 33, at 32 ("One cannot expect the child to speak freely if he thinks that everything he says 'will be taken down in writing and may be used in evidence'. But to start off by assuring him that it will not, if the idea had never crossed his mind, will make him unnecessarily apprehensive").

44. See generally notes 241-52 and accompanying text infra.

sions also are less likely to be ones that the child will be satisfied with or that the child will follow in the long-run.46

In this regard, it is important to remember that the success of the interview may depend upon the manner in which attorneys verbally approach children. When speaking with children, adults have a tendency to change their facial expressions (opening the eyes wide and raising the eyebrows), their voices (elevating pitch and lowering volume), and the content of their messages (sometimes even using "baby-talk").47 A much more successful and less demeaning approach is to maintain an adult manner while simplifying the language and content of the verbal message.48

B. DEALING WITH THE RELUCTANCE TO TALK

Once the interview has been opened satisfactorily and a working relationship has been established, the attorney's principal task is to encourage information flow. Usually, the best starting point is a simple open-ended question such as "Tell me what happened," or "Tell me what you saw and heard." In introducing this open-ended question, or in the earlier discussion, it is vitally important for the interviewer to avoid an unintentional association with persons whom the child fears by a statement such as "The police say you were at the scene." Likewise, critical remarks should be avoided because they too tend to discourage communication.50

To maintain the interview, the attorney often will have to be a more active participant than in an interview with an adult. Numerous nods, "Mm-hmm," and other recognition and encouragement, such as "I see," often will be needed to promote information flow. The attorney should more liberally tolerate silences and pauses because children may need more time than adults to think or to decide how to express themselves.52 Likewise, the attorney should be careful to use general probe questions such as "Can you remember anything (more) about ——?" before resorting to more specific

49. J. Rich, supra note 33, at 31-32.
50. H. Freeman & H. Weihofen, supra note 15, at 461 (suggesting the use of a more neutral introduction, such as "I'd like to hear your story of what happened").
51. J. Rich, supra note 33, at 32. Rich illustrates this point with the following two examples: "I see that you're not doing very well in school" and "Your mother says that you have been very naughty lately." Id.
52. Freeman and Weihofen point out that children often will come to a full stop in the conversation just before they are about to express their deepest feelings or reveal an important fact. H. Freeman & H. Weihofen, supra note 15, at 459.
questions. If more specific questions are needed, it is helpful to remember that children tend to encode their experiences in memory “pigeonholes”; that is, all information relating to a particular event is, practically speaking, stored together. It is the attorney's job to ferret out this information by finding the “key” to the right pigeonhole. Questions that tap the five senses are likely keys. Thus, the following open-ended questions may prove useful: “What colors do you remember seeing?” “What sounds did you hear?” “What could you smell?” etc.

During the course of an interview, there are three situations in which the child is likely to show a reluctance to talk: (1) the subject matter or the child’s answer is embarrassing; (2) the topic (or the interview or the interviewer) is perceived as threatening; and (3) the discussion is emotionally upsetting. Because these situations can be expected, the attorney needs to have at hand techniques to overcome these barriers to communication.

When a child appears to be needlessly embarrassed, the attorney may reassure the child that there is no cause to be. Even better, the attorney can empathize with the child by saying, “I know it’s tough to talk about it, but it will be worth it to get this whole thing cleared up.” The attorney can add that when the attorney knows all about it, together they can decide what to do next. Sometimes, however, a simple expression of interest (“I see” or “uh huh”) may be enough to get the child to continue. On the other hand, if the attorney’s encouragement is not sufficient to overcome the child’s reluctance, it is better for the attorney to change the topic quickly and approach the embarrassing matter again later.

Whenever possible, the attorney should try to anticipate situations that are likely to be embarrassing or derogatory to children. Their difficulty can be eased by asking them a multiple-choice question. In this way, they can choose between different adjectives or descriptions, phrased in a manner that tries to avoid making any of them sound derogatory. For example, if the child appears reluctant to discuss the drinking habits of a parent, the attorney might say,

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53. This terminology was suggested by Dr. T. Santmire of the University of Nebraska.
54. J. Rich, supra note 33, at 37.
55. Id. (such a statement demonstrates that the interviewer understands and sympathizes with the child’s difficulty).
56. Id. (such a statement demonstrates that the interviewer is in a position to help).
57. Id.
58. Id. at 55 (suggesting that it is valuable to have a set of neutral or pleasant topics on which to draw at short notice if the interview becomes difficult).
59. See H. Freeman & H. Weihofer, supra note 15, at 460.
“You mentioned that your father drinks a ‘little’ beer each night. Would you say he usually drinks one or two cans, three or four, five or six, seven or eight, nine or ten, eleven or twelve, or more than that each night?” Another approach is to ask a question embodying a comparison, such as, “Compared with the fathers of your friends, would you say your father drinks more or less than most of them?” rather than, “Does your father drink a lot?”

Threatening situations, such as a discussion of an accused child’s guilt generally can be dealt with in a similar way—by reassurance, empathic support, and carefully framed questions. Unrealistic protests of innocence or non-involvement by a child can be met directly by the attorney with a reminder of confidentiality and the various techniques of dealing with any lying client. But here the attorney must be careful not to drive the child into a sulky silence by a too direct confrontation.

Closely related to threatening situations are those that are emotionally upsetting. Guilt feelings sometimes are the cause for the reluctance to discuss a topic. Another cause can be the child’s unwillingness to “relive” a traumatic event or experience again by talking about the details, such as when the child has witnessed a bloody crime or accident or has been sexually molested. This latter situation probably is one of the most difficult for attorneys to deal with effectively, but unfortunately it is one of the more common ones. Here again, reassurance, empathic support, carefully framed questions, and encouragement are the best techniques. Painful topics may have to be approached from several directions, coupled with topic-switching, before the complete story comes out. Another approach may be to use indirect questions. For example, children might be asked how they intend to bring up their own children when they have them, which may indirectly reveal information about how they are treated. Often children may be willing to draw a picture about an incident when they are otherwise emotionally unable to talk about it. Asking them to depict the incident using small dolls...
or puppets also can be effective.66

C. INABILITY TO UNDERSTAND QUESTIONS OR EXPLANATIONS

As highly educated persons, lawyers routinely use a relatively sophisticated vocabulary, including technical terms and legal jargon. Although a lawyer's verbal skills are valuable for many legal purposes, they sometimes can present a significant barrier to communication with adults. They present an even greater potential barrier when children are involved. For this reason, lawyers must choose their words with great care, especially in asking questions of children or explaining matters to them.

It is important to recognize from the outset that words do not always mean the same thing to children as they do to adults. For example, "staying up late" may mean 8:30 p.m. to a child.67 Other words or terms simply will be incomprehensible to a child. For example, it would be virtually useless to give explanations to a child that include such terms as "negligence," "verdict," "(legal) judgment," "presumption," "pleading," "compensate," "cause of action," etc.

A lawyer likewise should not expect children to be able to answer questions about abstractions, especially concerning a subject which they have not previously considered.68 Similarly, they may not fully comprehend a generalized term in a question, such as the word "statement" in the following question: "Did you make a statement to anyone?"69 Nor should a lawyer expect a child to fully understand evaluative questions, such as "Do you get along well with your father?"70

The best approach is to reduce the questions or explanations to the most basic and concrete terms. For example, believing that "hobbies" means "handicrafts," children may answer the question, "What are your hobbies?" by stating that they do not have any. Yet a more

66. See Berliner & Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues, No. 2 1984, at 125, 129, 133 (use of anatomically correct dolls that permit children to demonstrate the sexual activity rather than having to describe it orally).
68. H. FREEMAN & H. WEIHOFEN, supra note 15, at 460.
69. See id. (Instead, "[a]sk whether he talked to the police (if that is what you want to know) or to anyone from an insurance company, or whether he made any comments to a friend as they stood there"). See also Goodman, The Child Witness: Conclusions and Future Directions for Research and Legal Practice, 40 J. Soc. Issues, No. 2 1984, at 157, 157-58 (three-year-old's confusion of "house" and "apartment" responsible, in part, for the dropping of sexual abuse charges).
70. Id. See notes 103-05 and accompanying text infra.
concrete question, such as "What do you do after school and during the evening?" may generate more meaningful and accurate answers. Similarly, children may give an unsatisfactory answer to "Where do you reside?" but readily answer the question, "With whom do you live?"

The same approach can be used for legal terms or concepts. For example, "negligence" can become "when it's someone's fault" or "not being careful enough"; "compensate" can become "pay for" or "pay back"; "divorce" can be explained as above—"when parents no longer live together and are not married to each other anymore"; etc.

D. INABILITY TO EXPRESS THEMSELVES

This barrier to communication—the inability of children to express themselves—is an intellectual rather than an emotional one. In part, this barrier arises from a child's limited vocabulary and reasoning capacity. It also arises, in part, from the inability of the attorney to see the child's frame of reference, to understand slang, and to be aware of the special connotations of what is said.

When an attorney is uncertain of the child's meaning, it is best if

71. J. RICH, supra note 33, at 47.
72. See Stafford, The Child as a Witness, 37 WASH. L. REV. 303, 314 (1962). Attorneys also must be careful to recognize the child's perspective and tendency toward extreme literalness. Consider the following example taken from a trial context:

[A] 5-year-old child, on direct examination, told the jury about her father putting his penis in her mouth. On cross-examination by the father's defense attorney, the following exchange took place:

Defense Attorney: And then you said you put your mouth on his penis?
Child: No.

Defense Attorney: You didn't say that?
Child: No.

Defense Attorney: Did you ever put your mouth on his penis?
Child: No.

Defense Attorney: Well, why did you tell your mother that your dad put his penis in your mouth?
Child: My brother told me to.

At this point, it looked as if the child had completely recanted her earlier testimony about the sexual abuse and had only fabricated the story because her brother told her to. However, the experienced prosecuting attorney recognized the problem and clarified the situation:

Prosecuting Attorney: Jennie, you said that you didn't put your mouth on daddy's penis. Is that right?
Child: Yes.

Prosecuting Attorney: Did daddy put his penis in your mouth?
Child: Yes.

Prosecuting Attorney: Did you tell your mom?
Child: Yes.

Prosecuting Attorney: What made you decide to tell?

Child: My brother and I talked about it, and he said I better tell or dad would just keep doing it.

Berliner & Barbieri, supra note 66, at 132.
73. J. RICH, supra note 33, at 53.
the attorney takes the blame for failing to understand. In any event, the attorney should use neutral phrases such as "What do you mean?" rather than "You are not making yourself clear." Furthermore, it is often possible to re-phrase the question or to ask for elaboration ("Tell me some more about ———"). Rich aptly points out that if all else fails, "it is far better to give the impression of having understood [the child] and change the topic and then come back to it later in some other way than to leave the child with the impression that he can't get his point across however hard he tries."75

It often is tempting to offer a summary of what was said and to ask whether this summary is correct when the child's meaning is unclear. While this technique may sometimes work well with adults, it is particularly dangerous to use with children who are in a state of anxiety or who are very young because they may be quite willing to agree to anything.76

Another possible approach when children are unable to communicate is to allow them to show the attorney with toy objects. For example, children may be able to demonstrate the position or movement of physical objects much more effectively with toy cars and toy "people" than through a narration of the events.77 This same technique may, of course, be used in a deposition or at trial.78 An-

74. See id.
75. Id.
76. Id. at 54. See notes 112-28 and accompanying text infra.
78. See, e.g., id. at 220-21; Deposition of Bobby Camerlinck at 6-8, Camerlinck v. Thomas, 209 Neb. 843, 312 N.W.2d 260 (1981) (action to recover damages after the six-year-old defendant negligently poked the four-year-old plaintiff in the eye with a stick at a playground). The plaintiff, who was five years old at time of deposition, was having difficulty explaining how the accident happened. The attorney handled this problem in this way:

Q. How close were you to the slide, Bobby, less than a foot, just a few inches, ten or twelve inches would you say?
A. About that.
Q. You could reach out and touch the slide if you wanted to real easy, right, you were close enough to do that without moving?
A. Yes.
Q. What direction were you facing, do you know? Was your body pointed toward the slide, or away from it, or how was it?
A. That way was the slide.
Q. Let's pretend this is the edge of the slide, okay, right here, this table, let's pretend the slide is coming down like this. Is that the right way?
A. Yes. It was coming down that way.
Q. Can you show me where you stood, if this is the bottom of the slide, and where your mom is seated would be the top. Do you understand what I mean?
A. Yes.
Q. It is coming down like this. Where were you standing with reference to the slide.
A. Right here.
other possibility is allowing them to draw or write out what happened. This approach may be especially useful when children have speech defects or have suffered an injury impairing their speech.79

III. PROBLEMS OF FACTUAL ACCURACY

One of the principal concerns in interviews with children is whether the information given by them is factually accurate. At trial, it is of the utmost importance to establish accuracy, particularly when children are the only eyewitnesses to the event. This section examines four basic factors affecting the veracity of children: (1) perception and recall (memory); (2) ordering and interpreting perceptions; (3) suggestibility; and (4) undue influence. In doing so, it draws on the findings of social science research.

A. PERCEPTION AND RECALL (MEMORY)

Perception is the conscious mental registration of sensory stimuli.80 To be of any use in giving factual information in interviews or testimony, children, of course, must have actually perceived the event. Like any other witnesses, for example, children may have been distracted or they may have defects in their sensory organs (eyesight, hearing, taste, smell, etc.). Unlike adults, who are prone to

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Q. You were on this side of it?
A. Yes.
Q. Show me how you were standing, which direction you were facing. This is the bottom.
[ATTORNEY]: Let the record show he is on the left side of the table facing what would be the bottom of the slide, ....
[OTHER ATTORNEY]: He is facing in the direction that the slope of the slide is.
[ATTORNEY]: Right, for this purpose.
Q. I want you to stand up there again, Bobby, like you were. Can you take one of your arms and reach out and show me which side the slide would have been on when you were standing there facing the bottom.
[ATTORNEY]: For the record he has reached out with his right arm and indicated.
Q. What direction did you turn when you heard Jay call to you?
[ATTORNEY]: For the record he turned his head to the right.

Id. (continuing the examination). See also note 102 and accompanying text infra.

Note that visual aids are especially helpful at trial when children are examined. See 6 AM. JUR. TRIALS Direct Examination of Defendant § 9, at 273 (1967) ("it may be far more useful to show [the child] a photograph [or other visual aid] and ask him to point out and mark certain items in it, than to ask him to attempt the difficult task of describing the scene of an accident or estimating distances and relative positions of such items"); this source also suggests that children ordinarily are quite adept in using visual aids because much of their education involves the use of such aids) [hereinafter cited as Direct Examination of Defendant].

79. Cf. 1 AM. JUR. TRIALS Investigating the Civil Case § 41, at 425 (1964) (suggesting such an approach for the purpose of memorializing the child's statement) [hereinafter cited as Investigating the Civil Case].
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divide their attention between observing and interpreting their observations, however, children tend to concentrate on observing. Thus, bright children may be very effective witnesses. On the other hand, children may fail to note peripheral elements because they may lack meaning or importance in the child's experience while other extraneous elements may be given exaggerated importance because of their peculiar transitory relevance to the child. For instance, some children may "draw a blank" when they are asked to describe the clothes that someone was wearing because they may not have learned to be conscious of detail in appearance or dress; in contrast, other children who are preoccupied with fashion may be able to describe the clothes in great detail.

In addition to the initial perception of events, children must have sufficient recall, that is, the ability to remember and report information in some way, to be of any use in giving factual information in interviews or testimony. Remember that the child's brain is not yet fully developed. In particular, the bundle of fibers, known as the corpus callosum, that provides communication between the perceptual right-brain and the verbal left-brain remains immature until nearly age nine. Thus, while children may be able to perceive an event accurately, they may have great difficulty translating perceptions into accurate verbal representations.

Generally speaking, social scientists measure children's memories in three ways. One is a "recall test," in which children must search their memories for missing ideas or facts; in this test, they must retrieve all the necessary information without hints. This method will be the most difficult for young children. Another is a "recognition test," in which children must choose between both correct and incorrect information that they are given. The third method is a "direct-question test," in which children are asked specific, direct questions to stimulate their recall.

The psychological research on a child's ability to remember has found that children have a relatively early development of recognition recall. Specifically, studies show that children as young as age four or five perform as well as adults on recognition memory tasks.

81. H. FREEMAN & H. WEIHOFEN, supra note 15, at 458. See also Investigating the Civil Case, supra note 79, § 41, at 424 (1964) ("Small children, particularly, often possess picture-image memories that sometimes make them exceedingly important witnesses to an accident").
82. 5 AM. JUR. TRIALS, Handling Perception and Distortion in Testimony § 19, at 824 (1966) [hereinafter cited as Handling Perception and Distortion].
83. Id. at 825.
84. V. Roth, supra note 24 (unpublished presentation).
85. See Melton, Children's Competency to Testify, 5 LAW & HUM. BEHAV. 73, 76-77 (1981) (summarizing the psychological research).
This research supports the conclusion that children may be "quite adequate" in performing eyewitness tasks such as suspect identification from a line-up or from photographs, which essentially involves the identification of a stimulus as the same as or different from what was previously seen.86

Not surprisingly, in contrast to recognition memory tasks, psychological research demonstrates a substantial difference with age in the ability to retrieve previously observed events from memory with few or no prompts (free recall).87 For example, if ten-year-old children are shown a group of twelve pictures, they usually will be able to recall seven or eight of them (and recognize all twelve). Four-year-old children, however, will be able to recall only three of them (but recognize all twelve).88 Measured in terms of the number of descriptive statements, older persons quite naturally produce much more material on free recall. This discrepancy can be accounted for in large measure by maturation of the brain itself.

In one study, for instance, subjects from kindergarten-age children to college-age adults observed an unexpected, staged incident—an interruption in which a person complained angrily about use of the room. When they were asked to relate what they could remember about the incident in a free recall, a number of the younger subjects did not volunteer any information. The kindergarten and first graders recalled an average of about one correct item per subject, the third and fourth graders about three, the seventh and eighth graders about six, and the college students between seven and eight.89 This study did point out, however, that although the youngest (kindergarten-first grade) group offered much less in a free narrative, what they did say tended to be correct (only 3% error). In contrast, the other age groups had an error rate of 12%, 8%, and 10% respectively.90

86. See Marin, Holmes, Guth, & Kovac, The Potential of Children as Eyewitnesses, 3 Law & Hum. Behav. 295, 296 (1979) [hereinafter cited as Marin]. But cf., Chance & Goldstein, Face-Recognition Memory: Implications for Children's Eyewitness Testimony, 40 J. Soc. Issues, No. 2 1984, at 69, 82-83; California abuse case may be unraveling, Chicago Tribune, May 17, 1985, at 1, col. 2, 9, col. 1 (in a preschool abuse case, a ten-year-old witness astonished courtroom observers by erroneously identifying photographs of the newly elected Los Angeles City Attorney and a motion picture actor as among those who had abused him).

87. Marin, supra note 86, at 296.


89. Marin, supra note 86, at 297-98, 300-01.

90. Id. at 303. It should be noted that the overall performance of eyewitness tasks was found to be poor in a free narrative: the observers were able to recall less than one fifth of the items that they could have recalled, based upon independent raters' analyses of the twenty most likely descriptive statements of ideas from tape recordings of the narratives. Id. at 298, 303.
After they had completed their narrative, the observers were asked to answer twenty, yes-no objective, nonleading questions about the incident. The questions used simple vocabulary and sentence structure (e.g., Was the man wearing brown pants? Was the man's hair longer than mine? Did the man touch me?). They then were asked to identify the man they had seen from six similar photographs. The researchers found that the children of all ages were just as capable as the adults of answering simple, direct questions about the incident as well as identifying from the photographs the person they had seen.

In the context of a legal interview or examination, this research suggests that when children are simply asked to tell what they can remember about an event, the quality of the narrative of older children will be better than that of younger ones, but neither will give as full a narrative as an adult. It also suggests, however, that even young children (kindergarten-first grade) have sufficiently developed ability to remember past events and that simple, direct (nonleading) questions or recognition recall appear to be viable means of finding out factual information from them. Using those methods, their answers apparently are no less credible than those of an adult, absent other influences.

B. ORDERING AND INTERPRETING PERCEPTIONS

Even if children have a sufficient memory ability to answer simple, direct (nonleading) questions about an incident or to recall by recognition, the possibility remains that they may have difficulty in conceptualizing complex events, identifying relationships, recognizing feelings, and attributing intentions. In each of these circumstances, the accuracy of their reporting depends on their ability to order and interpret perceptions. It is widely recognized that this ability is influenced by age. Generally speaking, this ability is a gradually acquired attribute that does not reach the standard of adult reliability until approximately the age of 10.
about the age of twelve. Because of this difference in cognitive development, lawyers must assess carefully the reliability of children's statements that embody conclusions based on their perception of complex events, relationships, feelings, or intentions.

In one study designed to evaluate children's ability to make inferences about feelings, thoughts, and intentions as well as their ability to explain sequences of behavior that occur in interpersonal relations, researchers found a substantial difference between the ability of six-year-olds and that of older children (ages nine and twelve). In this study, the children were shown two movies of factual situations. The six-year-olds were clearly less able to report about the adults' actions, states of mind, feelings, etc. than were the older children. This conclusion has been corroborated by extensive research on children's ability to accurately understand and interpret events depicted on television programs. This interpretive ability is not well established until between ages ten and thirteen.

Another skill required in ordering and interpreting perceptions is understanding the concept of time. Although there is some debate among psychologists about when the concept of time is mastered, it is generally accepted that young children (under age seven or eight) have great difficulty in understanding and reporting elapsed time. They are much better in reporting events as having occurred in relation to some routine aspect of their daily lives (e.g., "during Sesame Street" or "after going to bed"). Without such concrete anchors, time perceptions may be embellished or magnified. Likewise, speed and distance judgments (e.g., "fast," "a long time," etc.) and other estimates (e.g., "tall," "big," etc.) may not be meaningful.

95. See Handling Perception and Distortion, supra note 82, § 19 at 824.
96. See D. Flapan, Children's Understanding of Social Interaction 65 (1968). Cf. Deposition of Bobby Camerlinck, supra note 78, at 11 (Q. "Was he [the six-year-old defendant] mad at you?" A. "I don't know. I ain't him"). With respect to assessing feelings, children have been found to be more accurate in their judgments of facial than vocal expressions. A. Mehrabian, Nonverbal Communication 105 (1972).
98. See Melton, supra note 85, at 77-78.
100. Handling Perception and Distortion, supra note 82, § 19 at 824.
101. Cf. Deposition of Bobby Camerlinck, supra note 78, at 9 (Q. "When you saw that stick, how long was it, Bobby, about ten to twelve inches long, about as long as a ruler at school?" A. "I don't know. I never saw a ruler"). Adults are not known for making particularly accurate judgments about time, speed, size, distance, or other conditions. See generally Handling Perception and Distortion, supra note 82, §§ 61-63, at
against these problems, careful questioning as to the child's experience in making such judgments and comparisons or simulations may be of use in assessing a child's statements.\textsuperscript{102}

Care also must be taken when a question in the attorney's mind calls for an "objective" answer, such as, "Is your mother kind to your brother and you?" This sort of question, however, is not objective, but instead one that calls for an opinion or characterization. In the child's mind, the mother may be quite kind, while on an objective basis she has demonstrated cruelty and harshness.\textsuperscript{103} After all, children—especially young ones who have lived in no other home—have no point of comparison. To them, their family is "normal" because they have experienced nothing better.\textsuperscript{104} Thus, it is essential to find out more specific, concrete information, such as that "[s]he always hit him [her brother] on the head with a broom."\textsuperscript{105} Be aware too that children are prone to generalize from one or two instances.\textsuperscript{106} For example, the fact that mother occasionally is kind may be adequate grounds for the child generally to categorize her as "kind."

When distortions do occur in a child's ordering and interpreting of events, the distortions are likely to be unconscious rather than deliberate.\textsuperscript{107} Such distortions often reflect the child's "uncertainty and lack of experience as to what is real and substantial and what is not."\textsuperscript{108} For example, a young child may accurately observe two persons in an argument, but in describing the incident erroneously may state that "they had guns," based upon the observation that they had bulging pockets (or perhaps not even that).\textsuperscript{109} In such a situation,
careful questioning may establish the child's line of inference or point of view. Another possible approach is to ask the child a wide range of questions to determine those areas in which overexaggeration tends to occur.

In sum, in asking factual questions and in considering what is said, a constant awareness is needed of the types of statements or conclusions that may be beyond the cognitive abilities of the child. In this regard, it is helpful to remember the basic stages of cognitive development. From ages two to four, most children have vivid mental

solutely convinced and convincing that they are telling the truth”); Direct Examination of Defendant, supra note 78, ¶ 9, at 272 (suggesting that most children “have highly active imaginations” and that “the experience of being on the witness stand and being the center of attention can often cause them to be carried by their imaginations to rather wild extremes”); California abuse case may be unraveling, Chicago Tribune, May 17, 1985, at 1, col. 3, 9, col. 1 (recent child witness in preschool abuse case testified that “children were beaten regularly at the McMartin school with a 10-foot-long bull-whip, forced to exhume bodies, and slapped by a priest if they refused to pray to ‘three or four gods’”; one of the seven defense attorneys commented, “This is killing the prosecution”).

110. See Handling Perception and Distortion, supra note 82, at 825; Melton, supra note 85, ¶ 19, at 82.

111. 2 AM. JUR. TRIALS, Locating and Interviewing Witnesses ¶ 73, at 280 (1964) (suggesting questions covering a wide range of areas to disclose those on which the child is most likely to fabricate). This source illustrates this approach with the following questions:

Q. Jimmy, what do you like most about school?
A. Well, recess, I guess.
Q. How about arithmetic?
A. It’s okay.
Q. Do you always get good grades?
A. No.
Q. What grade did you get in arithmetic last term?
A. I did pretty well. I got a “satisfactory” in reading.
Q. I mean in arithmetic.
A. Well, I got a “good” once.
Q. Yes, but what about last semester?
A. I got a “Needs Improvement.”
Q. Do you swim?
A. Yes.
Q. How far can you swim?
A. Oh, about a mile.
Q. When did you learn to swim?
A. Last summer.
Q. Ever been up in an airplane?
A. Lots of times.
Q. A jet?
A. Yes, I go up in jets a lot.
Q. Can you fly one?
A. My father is teaching me.
Q. Where does your father work?
A. He is a plumber.

Id. at 280-81. In this illustration, the child tended to be truthful concerning his intellectual abilities but falsified or exaggerated his physical accomplishments; in other areas, he was perhaps somewhat evasive but apparently was otherwise factual and accurate. Id. at 281.
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images but have difficulty expressing them in verbal form. Specific, concrete questions that probe the five senses will be most useful for preschool-age children. From ages four to about seven, children reason by intuitive leaps and bounds. The attorney must be careful, therefore, to ask questions aimed at unraveling the child's complicated, transductive reasoning process. During the elementary school years, children have an affinity for “stockpiling” facts in mutually exclusive mental pigeonholes. Drawing inferences that bridge these categories, however, is not yet feasible for most children. Therefore, at this level, it is best for the attorney to ask questions that can be answered factually rather than interpretively. Only as children make the transition into puberty do they begin to report reliably about another person's states of mind, feelings, or intentions.

C. SUGGESTIBILITY

It is commonly stated that children are more suggestible than adults. The study, referred to previously, in which children from kindergarten to college-age adults observed an unexpected, staged incident, nonetheless found that children in that study were not “more easily swayed into incorrect answers by the use of leading questions than were adults.” After the twenty objective questions had been asked, they were asked two leading questions (“Did the man slam the door as he closed it?” and “Was the package the man carried small?”). The impact of these questions was assessed at a second testing session two weeks later when all questions were presented in a nonleading form. No significant age difference was found. Other recent studies support the conclusion that young children are no more suggestible than adults.

113. See notes 89-92 and accompanying text supra.
114. Marin, supra note 86, at 304.
115. One half of the subjects in each age group was asked one of the leading questions and the other in a nonleading form; the other half of the subjects was asked the leading and nonleading questions in reverse order. Id. at 299.
116. Id. The nonleading form of the two questions noted in the text was: “Did the man close the door as he left?” and “Was the man carrying a package?” Id. at 305.
117. Id. at 303.
118. See, e.g., Duncan, Whitney, & Kunen, Integration of Visual and Verbal Information in Children's Memories, 53 CHILD DEV. 1215 (1982). In this study, 6, 8, and 10-year-old students and college-age students were asked short-answer questions after they had seen a series of slides. Id. at 1216. For example, one set of slides dealt with “Krog,” a caveman, who with his friends, was attacked by a bear. The subjects were asked three types of “information” questions: (1) “When the bear appeared, where did it chase the men?” (“no-information” question); (2) “After the bear appeared and broke the man's spear, where did it chase the men?” (“correct-information” question); and (3) “After the bear appeared and broke the man's fishing pole, where did it chase
In contrast, a number of studies have found in varying contexts that children indeed may be more suggestible than adults. Some of the more extreme examples involved group behavior.\textsuperscript{119} A more relevant study involved three groups (third-graders, sixth-graders, and college-age adults) that were shown a film detailing two petty crimes—failure to return a purse left on a bus to its known owner and shoplifting. One half of the observers were asked twenty-two questions, half of which were in a suggestive form containing false information (e.g., “The young woman was carrying a newspaper when she entered the bus, wasn’t she?”—in actuality, it was a shopping bag); the other half of the observers were asked the twenty-two questions, but in a nonsuggestive form (“What was the young woman carrying when she entered the bus?”).\textsuperscript{120} If the observers disagreed with a suggestive question, they were required to supply their own description of the events. The results showed that the third-graders gave a poorer memory performance than the older groups (means for correctly answered nonsuggestive questions were 51% for the third-graders and 76% for the older groups). The results also showed that the grade schoolers had a much greater tendency to accept (false) suggestions than the older group, although all three groups were influenced to some extent.\textsuperscript{121}

One week later, a different interrogator asked all the observers the same twenty-two questions using a multiple-choice (recognition)
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format (e.g., "Which of the following was the young woman carrying when she got on the bus? (a) an umbrella; (b) a shopping bag; (c) a newspaper; (d) a hat-box").

The results showed again that the third-graders had poorer memories for the relevant events than did the older subjects, although they had a fair amount of correct information (a mean of 76% correct on the nonsuggestive questions in the second session versus a mean of 87.5% correct for the college students). The results also showed that all observers almost always chose either a correct response or a suggestive one from the prior suggestive questions. The youngest group chose a greater number of the suggestive responses and the older groups again appeared to be equivalent. The analysis attributed the youngest group's inferior performance on suggestive items mainly to their inferior encoding of the film (the ability in free recall).

The effect of suggestion on actual memory, however, was not significantly different for the three age-groups.

A recent review of these and other studies of suggestibility of children has led two commentators to conclude:

Taken together, the results of these studies support the conclusion that adults spontaneously recall more about events they have witnessed than do children, but not the simple notion that children are always more suggestible than adults. . . .

Probably no single factor can by itself explain the discrepant findings of these studies. This points to a possible resolution of the discrepancy. Perhaps age alone is the wrong focus for these studies. Whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other factors. If an event is understandable and interesting to both children and adults, and if their memory for it is still equally strong, age differences in suggestibility may not be found. But if the event is not encoded well to begin with, or if a delay weakens the child's memory relative to an adult's, then age differences may emerge. In this case, the fragments of the event that remain in the child's memory may not be sufficient to serve as a barrier against suggestion, especially from authoritative others. Of course, if the child's grasp of the language

122. Id. at 204-05.
123. Id. at 208-09. Cf. Wood, The Child as Witness, 6 Fam. Advoc., Spring 1984, at 14, 19 (pointing out that experiments in feedback encephalography show that the brainwave patterns of children in their "waking state" are much like those of adults just before they go to sleep and that "[a]dults are highly vulnerable to suggestion during such times, thus young minds are impressionable all day").
is so weak as to make him or her oblivious to the subtle implications in the suggestive information, then the child may be immune to the manipulation regardless of the interest value or memorability of the stimuli, or the loss of an accurate memory record.\textsuperscript{125}

In light of these studies, attorneys should be extremely cautious in using leading questions for several reasons. First, leading questions apparently influence to some extent respondents of all ages toward the bias of the question.\textsuperscript{126} The safeguard is that a person whose interest is adverse to the questioner’s (e.g., the hostile witness) will be careful to resist misleading suggestions. That interest and the necessary maturity to resist misleading suggestions, however, often may be lacking in children. Second, leading questions have to be based on some hypothesis that the children may simply confirm, especially when the child lacks information to the contrary. In essence, attorneys may elicit what they think a child has seen or heard rather than what the child actually saw or heard, if anything.\textsuperscript{127} One device recommended to reduce the effect of the leading form of questions on a child is to use what is referred to as “stacked” and “counter-stacked” versions of the questions—ones that first call for a positive reply and then ones that call for a negative reply to achieve the same meaning.\textsuperscript{128}

D. UNDUE INFLUENCE

Closely related to suggestibility is the problem of undue influence. Legal interviews are not conducted in the abstract, but instead often occur in the context of an incident or some other disrupting circumstances. The above studies did not involve intense pressure or stress, conditions that amplify the effects of suggestibility.\textsuperscript{129} Studies of brainwashing indicate that any person may develop an abnormal, highly suggestible mental condition under stress.\textsuperscript{130} Children may be unable to resist great pressure to agree with the adult’s version of the

\begin{thebibliography}{99}

\bibitem{125} Loftus & Davies, \textit{Distortions in the Memory of Children}, 40 J. SOC. ISSUES, No. 2 1984, at 51, 63. Loftus and Davies point out that the various studies used different age groups, stimuli, and time intervals between the initial event, the suggestive information, and the final test, and thus comparisons across the studies are difficult. \textit{Id.} at 62-63. Factors other than age that might be significant include interest value, delay interval, language sophistication, and the type of final test. \textit{Id.} at 63-64.


\bibitem{127} See \textit{Qualifying Child Witness}, supra note 112, § 7, at 676.

\bibitem{128} H. Freeman & H. Weihofen, \textit{supra} note 15, at 460.

\bibitem{129} See Melton, \textit{supra} note 85, at 82 (suggesting the possibility of testing in situations of naturally occurring stress, such as hospitalization).

\bibitem{130} J. Rici, \textit{supra} note 33, at 54.
\end{thebibliography}
"facts," particularly when they may not fully understand the meaning or significance of the question (e.g., "Did he have sexual intercourse with you?").\textsuperscript{131} Likewise, to the extent that they are deliberately or otherwise made to feel insecure or anxious, children may be induced to conform with what they conceive the attorney's opinion to be.\textsuperscript{132} This problem is compounded by the fact that children in our culture are taught to view adults as authority figures—persons to be obeyed and appeased.

If the interested adult (e.g., a plaintiff or defendant in litigation) is one whom the child likes and the desired answer is obvious, there also is a natural tendency on the part of the child to want to please the adult; in this way, intentionally or unintentionally, the child may be led into a false answer.\textsuperscript{133} An attorney thus should be aware of the possibility of coaching or of a real or perceived threat of punishment for unfavorable testimony when the child's parents or other adults important to the child are involved in legal actions.\textsuperscript{134} Criminal investigators routinely are warned, for example, to guard against situations in which some adult may have induced a child to falsify a sex report, such as when the accused is the estranged husband of the child's mother.\textsuperscript{135} In \textit{People v. Oyola},\textsuperscript{136} for instance, a ten-year-old girl admitted that her mother rehearsed her story privately with her five times before her mother caused her estranged husband to be arrested for alleged sexual intercourse with her daughter.\textsuperscript{137}

A more recent example of undue influence exerted on children appears to be the "Jordan sex cases," in which twenty-four adults, including several couples, were charged with sexually abusing forty

\textsuperscript{131} Cf. Stafford, \textit{supra} note 72, at 319.
\textsuperscript{132} See J. Rich, \textit{supra} note 33, at 81.
\textsuperscript{134} See Melton, \textit{supra} note 85, at 81. Cf. Paulson, Strouse, & Chaleff, \textit{supra} note 62, at 48 ("Most often [an interview] comes after a law enforcement investigation, in which [the child] has been confronted with questions specific to the physical act of incest. In the meantime, there frequently has been family pressure, direct or indirect, to change statements in order to avoid the consequences of incriminating testimony"); Wood, \textit{supra} note 123, at 19 (discussing the common pattern of "brainwashing" of children in custody litigation).
\textsuperscript{135} See, e.g., F. Inbau & J. Reid, \textit{Criminal Investigation and Confessions} 111 (2d ed. 1967). It is important to remember that children may sometimes fabricate such reports on their own. See, e.g., Paulson, Strouse, & Chaleff, \textit{supra} note 62, at 49-50 ("sometimes children fabricate incest stories in order to intimidate and blackmail a parent . . . especially when resolution of an earlier incest has allowed the perpetrator to return home").
\textsuperscript{137} Id. at 261, 160 N.E.2d at 496, 189 N.Y.S.2d at 205. In this instance, there were no corroborating witnesses nor even any circumstantial physical evidence to support the child's charge. \textit{Id}. 1
children, including their own, at bizarre sex parties in Jordan, Minnesota.\textsuperscript{138} A total of twenty-seven children were taken away from their parents.\textsuperscript{139} The children were not allowed to see or talk to their parents for several months until after the prosecutor abruptly dropped the charges when one of the couples was acquitted.\textsuperscript{140} According to attorneys for some of the parents, social workers apparently pressured the children for several months to accuse their parents. The children allegedly were threatened that they never would see their parents again unless they accused their parents of sex crimes. Videotapes of children denying that their parents ever had molested them admittedly were destroyed by the sheriff's officers.\textsuperscript{141} Thus, while undue influence is a serious legal problem under any circumstances, it is especially difficult to guard against when interviewing children. Exceptional care must be used to alleviate the stressful situations that may lead to undue influence on children.

IV. EXAMINING AND CROSS-EXAMINING CHILDREN

Surprisingly divergent views exist on the usefulness and reliability of sworn testimony of children. On one hand, some commentators flatly assert that “[c]hild witnesses are dangerous.”\textsuperscript{142} On the other hand, others maintain that “children are no more likely than are adults to fabricate incorrect responses”\textsuperscript{143} and suggest that sex reports rarely are falsified.\textsuperscript{144} Furthermore, they assert that “when their testimony is elicited through the use of appropriate cues, it is no less credible than that of adults.”\textsuperscript{145} This controversy aside, as Stafford points out, children seem to have an “uncanny ability of being in strange places at unexpected moments”—often to see people, events,
or things that are not witnessed by other adults or to overhear "confidential" conversations. Likewise, they may be the only witnesses to crimes committed against them. Because of such circumstances, whether children are permitted to testify and how they are examined often will prove crucial to the outcome of legal proceedings. This section examines the legal competency of children to testify, the techniques of qualifying, examining, and cross-examining children, and the weight that should be given to their testimony.

A. LEGAL COMPETENCY TO TESTIFY

Competency refers to "the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give testimony in a court." Credibility, on the other hand, refers to the degree of credit or weight to be given to the testimony. For example, persons may be perfectly qualified to testify, but their testimony may be unbelievable and thus disregarded. The reverse, of course, also may be true: persons may not be qualified (competent) to testify at all for some reason, such as by operation of the Dead Man's Acts or from their lack of personal knowledge of the events; but if their testimony were received, it might seem quite believable (credible) to those who heard it. Traditionally, questions of competency—whether a person can testify at all—are for the court; questions of credibility are for the trier of facts (the jury if there is one).

With respect to the legal competency of children, the common law originally focused on the age of the child. Those who were age fourteen or older were presumed to be competent to testify. Those who were under that age were presumed, prima facie, not to be.

146. Stafford, supra note 72, at 303. See also Note, supra note 77, at 214.
147. Stafford, supra note 72, at 303.
149. See BLACK'S LAW DICTIONARY 257 (5th ed. 1979).
150. The Dead Man's Acts ordinarily exclude a witness' testimony concerning a conversation or event that occurred in the decedent's presence when it is offered against the decedent's representative. This rule is also applied to conversations with a person who is mentally incompetent. See M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 601.4, at 381 (1981) ("Dead Man's Statutes").
151. See, e.g., Fed. R. Evid. 602 ("A witness [other than one qualified as an expert] may not testify to a matter unless evidence is introduced sufficient to support a finding that [the witness] has personal knowledge of the matter").
152. See 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶104[01], at 104-13 to 104-14, 3 id. ¶601[05], at 601-37 to 601-38 (1982) (noting the current trend permitting all witnesses to testify and trusting the jury to evaluate the relative credibility of each).
153. 81 AM. JUR. 2d Witnesses § 90, at 128 (1976). See Note, Youth as a Bar to Testimonial Competence, 8 Ark. L. Rev. 100, 100 (1954) (summarizing the development of these rules from early canon law).
The later common-law rules developed that it was for the court, in its discretion, to decide whether the child had sufficient intelligence to testify and to comprehend the obligation of an oath.\(^{154}\) A large number of states have lowered the common-law presumption to age ten by statute.\(^{155}\) The focus of the inquiry for children under age ten under those statutes, like that under the later common law, is on the child's intelligence, not merely the child's age.\(^{156}\) Those statutes typically disqualify only those children under ten years of age "who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."\(^{157}\) In addition, it is generally required that children possess a sense of obligation to tell the truth.\(^{158}\) Unfortunately, as discussed earlier, this sense of obligation to tell the truth has strong maturational underpinnings.\(^{159}\)

The Federal Rules of Evidence are more liberal in defining competency to testify. Rule 601 provides that "[e]very person is competent to be a witness except as otherwise provided in these rules [or by state law when it provides the rule of decision]."\(^{160}\) This rule contains no provision requiring any measure of incapacity as a condition precedent to giving of testimony.\(^{161}\) The inquiry thus is shifted to relevancy since "a judge would be unlikely to find the testimony of an incompetent or child to be totally lacking in probative value unless it failed to relate to the consequential, material fact in issue."\(^{162}\)

Assuming that the child's testimony is relevant, the Advisory Committee that prepared the Federal Rules of Evidence felt that the testimony should be allowed since "[t]he question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence."\(^{163}\) The Federal Rules of Evidence do provide other controls, such as the judge's right to exclude even relevant evidence if its probative value is outweighed substantially by the dangers of unfair prejudice, confusion, delay, or needless repetition of the evidence under Rule 403.\(^{164}\) But commentators have suggested that when the child is the only witness, the need and high probative value of the child's testimony "would, in

\(^{154}\) JONES ON EVIDENCE § 20:10, at 605-06 (S. Gard 6th ed. 1972).
\(^{155}\) See 81 AM. JUR. 2d Witnesses § 91, at 129 (1976).
\(^{156}\) Id. § 88, at 126. Similar provisions have been included in court rules of evidence. See, e.g., OHIO R. EVID. 601(A). See generally Note, The Competency of Children as Witnesses, 39 VA. L. REV. 358, 360-61 (1953) ("American Developments").
\(^{157}\) Id. § 88, at 126.
\(^{158}\) See notes 28-31 and accompanying text supra.
\(^{159}\) FED. R. EVID. 601.
\(^{160}\) Id. advisory committee note.
\(^{161}\) FED. R. EVID. 403.
fact, under the [federal] rules as written, probably compel admission, subject to challenge by cross-examination and impeachment."^{165}

The Federal Rules of Evidence also have dispensed with a requirement that the witness have a sense of responsibility to speak the truth.\(^{166}\) The Advisory Committee felt that the main function of the moral capacity requirement was to afford an opportunity on voir dire (preliminary) examination to impress on the witness the moral duty to tell the truth. This result, in the Advisory Committee's opinion, could "be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation."\(^{167}\) Rule 603 simply requires that all witnesses before testifying must declare that they will testify truthfully through an "oath or affirmation administered in a form calculated to awaken [their] conscience and impress [their] mind with [the] duty to do so."\(^{168}\) In other words, witnesses simply must declare that they will testify truthfully; no special verbal formula is required.\(^{169}\) The Advisory Committee thus specifically intended to afford flexibility in dealing with children, among others.\(^{170}\)

Weinstein and Berger point out that if a judge is convinced that no trier of fact would find that the prospective witness was capable of telling the truth, for instance because of the witness' extreme infancy or mental incompetency, the proper course would be for the judge to rule that such testimony has no probative value and, therefore, it is irrelevant.\(^{171}\)

### B. Qualifying Children to Testify

In jurisdictions other than those following the Federal Rules of Evidence, a voir dire (preliminary) examination ordinarily will be conducted for the purpose of qualifying the child as a competent witness.\(^{172}\) Depending on the practice in the jurisdiction, the trial judge alone or with the participation of the attorneys will conduct the qualifying examination.\(^{173}\) Although the trial judge has the right to ex-
amine the child without interference of counsel,\textsuperscript{174} the child's competency cannot be decided based upon a private examination by the judge.\textsuperscript{175} It has been suggested that the inquiry must be more searching in proportion to chronological immaturity.\textsuperscript{176}

The basic approach in such an examination is to establish all the requisite elements of competency over the course of the questioning. These elements may be summarized as follows: First, the child must have a present understanding or intelligence to understand, on instruction, an obligation to tell the truth. Second, the child must have had the mental capacity at the time of the occurrence or events in question to observe and register the occurrence. Third, the child must have a sufficient memory to retain an independent recollection of the observations made. Fourth, the child must have the ability to translate into words those memories. Fifth, the child must have the ability to understand and respond to simple questions about the occurrence.\textsuperscript{177}

Traditionally, the examination is started with the child's name.\textsuperscript{178} It should be followed by a number of general questions that

If an attorney conducts the examination in the presence of the jury, he incurs the hazard of having some jurors get an impression unfavorable to his case. If the witness is not admitted to give general testimony, the jurors may feel that he should have been heard, and may hold the lawyer whose efforts excluded the witness responsible for his exclusion, and attribute his effort in excluding him to a fear that the witness' testimony would have been unfavorable to him. On the other hand, if the person is held competent through the advocate's effort, and makes a poor witness, the jurors may conclude that it was the extremity of the case which prompted the effort to obtain the testimony of such a witness. If the court concludes the examination at the request of the attorney, no such inferences can be made; rather, the jurors will accept the decision of the court as being wholly disinterested. The fact that the advocate left the matter to the court, and offered no argument one way or the other, will certainly not prejudice him with the jury.

Of course, circumstances alter cases and the exigencies of a particular case may clearly demand a strenuous effort either to admit or exclude the testimony of a witness such as has been indicated. In this situation, the advocate might well consider requesting the court to exclude the jury during the preliminary examination and presentation of evidence and argument thereon.


\textsuperscript{174} See, \textit{e.g.}, State v. Wilson, 156 Ohio St. 525, 529, 103 N.E.2d 552, 555 (1952) ("it is the duty of the trial judge to immediately examine the child, without participation or interference of counsel, to determine the child's competency to testify").

\textsuperscript{175} Qualifying Child Witness, \textit{supra} note 112, at 674.

\textsuperscript{176} See, \textit{e.g.}, Rosche v. McCoy, 397 Pa. 615, 621, 156 A.2d 307, 310 (1959).

\textsuperscript{177} See Annot., 81 A.L.R.2d 386, 389 (1962); Qualifying Child Witness, \textit{supra} note 112, § 5, at 670. It also might be possible to use an interpreter in some situations. \textit{Cf.} Fairbanks v. Cowan, 551 F.2d 97, 98-99 (6th Cir. 1977) (father of alleged sodomy victim allowed to act as an interpreter; victim had a mental age of six-year-old and could only make gutteral sounds).

\textsuperscript{178} See, \textit{e.g.}, Note, \textit{supra} note 157, at 362 ("What is your name?"); Qualifying Child Witness, \textit{supra} note 112, at § 9, 679 ("What is your name?" "Do your friends call you Bill or Billy?").
have the purpose of (1) relaxing the child to the extent that it is possible, (2) showing the child's general ability to answer questions, and (3) demonstrating the child's general level of intelligence.179 Such questions may include how the child is feeling, the child's age and birthday, the child's school and present teacher, the child's address, the names of the persons with whom the child is living, etc.180 The questions should be tailored to the child's age and mental development. For example, a preschool or very young child can be asked to spell his name, count to ten, recite the alphabet, etc. Older children

179. See Qualifying Child Witness, supra note 112, § 9, at 679-80 (preliminary questions).

180. The following questions illustrate this approach:

Q. Billy, how are you today?
A. I'm fine.

Q. Do you know where you are?
A. Yes.
Q. Where?
A. In a courtroom.
Q. Do you know how you came here today?
A. Yes.
Q. Will you tell me how?
A. My mother drove me in her car.
Q. How old are you?
A. I'm eight.

Q. When was your birthday?
A. 
Q. Do you go to school?
A. Yes.

Q. What school do you go to?
A. 
Q. What grade are you in?
A. Third grade.
Q. Have you failed any grade?
A. No.
Q. Who is your teacher this year?
A. 
Q. What subjects are you learning in school this year?
A. 
Q. How are you doing in school this year?
A. Pretty good.
Q. What are your grades in —?
A. 

Q. Where do you live?
A. 

Q. Do you know how far it is from your house to your school?
A. Yes.
Q. How far is it?
A. Four blocks.
Q. Who lives in the house with you?
A. My mother, my father, my brother, my sisters, and my dog.

Id. §§ 9-11, at 679-81.
Some of the questions also should be directed to establishing the capacity to register events at the time the incident at issue occurred and the sufficiency of the child's memory to recall those events. The usual approach is to ask about past events unrelated to the incident but occurring at approximately the same time (e.g., questions about moving, former teachers and schools, events in the family, etc.).

Although it is not conclusive, the child's age at the time of the event certainly has a bearing on this issue. It is important, too, to evaluate the child's capacity in relation to the complexity of the testimony sought. For example, there is likely to be a substantial difference between testimony concerning simple events and testimony involving more complex events, as in relating a sequence of events in a negligence case. In this regard, recall that the ability to order and interpret perceptions requires hypothetico-deductive reasoning, which is not available to most children until they reach the highest level of cognitive reasoning (formal operations).

Another line of questioning should be directed to showing that a child has an independent memory of the events. One aspect of this questioning could be directed to the degree of "coaching" that the child has received. For example, children can be asked how many

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181. Id. § 10, at 680.
182. This following line of questions illustrates this approach:
   Q. When did you move to where you live now?
   A. 
   Q. Where did you live before you moved?
   A. 
   Q. What grade are you in?
   A. Third grade.
   Q. When were you in the first grade?
   A. Not last year, but the year before that.
   Q. Who was your teacher in the first grade?
   A. 
   Q. What subjects did the teacher teach you in the first grade?
   A. 
   Q. Did you get good grades that year?
   A. Sort of.
   Q. What did you get in ________?
   A. 
   Q. Do you remember when your baby sister was born?
   A. Yes.
   Q. Were you going to school then?
   A. I was in kindergarten.

Id. § 15, at 685-86.
183. See, e.g., Rosche v. McCoy, 397 Pa. 615, 623, 156 A.2d 307, 311 (1959) (drawing the distinction between testimony about a simple fact—such as that a dog bit the child or it was her father who shot her mother—and testimony based on the exercise of contemporaneous judgment about the different factors in a negligence case).
184. See note 26 and accompanying text supra.
times they previously have talked with counsel and whether they have been told to say anything that was not true.185 An appropriate question, particularly for cross-examination, might be the number of times that the child had discussed the events. In one case, for instance, an eight-year-old child was found to be incompetent when it affirmatively appeared that he had talked so much about the accident that occurred when he was between four and five that he had little, if any, independent recollection of the facts.186

Another part of the examination should be directed to showing that the child possesses a sense of obligation to tell the truth.187 A prerequisite to having such a sense is, of course, knowing the difference between the truth and lying. The problem with this requirement is that “testifying truthfully,” which involves relatively straightforward presentation of facts for the adult, is a much more complex issue for the child. Depending upon the child’s level of moral development, “testifying truthfully” may mean saying what is most advantageous for the child, saying what is “fair” for the good of all concerned, or saying whatever will please important adult(s). It is not until the child reaches adolescence that “testifying truthfully” means giving an accurate, objective presentation of the facts.188 Thus, meeting this requirement of legal competency often will hinge

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187. See notes 158-59 and accompanying text supra. The following approach has been suggested:

Q. Do you know the difference between right and wrong?
A. Yes.

Q. What is the difference?
A. When I do things right, I’m a good boy, and when I do things wrong I’m a bad boy.

Q. Do you know what it means to tell a story?
A. It means to make something up.

Q. Is it right or wrong to tell a story?
A. It’s wrong.

Q. If you told these people a story, or something that wasn’t true, what would happen to you?
A. I’d be punished.
Q. Who would punish you?
A. God.

Q. What would happen to you?
A. I wouldn’t go to heaven.
Q. Where did you learn about what happens to little boys who lie?
A. From my mother and at Sunday school.

Qualifying Child Witness, supra note 112, § 12, at 683-84.
188. See notes 29-31 and accompanying text supra.
upon the lawyer's careful preparation of the child.\textsuperscript{189}

Some courts require that the child also understand the meaning and nature of an oath.\textsuperscript{190} When it appears that the child does not understand, the trial court may instruct the child on its meaning and nature.\textsuperscript{191} There are a number of approaches to qualify a child in this regard. One common approach is to ask about church attendance, belief in God, and the fear of divine punishment for lying.\textsuperscript{192} Even very young children, however, can repeat religious doctrine virtually verbatim without any real understanding of its meaning.\textsuperscript{193} An indication of personal moral conviction may be sufficient, but it is less likely to be acceptable for younger children.\textsuperscript{194} Another approach, one that taps into the child’s probable stage of moral development, is to base the obligation to tell the truth on the fear of some real or imagined worldly punishment. Such a concrete admonition should be tailored to the young child’s cognitive and moral levels of development.\textsuperscript{195}

It has been suggested that a child witness’ parents or the prosecution almost invariably will have coached the child to state that he or she does know the difference between the truth and a lie.\textsuperscript{196} To explore the child’s real understanding, it may be useful to ask whether the child knows the difference between a lie and a fib or be-

\textsuperscript{189} The need for careful preparation to meet this standard was recognized implicitly by the drafters of the Federal Rules of Evidence: “Standards of moral qualification in practice consist essentially of evaluating a person’s truthfulness in terms of his own answers about it.” \textit{Fed. R. Evid.} 601 advisory committee note.


\textsuperscript{191} \textit{6 Wigmore on Evidence} § 182(c), at 406 (Chadbourn rev. 1976); Note, \textit{supra} note 153, at 102. \textit{See also Note, supra note 157, at 366 (rehabilitation). Cf. McAmore v. Wiley, 49 Ill. App. 615, 617 (1893) (girl instructed by the judge on his own motion).}

\textsuperscript{192} \textit{See Note, supra note 157, at 362 (typical group of questions include “Do you go to Sunday School?” “Do you know what happens to anyone telling a lie?” “Suppose you told a wrong story, do you know what would happen?” and “Did you ever hear of God?”). \textit{See also Qualifying Child Witness, supra note 112, §§ 12, 19, at 682-84, 688-89 (similar questions).}

\textsuperscript{193} In early times, a child who did not have “proper” and adequate religious instruction could not take the oath and would be barred from testifying. During the 1800’s, this requirement was eliminated. Today, few states require formal religious training exclusively for the purpose of the trial. However, a child typically still must be able (1) to demonstrate the ability to distinguish the truth from a lie and (2) to know it is wrong to tell a lie. Goodman, \textit{Children’s Testimony in Historical Perspective}, 40 J. Soc. Issues, No. 2 1984, at 9, 13. \textit{See also 81 Am. JUR. 2d Witnesses} § 87, at 124-25 (1976) (“Religious belief”).

\textsuperscript{194} \textit{Qualifying Child Witness, supra note 112, § 14, at 685.}

\textsuperscript{195} \textit{See} notes 29-31 and accompanying text \textit{supra.}

tween a lie and a white lie. The answers may undercut the child's asserted belief that it is always wrong to lie. On the other hand, it should not be necessary for a child to be able to define an oath or other abstract terms.

Generally speaking, appellate courts have deferred to the sound discretion of the trial court on matters of competency. Most reversals appear to be based on the trial court's misunderstanding of the law or on the court's failure to examine the child before ruling the child to be incompetent. Otherwise, it would take a clear showing that the trial judge acted arbitrarily or otherwise seriously abused his discretion.

Although there is no precise minimum age which absolutely excludes a child from testifying, courts appear not to have let anyone under the age of four testify. This exclusion appears justified when the pre-four-year-old child's limited cognitive capacities are considered. Although the Supreme Court has suggested that "no one would think of calling as a witness an infant only two or three years old," the litigated cases indicate that it has been attempted, albeit apparently unsuccessfully so far. Children four and older also are disqualified with some frequency.

It should be pointed out, however, that even when children are clearly too young to meet the requirements to testify in certain jurisdictions because, for example, they do not understand the obligation to speak the truth, it still may be possible to use some of their statements as part of the res gestae. For example, in a dog-bite case, a child's mother was permitted to testify about statements made by a

197. Id.
198. See, e.g., Houston & T.C. Ry. v. Roberts, 201 S.W. 674, 676 (Tex. Civ. App. 1918, error ref'd) (children need not be able to "explain the meaning of such terms as 'the obligations of an oath,' 'the pains and penalties of perjury,' or 'the consequences of false swearing'—expressions which even adults would often find difficult of ready definition"). modified on other grounds, 206 S.W. 382 (Tex. Civ. App. 1918); State v. Diggins, 227 Iowa 632, 634, 288 N.W. 640, 641 (1939) (failure of eight-year-old girl to know the meaning of the word "oath" or to define the word "witness" not controlling). One way to explain the meaning of an oath is to explain that it means that you promise God to tell the truth. See Qualifying Child Witness, supra note 112, § 12, at 683.
199. See Annot., supra note 177, at 390 (suggesting that reversals occur "with great frequency").
200. See 81 AM. JUR. 2D Witnesses § 93, at 132 (1976).
201. Annot., supra note 177, at 389 ("there is no specific age at or under which a child is absolutely excluded as a witness").
204. Annot., supra note 177, at 405-13 (citing cases).
205. Res gestae refers to remarks made spontaneously and concurrently with an event or occurrence. The spontaneity of the remarks provide them with an inherent
two-year-old shortly after the child had been attacked.\textsuperscript{206} It also may be possible to introduce a child’s statements based on the “catch-all” hearsay exceptions of Rule 803(24) and 804(b)(5) of the Federal Rules of Evidence.\textsuperscript{207}

In sum, then, qualifying a child to testify involves assessments of the child’s (a) chronological age, (b) cognitive and moral maturity, (c) understanding of the obligation to speak truthfully, (d) mental capacity at the time of the occurrence or events in question, (e) and memory capacity. These assessments first should be made informally through vitally important pretrial interviews.

C. DIRECT EXAMINATION

Whenever children are called to testify, they should be adequately prepared. Special preparation may be necessary when they are directly examined as part of the plaintiff’s case or when they testify for the prosecution. Most of this preparation, however, should not be directed to what they will say, but rather to what the courtroom, courtroom procedure, and testifying will be like.\textsuperscript{208} Some of this education can be done by means of courtroom visits.\textsuperscript{209} Overcoaching as to the substance runs the risk of erasing the child’s independent recollection\textsuperscript{210} as well as undermining the child’s credibility. It also encourages children to memorize their story, which often will be detrimental to the effectiveness of their testimony.

On a direct examination of a witness, the general rule is that the examining attorney is not allowed to ask leading questions.\textsuperscript{211} Exceptions are made at times for young children, for example, when it is necessary to draw their attention to the subject matter or when modesty or delicacy prevents full answers to general questions.\textsuperscript{212} The use of leading questions to cover the vital points of the inquiry,
however, raises the risk of reversal. In Coon v. People, the Supreme Court of Illinois held that it was an error to permit the extensive use of leading questions with witnesses nine and eleven years old in a prosecution for assault with an intent to commit rape. Further, to the extent that the children appear to be only parroting the lawyer as a result of counsel asking a series of leading questions, the impact of their testimony will be diminished.

A better approach is to ask simple, direct, nonleading questions that do not call for “yes” or “no” answers. As pointed out earlier, children apparently can reliably respond to such questions even at a relatively young age. Moreover, the child’s own words may have dramatic impact that would be lost if leading questions were used.

D. CROSS-EXAMINATION

It is well known that juries instinctively sympathize with child witnesses. Because of this reaction, counsel must proceed carefully in cross-examining children. Counsel scrupulously should avoid any questioning that suggests that counsel is being harsh. Because children generally do not have the verbal skills to defend themselves and because they may be intimidated easily, juries may consider such tactics to be unfair even if counsel appears to have succeeded in discrediting the child’s testimony.

213. 99 Ill. 368 (1881).
214. Id. at 370.
215. See Note, supra note 77, at 220 (attorneys face “the danger of having the perfectly accurate testimony of [their] child witness[es] discounted by the court or the jury because it was elicited by the use of leading questions”). Cf. Stafford, supra note 72, at 308 (suggesting that trial judges should proceed with caution when it becomes evident that the answers to leading questions reflect what the attorney thinks the facts are rather than what the child actually recalls).
216. See notes 89-94 and accompanying text supra.
217. See, e.g., Use of Child Witnesses Sparks Concerns, Omaha World Herald, Nov. 7, 1983, at 3, col. 1 (“Daddy stick a knife in Mommy”); Stafford, supra note 72, at 320, n.102 (recounting the electrifying effect of youth’s graphic description of sordid and disgusting morals offense in his own language); Silas, supra note 144, at 17 (“Sometimes children are so candid and innocent in [their] responses, the jury can’t help but believe them”) (quoting a Des Moines assistant county attorney who handles child abuse cases).
218. F. Bailey & H. Rothblatt, supra note 196, § 387, at 331; 3 F. Busch, supra note 173, § 374, at 569 (“Jurors are particularly sympathetic to such witnesses and will be quick to resent anything which appears like an effort to take advantage of their weaknesses”). See generally Goodman, Golding, & Haith, Jurors Reactions to Child Witnesses, 40 J. SOC. ISSUES, No. 2 1984, at 139, 146-48 (attorney tactics).
219. See Handling Perception and Distortion, supra note 82, § 19, at 825.
220. See F. Bailey & H. Rothblatt, supra note 196, § 387, at 331; 3 F. Busch, supra note 173, § 374, at 569. One commentator has aptly explained the harm such an approach may do in this way:

It is seldom profitable to bully the child witness. The result is usually that the child withdraws and everyone in the courtroom rushes to the protec-
A harsh cross-examination also may evoke a remark from the child such as, "You are trying to mix me up," particularly if the child has been prepared for cross-examination. Such a remark "might be more devastating to the cross-examiner's case than anything plaintiff's counsel can devise." In this regard, some commentators suggest that counsel should prepare child witnesses so that they know what to expect on cross-examination. By showing them the type of questions, they suggest that "[c]ounsel will be surprised at how quickly [they] will catch on and how quickly [they] will become aware of any attempt to mix [them] up or confuse [them]." This approach, however, has to be counterbalanced against the "damage" that might be done to the extent opposing counsel can characterize this preparation as "overcoaching."

During the course of direct examination, opposing counsel should watch for several things. First, counsel should watch for any statements that suggest that imagination is supplementing the child's factual knowledge. These areas may provide a fertile basis for cross-examination. Second, counsel should watch for memorized testimony, especially when the child is intelligent. This memorization can be exposed by having the child repeat the answers. Third,
counsel should watch for terms used in questions that the child may not have understood, particularly when the questions are central to the case.\textsuperscript{225} Fourth, counsel should watch for inconsistencies.\textsuperscript{226} Fifth, counsel should watch for any indications of "overcoaching," such as the use of sophisticated terms that depart from the child's otherwise limited vocabulary\textsuperscript{227} or the use of adult reasoning.\textsuperscript{228}

There are several possible approaches to suspected overcoaching. One is to use suggestive questions in language and phrases the child understands on any point for which overcoaching appears to have occurred.\textsuperscript{229} Another approach is to ask about discussions on the point with interested parties or their counsel.\textsuperscript{230} One approach not to take is to ask children whether they have been "coached." They will not know what this term means in this context nor will they be able to discern overcoaching from their normal interaction with adults in many instances.\textsuperscript{231}

Unlike on the direct examination, it has been suggested that it is "imperative" that counsel ask child witnesses only questions that call for direct answers.\textsuperscript{232} From an advocate's point of view, any question "that permits the child to talk freely or to make an extended expla-

down what you said?,” "Then afterwards, did he read something to you?,” "He read it over to you several times, didn't he?,” "And you have heard that statement read over many times since, haven't you?,” You have tried to tell the story here just as it was in that statement, haven't you?,” “You knew that man was from the lawyer's office, didn't you?” and, finally, “Do you see him here in the court room?" Sometimes the cross-examiner, having brought the witness to this point, will call upon his adversary to produce the statement. Ordinarily such a request entails no risk. If the opponent objects to the request as improper, or refuses to produce the statement, there is the necessary implication that he is concealing something from the jury. If he produces the statement and it appears that the witness has followed more or less literally, the point that the witness was coached is helped. If the witness' statement is at variance with the testimony, a situation even more favorable to the cross-examiner may be presented.

3 F. BUSCH, supra note 173, § 374, at 572. Likewise, the child's memory of other events and experiences can perhaps be probed to reveal a memorized story or otherwise discredit the witness. Cf. id., § 374, at 572-73.

225. See notes 68-72 and accompanying text supra.

226. See Stafford, supra note 72, at 309.


228. See Newman & Collester, Children Should Be Seen and Heard, 2 Fam. Advoc., Spring 1980, at 8, 11 (adult reasoning suggests coaching when children are asked to explain custody preference).

229. I. OWEN, supra note 133, at 194. See also note 224 supra.

230. See notes 185-86 and accompanying text supra.

231. See Charge Defense, supra note 220, § 12, at 532-33. Cf. 3 F. BUSCH, supra note 173, § 374, at 572 (a direct question, such as "Has anybody told you what to say here?" or its equivalent, will almost invariably produce a quick negative answer).

232. Plaintiff Cross-Examination, supra note 223, § 43, at 244.
nation can have disastrous results. 233

E. WEIGHT OF A CHILD'S TESTIMONY

After a child's testimony has been admitted as competent, the trier of fact must then decide how much weight it should be given. In a few states, a special instruction to the jury apparently is given extolling them to give special attention to a child's testimony in light of the perceived risks attendant to it. 234 It is submitted, however, that a special instruction in every case is inappropriate because some children may be able to testify on limited matters in such a way that they should not be treated differently from adults giving the same testimony.

Most courts do not give special jury instructions. In the federal courts and in state courts that allow it, however, the trial judge may comment to the jury upon the weight of the evidence and the credibility of the witness. 235 Using this authority, a trial judge could give a cautionary admonishment about a child's testimony if the judge deems it to be warranted. 236 Further, if the child's actual testimony clearly is incompetent or irrelevant, the trial judge may order the testimony stricken and the jury should be instructed to disregard it. 237 The court also may refuse to consider incredible testimony of a child in deciding whether a prima facie case has been established. 238

A few courts, too, require corroboration of the child's testimony as a cautionary measure in certain types of cases, such as those involving sexual abuse. 239 In Nebraska, for example, by judicial decision corroborating evidence is required in child sexual abuse cases. 240

V. SPECIAL PROBLEMS

This final Part addresses several problems that may arise in interviewing and counseling children and in their giving testimony: (1) issues of confidentiality; (2) dealing with parents; (3) working with severely injured children; (4) counseling children who have wit-

233. Id.
235. See generally 1 J. WEINSTEIN & M. BERGER, supra note 152, ¶107, at 107-01.
236. See 3 id. ¶601[4], at 601-29.
237. See Stafford, supra note 72, at 308-09.
238. See 3 J. WEINSTEIN & M. BERGER, supra note 152, ¶601[04], at 601-29.
239. Most states, however, permit convictions in child sexual abuse cases without corroborating testimony. Silas, supra note 144, at 17.
necessed death or violent injuries; (5) possible psychological harm to children from giving testimony; and (6) counseling children about possible courses of action and making decisions.

A. ISSUES OF CONFIDENTIALITY

Every professional working with children in a counseling context is faced with a possible conflict of loyalty to the child on one hand and the parents or the state on the other. Most counselors apparently take the view that a child's "[p]arents are entitled to know, up to a point, all that is to be known about their own child's activities." Rich suggests that the decision about how much to tell others varies with the importance of the circumstances and the child's age, but with young children Rich suggests that parents are entitled to know "just about everything." In contrast to the situation of many counselors, a lawyer's freedom to disclose information may be severely restricted by law or professional ethics. When a child is the lawyer's client, the information given to the attorney by the child ordinarily will be covered by the attorney-client privilege and the confidentiality rule established by the disciplinary standards. Generally speaking, unless a client consents, a lawyer is not permitted directly or indirectly to reveal a confidence of a client or use it in any way detrimental to the interests of the client. This prohibition apparently pertains equally to child and adult clients. There are exceptions that allow an attorney to make disclosures without the client's consent, but these are limited. One of the principal exceptions is when "[t]he intention of [the attorney's] client [is] to commit a crime and the information [is] necessary to prevent the crime." Under this exception, for example, attorneys would be allowed to deal with situations in which children disclose their planned purchases of controlled substances or their planned physical retaliation on other persons.

The other principal exception relevant here is when attorneys are required to disclose the confidential information "by law or court

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242. Id. at 35-36.
244. Model Code of Professional Responsibility DR 4-101(C)(3) (1981) (emphasis added). But cf. Model Rules of Professional Responsibility Rule 1.6(b)(1) (1983) (lawyer has discretion to reveal otherwise confidential information when the lawyer believes it is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm").
Under this exception, for example, attorneys may be required to report "abuse or neglect" of the child-client to state or local authorities as required by law under a child protection act. In many jurisdictions, an abused and neglected child is any child who is knowingly, intentionally, or negligently placed in situations that endanger "his or her life or physical or mental health," who is "cruelly confined or cruelly punished," who is deprived of "necessary food, clothing, shelter, or care," or who is sexually abused. This duty to report includes both past incidents and present circumstances. Obviously, making such a report may destroy the working relationship between the child's parents and the attorney. It also raises the question whether lawyers must inform their clients beforehand that information covered by such acts is not privileged.

As between the parents and the lawyer, these restrictions on disclosure are not a problem when children are plaintiffs in litigation because they must have legal representatives to sue on their behalf, usually a parent or legal guardian. In those instances, the information divulged by children can be told to their legal representatives (because presumably there is an identity of interest between them), but, of course, not to others.

Two notable exceptions in a litigation context to the free flow of information from attorneys to the parents can occur (1) when attorneys are appointed as guardians ad litem to represent the separate interest of children (e.g., in divorce proceedings) and (2) when they represent children as defendants in criminal or juvenile delinquency proceedings. In these situations, attorneys may present a position adverse to the parents and should refuse disclosure to the parents unless the child has given consent.

A lawyer also must be careful to observe the rule that communications made in the presence and hearing of a third person, other than a confidential agent of either the client or the attorney, will not be within the attorney-client privilege because such communications are not "confidential" ones. Thus, while it may be tempting to have someone close to the child such as a trusted social worker,
teacher, or counselor at the interview, their presence will destroy the privilege.\textsuperscript{252}

B. DEALING WITH PARENTS

Lawyers usually do not deal with a child alone; rather, they generally must deal with the child's parents as well. Often the lawyer is selected by the parents and sometimes both parents and child are represented. In rare circumstances, such as in a guardian-ad-litem appointment, the attorney may have only limited contact with parents. Usually, however, the lawyer must interact with the child's parents. As discussed in the preceding section, attorneys may face a difficult situation when children disclose information that they have withheld from their parents. In such a case, the attorney's obligation primarily is defined by to whom the attorney owes a duty of loyalty.\textsuperscript{253}

Many attorneys try to talk to a child-client without the presence of the parents once rapport has been established.\textsuperscript{254} Some attorneys accomplish this separation by explaining to the parents and child that this lawsuit is the child's and that it is standard practice to take some time to discuss it privately with the child. As many attorneys know, there may be some things that children, particularly older ones, will not divulge in front of their parents. Further, it emphasizes to child-clients that it is indeed their lawsuit and that they have a special relationship with their attorney.\textsuperscript{255}

Parents, nonetheless, often are essential sources of information in several ways. For example, they are good sources for historical background information that a child may not be able to give the attorney.\textsuperscript{256} Parents also can provide information about the child's interests that can be used by the attorney at the outset of the interview with the child. However, attorneys should be aware that many parents will repeat to their children what the attorney has told them, even if they are asked not to do so. As Bird points out in his advice to doctors dealing with parents of young patients, "[i]t is never safe to tell a parent something in the belief that it will not be passed on,

\begin{itemize}
  \item \textsuperscript{252} Sometimes, however, the need to preserve confidentiality has to be counterbalanced against the need to secure the child's cooperation. See, e.g., \textit{Damages for Child Death}, supra note 221, at 595 (usually necessary to conduct initial interview with an injured child in the presence of someone on whom the child relies for comfort and support).
  \item \textsuperscript{253} See notes 42 and 243 and accompanying text supra.
  \item \textsuperscript{254} See, e.g., \textit{Damages for Child Death}, supra note 221, § 55, at 595.
  \item \textsuperscript{255} See Lecture on the "Principles of Client Interviewing" by E. Robert Wallach, American Trial Lawyers Ass'n, Hastings College of Trial Advocacy (1972) (available on sound and video cassette).
  \item \textsuperscript{256} Cf. B. \textsc{Bird}, \textsc{Talking With Patients} 306 (2d ed. 1973).
\end{itemize}
often twisted, to the child.”257

Sometimes attorneys will encounter uncooperative behavior by parents. Occasionally, this behavior may be the result of extreme anxiety about their child’s legal predicament. It has been suggested that if the parents can get their fear out in the open, then they may be able to “settle down and be of assistance.”258 Uncooperative behavior also may be the result of the parents’ feelings of guilt for having somehow contributed to the child’s problem or injury. For example, they may blame themselves for failing to supervise the child, allowing the child to be placed in undesirable circumstances, or failing to recognize the dangers of a situation. In such instances, they may demand that the attorney take overzealous or unwise legal action to compensate in some way for their supposed neglect.259 The attorney, nevertheless, has an ethical obligation to resist this pressure.260

Another possible reaction arising from parental guilt or anxiety is that the child’s parents may refuse to support the child. In effect, they may withdraw from the situation by suggesting that the child be allowed to “take the consequences.” In such circumstances, the child likely will feel abandoned, while others, including their child’s attorney, may be disgusted by the parents’ apparently indifferent, callous, and heartless behavior. Their unwillingness to face the situation also may make them feel even more guilty,261 which thus perpetuates a vicious cycle.

These types of uncooperative parental behaviors frequently are based on the parents’ unconscious feelings. When such behaviors are

257. Id. at 307.
258. This suggestion was made in the context of a doctor-patient context, but it seems equally applicable to a legal context as well. Id. at 311.
259. Cf. id. at 311-12 (in the context of the doctor-parent relationship, they “may be overzealous, demand more and more treatment, may give twice the prescribed dose of medicine, may insist on getting more doctors in on the case, demand more attention, etc.”).
261. Cf. B. Bird, supra note 256, at 313. Attorneys should realize that a parent’s guilt feelings can have an adverse impact on the litigation. Consider, for example, the following suggestion made to defense attorneys for use in child-pedestrian accident cases:

Wherever possible, defense counsel should take advantage of the tendency of the parents of injured children to rid themselves of guilt feelings in connection with the accident. Many parents will seek to protect themselves by testifying that their child was highly intelligent, that he had been taught the proper way to cross the street, and that he was fully aware of the hazards of improper crossing. By taking full advantage of this tendency, defense counsel may be able to shift the blame for the accident from the defendant-driver to the child and his parents. Plaintiff’s attorney must guard against this line of questioning and object to it if possible.

9 AM. JUR. TRIALS Child-Pedestrian Accident Cases § 39, at 500 (1965).
encountered, the attorney may want to consider explaining to the parents that (1) it is normal to experience anxiety or for parents to feel in some way responsible for the child's problem or situation, (2) it is unproductive to blame themselves, and (3) the attorney will do everything that can be done to help their child. If the attorney decides that it is not possible or that it is inappropriate to talk openly about the parents' guilt or anxiety, the attorney at the very least should avoid implying that they were in any way the cause of the child's predicament. In essence, attorneys should avoid being judgmental, either directly or indirectly, if they want to overcome these uncooperative behaviors.262

C. SEVERELY INJURED CHILDREN

When the child has been severely injured or disfigured and an attorney has been retained to pursue compensation, the attorney faces special problems in dealing with the child. Because of the psychological problems that ordinarily arise with such injuries, the attorney should consult with the child's parents or other relatives before undertaking the interview with the child. Likewise, permission should be sought to discuss the child's physical and mental condition with the child's physicians before the interview. It is suggested that the initial interview be conducted with the child's parents. Later interviews should be held with the child alone once the child's confidence has been gained.263

The attorney should approach the subject of the accident and the child's injuries indirectly, determining first whether the child is willing to discuss these matters. The child may become upset during the discussion or even at the prospect of discussion—of the accident or the injury; the attorney, along with others present, thus must be prepared to comfort and encourage the child. The attorney, however, should accept the possibility that the discussion of these matters will have to be deferred, perhaps indefinitely, if the child is unwilling or unable to discuss the accident or the injuries.264

In some instances, the prosecutor will be forced by the circumstances to work with a child who has been severely injured. For example, in a case in Chino, California, an eight-year-old boy had his throat slashed but survived a bloodbath that left his parents, his sis-

262. Cf. B. BIRD, supra note 256, at 313-14. Bird points out that even a simple fact-finding question, with a certain inflection, can sound like a terrible accusation. Thus, in a medical context, "what has the child eaten?" becomes in the parents' mind, "What kind of rotten food have you been shoving into this poor kid? Are you trying to kill him, or something? Or are you just stupid?" Id. at 314.
263. Damages for Child Death, supra note 221, § 55, at 594-95.
264. Id.
ters, and a playmate dead. Because the boy was the only witness, the prosecutor had little choice if the alleged killer—in this instance, an escaped convict—was to be brought to trial. In this kind of situation, the prosecutor not only has to deal with the problems of the injured child, but also those arising from the topic discussed in the next section—witnessing death and violent injuries. In cases of severe injury or trauma, therefore, it is advisable for the prosecutor to seek the assistance of psychologists, social workers, or other mental health professionals in charting the course of the litigation in order to gauge the possible emotional harm that might come to the child as a result of testifying.

D. WITNESSING DEATH OR VIOLENT INJURIES

In a number of reported cases, children have witnessed violent injuries or crimes, many of which have resulted in the victim's death. The exposure to such events can be traumatizing to any person. Especially if the victim is one of the child's parents, the trauma and psychological problems attendant to such circumstances may be severe. Case studies indicate that the death of the child's parents will represent very painful, disruptive information that the child must try to manage. It is likely to stimulate excessively destructive and aggressive urges in the child. Probably it also will leave the child with feelings of loss and abandonment as well as a lack of trust in others.

In dealing with such a child, it is important that the attorney be aware of these typical reactions. According to the experts, how children cope in specific instances of domestic violence and murder is dependent on a variety of factors, including (1) their ages; (2) their concept of death; (3) which parent is killed—the abused one or the aggressor; (4) whether the surviving parent is emotionally disturbed; (5) the home situation before the crime was committed; (6) the rela-

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266. See id. Attorneys also should realize that the child's injury may have serious consequences for the entire family unit. See Authier, Starr, & Authier, Impact of Illness on the Family, in TEXTBOOK OF FAMILY PRACTICE 102-17 (3d ed. 1984) (excellent discussion and recommended background reading).
267. Children 'Living Victims' of Murder, Omaha World Herald, Aug. 21, 1983, at 1-E, col. 3 (quoting news reports). See generally Pynoos & Eth, supra note 20, at 90-96 (good discussion of the implications of children witnessing homicides). Pynoos and Eth report that out of 2,000 homicides in 1982 in Los Angeles County, approximately 200 of them apparently had a dependent youngster as a witness. Id. at 88.
268. S. Santostefano, Children Cope with the Violent Death of Parents; The Effect of Severe Trauma Discussed from the Viewpoint of Adaptation, in THE LOSS OF LOVED ONES: THE EFFECT OF A DEATH IN THE FAMILY ON PERSONALITY DEVELOPMENT 164 (D. Moriarty ed. 1967). See also Pynoos & Eth, supra note 20, at 93-95 (coping strategies).
INTERVIEWING CHILDREN

(1) how many of the children have been emotionally supported by
the children had with both parents; (7) what kind of death
they witnessed—shooting, stabbing, violent beating, drug overdose,
etc.; (8) whether the children get counseling, what type of therapy
they receive, and for how long; (9) their ability to build new relation-
ships; and (10) where they are placed after the incident—foster care,
close family member's home, etc.269

It is important for the attorney to understand how the concep-
tion of death changes as the child matures. Preschool-age children,
for example, tend to view death as a “disappearance” or as “going to
sleep,” a view that implies reversibility.270 During the early elemen-
tary school years, however, children gradually seem to accommodate
themselves to the proposition that “death is final, inevitable, universal,
and personal.”271 After the age of ten, children usually under-
stand fully the permanence of death, although even they may not be
able to affectively accept its finality for months or even years.272

Noted thanatologist Elisabeth Kubler-Ross has outlined five
stages in the dying process. Others successfully have applied the
stages of dying to the process of grieving.273 An understanding of
these stages often will be helpful to attorneys who are working with
children who have witnessed the death or serious injury of a parent,
sibling, or special friend.

The first stage in the process of grieving is called denial and iso-
lation, during which the child fails to believe the reality of the death.
This stage is similar to the physiological shock that traumatizes a
person following serious injury. Children may feel “numb,”274 or
they actively may deny the death. Attempting to interview children
at this point likely will be counterproductive because sensations, per-
ceptions, and memories may be blunted.

Next the grieving child experiences anger, including rage and re-
sentment. Adults in this stage often are able to verbalize these feel-
ings in such comments as, “Why me?” Young children, however, do
not have this level of sophistication. Instead, children who are suf-
fering from these intense feelings may “act out” their anger, becoming belligerent, unruly, or temperamental. A child in this stage thus
can be a most difficult client or witness for the attorney. In fact, the
child's anger may be displaced directly onto the attorney. Whenever

269. Children 'Living Victims' of Murder, Omaha World Herald, Aug. 21, 1983, at
1-E, col. 2.
270. R. Kastenbaum, The Child's Understanding of Death: How Does It Develop?
in EXPLAINING DEATH TO CHILDREN 89, 98 (E. Grollman ed. 1967).
271. Id. at 101.
272. Id. at 103.
274. Id. at 220, citing C. Parkes, Bereavement (1972).
possible, therefore, it is advisable to proceed legally after the child has overcome these intense feelings of anger and resentment.

Bargaining is the third stage in the process. During this phase children overtly or covertly promise good behavior in exchange for the return of the parent or other loved one. At this time children experience "a restless kind of searching, accompanied by preoccupation with thoughts of the dead person." Guilt also is evoked because (1) the child wasn’t better behaved while the parent was alive; (2) the (bad) child was allowed to live while the (good) parent had to die; (3) the child previously felt intense anger toward the dead parent; and (4) the child may have had unconscious (or even conscious) death wishes directed toward the dead parent. The latter source of guilt is especially potent for young children, who engage in "magical thinking," the belief that thoughts cause actions in the external world. Thus, the child in the bargaining stage may experience intense grieving and, therefore, must be dealt with carefully. At the same time, however, the child in this stage of grieving may be quite cooperative in interviews and during legal proceedings, in the vain hope that the bargain will work.

When it becomes obvious that bargaining is not going to work, the bereaved child enters the stage of depression, at which time the feelings of loss become overwhelming. Unlike the depressed adult who displays symptoms of sadness, despondency, poor appetite, and lethargy, however, the depressed child may exhibit restlessness, irritability, sulkiness, or pouting. These characteristics make the child a most difficult interviewee or witness.

Eventually the grieving child overcomes the acute sense of loss, finishes mourning, and arrives at the stage of acceptance. This stage is characterized by detachment from the lost parent and a willingness to cope with life once again. While this stage may be the most appropriate time psychologically to work with the child, often it is not reached for years.

In addition to understanding the child's stages of grief, attorneys, to the extent that they can influence matters, should seek to have the child placed in a home with a family member who is able to provide stability, love, and care. Attorneys also should see that professional counseling assistance is being provided.

275. Id. at 222.
277. C. Wenar, Psychopathology from Infancy through Adolescence 142 (1983).
278. R. Kalish, supra note 273, at 228.
Even when mental health counseling is provided, however, attorneys should accept and encourage children to talk about how they feel and should show them that they understand the child’s feelings, whatever they may be—even if they say something like, “I’m glad she [my mother] finally got rid of him [the abusive parent who made their lives miserable].” On the other hand, the children may express how guilty they feel for being unable to do something to protect the victim. Or they may be depressed or show intense anger at the surviving parent. Attorneys should be good listeners and nonjudgmental about these feelings. They also can be valuable simply as objective persons with whom children can talk about the events—especially when the family with whom they have been placed is too emotionally involved to be very helpful to them.

E. PSYCHOLOGICAL HARM TO THE CHILD FROM GIVING TESTIMONY

An important consideration for prosecutors and other attorneys should be the effect on a child of giving testimony. Victims or witnesses who testify in court, no matter how mature, end up “reliving” at least part of their past experience. In doing so, they may suffer significant trauma and possibly emotional harm. This phenomenon is probably best known as occurring in rape cases. Because of this potential harm, prosecutors sometimes may be more likely to plea bargain if it means keeping child witnesses or victims from testifying.

Often, however, prosecutors have little choice because the child may be the key, and perhaps the only, witness. In other situations, the child’s testimony may be essential if any recovery is to be had or any effective defense is to be presented.

What can be done to minimize the child’s trauma and psychological harm? First, the trial process should be explained to the child in simple terms—a description of the court, the role of witnesses and

280. Id. at 9-E, col. 1.
281. Id. See generally A. BRENNER, HELPING CHILDREN COPE WITH STRESS (1984) (recommended background reading concerning death and the spectrum of other stresses children face).
282. See Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 977, 983-86 (1969). Attempts have been made to reduce the number of times a child will have to testify. This approach, however, may not always work well. For example, in the McMartin preschool abuse case, the trial judge ordered a consolidated preliminary hearing for all seven defendants, but, as a result, some children have been kept on the witness stand more than one week; one ten-year-old boy testified sixteen days. California abuse case may be unraveling, Chicago Tribune, May 17, 1985, at 1, col. 2, 9, col. 1.
the parties or the state, the role and function of the judge (and jury), and the purpose and role of counsel.\textsuperscript{284} An innovative, practical way to present this information would be by a well-designed videotape. This approach would make an efficient use of the prosecutor's time and would permit a visual and oral presentation of what is involved.\textsuperscript{285}

Second, children should be taken to the courtroom so they can become familiar with the surroundings. If possible, the child should meet the court personnel.\textsuperscript{286} Commentators suggest that “[o]nce the child becomes familiar with the court atmosphere, [the child], in most cases, will be neither awed nor fearful.”\textsuperscript{287} In this way, children will be more relaxed and perhaps less stressed. During this visit, they should be accompanied by their parents or by persons to whom the child feels close.\textsuperscript{288} One commentator has proposed that an informal “Child Courtroom” with one-way glass be provided to ease the trauma to children giving testimony.\textsuperscript{289}

Third, children should be prepared concerning the oath and the kind of questions that will be asked on direct and cross-examination.\textsuperscript{290}

Fourth, at trial, steps should be taken to make a child's giving of testimony as painless as possible. If the child is very young or frightened, a parent or someone close to the child should be allowed to sit with the child.\textsuperscript{291} Another possibility is to let such a child bring a fa-

\begin{thebibliography}{99}
\bibitem{284} See \textit{Damages for Child Death}, supra note 221, \S~107, at 653; Melton, \textit{Child Witnesses and the First Amendment: A Psychological Dilemma}, 40 J. SOC. ISSUES, No. 2 1984, at 109, 110 (citing special materials published by the Brooklyn Victim Services Agency).
\bibitem{285} To date, the authors have been unable to discover the existence of such a videotape presentation. A good presentation for prosecutors and others is a motion picture entitled “\textit{Double Jeopardy},” which looks at better ways to interview sexually abused children and to prepare them for court. See \textit{Double Jeopardy}, Cavalcade Productions (1979).
\bibitem{287} \textit{Damages for Child Death}, supra note 221, \S~107, at 654.
\bibitem{288} See id.
\bibitem{289} Libai, supra note 282, at 1014-25. See also Parker, \textit{The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?} 17 NEW ENG. L. REV. 643, 664-73 (1982) (several innovative protections embodied in a proposed model act for child witnesses).
\bibitem{290} See Gibbs, \textit{Ten Steps to Take When Representing the Minor Child}, 4 FAM. ADVOC., Spring 1982, at 35, 36 (suggesting that attorneys should explain the entire proceedings well in advance and should prepare the child for questioning; answers should not be supplied); Berliner & Barbieri, supra note 66, at 130-31 (preparing the child for a court appearance). This preparation should include a review of the visual aids that will be used at trial. See \textit{Direct Examination of Defendant}, supra note 78, \S~9, at 273 (“no photographs or other visual aids should be shown to the child for the first time while he is on the witness stand”; recommending a careful review before trial).
\bibitem{291} Silas, supra note 286, at 18.
\end{thebibliography}
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Favorite toy to the stand. In one case, the judge allowed the child to testify in another room on closed-circuit television. In this instance, the court did not allow the spectators to see the television screens. This approach, however, may raise constitutional problems in the absence of a specially designed courtroom for this purpose.

Fifth, in-camera (in-chambers) proceedings may be possible in some nonjury trials as a means of lessening the psychological stress on a child, if adequate safeguards are provided. This approach is commonly used in custody litigation, in which the judge privately interviews the child. When a child’s custody preference is sought in this way, the child should be made to understand that the judge alone has the responsibility of making the custody decision based on all the relevant information and that the child has no real control over the decision. In this way, a child’s feeling of guilt about stating a preference may be lessened.

Finally, special arrangements should be made to ensure that the child has access to professional mental health counseling. While it is not necessarily the job of the attorney to insist upon counseling, it often may be prudent to encourage the child’s participation in therapy.

F. COUNSELING CHILDREN ABOUT COURSES OF ACTION AND MAKING DECISIONS

It is common for adults to think that they know what is best for children. Indeed, this attitude probably is correct for purposes of deciding the broad limits of acceptable behavior for children or for determining the steps necessary to preserve their physical health. But when adults attempt to make decisions beyond setting such limits, the results may be neither satisfactory nor effective. Unfortunately, if they are not keenly aware of their actions, lawyers or judges can fall into such a pattern because, in effect, they may be able to force upon children their ideas of what is best by manipulating the alternatives and applying pressure to achieve the desired decision.

293. Id. See also California abuse case may be unraveling, Chicago Tribune, May 17, 1985, at 1, col. 2, 9, col. 1 (separate courtroom used in preschool abuse hearing in which the public can watch the proceedings over closed-circuit TV; but the young witnesses still have about two dozen adults, including the seven defendants and their lawyers, prosecutors, stenographers, clerks, and bailiffs in front of them).
294. See Libai, supra note 282, at 1021-28; Melton, supra note 284, at 110-15, 118-21 (good discussion of constitutional problems of “innovative” procedural reforms).
295. See Newman & Collester, supra note 228, 10-11, 32.
Rich gives the following example of this type of difficulty. A judge in England was questioning a delinquent charged with theft. The judge asked the youth what made him commit the offense. The youth had a complex background and many personal problems but was not inclined to go into all the details. He instead said the first thing that came to his mind, "Just for kicks, I guess." "Oh," replied the judge, "bored, eh?" There was noting to reply to this except, "Yes, sir." The judge told the youth, "A boy like you should have a hobby. Have you ever tried bird-watching?"—(the judge's favorite avocation). At this point, Rich suggests that the boy must have thought that the judge was crazy, but had nothing to lose by humoring the judge, so he announced that he would try it. The judge pointed out to him how he "would learn a lot, be out in the open, much better than hanging around the street corners." So the boy took up bird watching, in which he had not the slightest interest, in order to secure probation.\textsuperscript{297}

In dealing with children and helping them arrive at decisions, attorneys should try to promote at least three qualities in the process: courage, responsibility, and cooperation. These are the same goals on which "active parenting" is based,\textsuperscript{298} and for attorneys who often work with children, taking an "active parenting" course can be of great value to them in their practice.\textsuperscript{299}

Generally speaking, a collaborative approach to decision making should be pursued. In this context, we are referring to choices that are those for the child to make, not someone else's, such as a parent or guardian. In this regard, attorneys can help children in several ways. First, attorneys can help children identify alternative courses of action. Using questions in this process ordinarily is more effective than simply setting out the courses for them (e.g., "What can you do about it?" "What else can you try?" etc.). Some prompting and offering tentative ideas (in question form) often will be necessary. Note that these courses of action may not involve specific solutions directly, but rather may be "leads" to solutions (e.g., setting up a meeting with the child's teacher, social worker, or probation officer to explore possible solutions).

Second, attorneys can help children evaluate and weigh the courses of action and the logical, natural, or legal consequences of each. Again, questions usually are better (e.g., "What do you think

\begin{footnotes}
\footnote{297. J. Rich, supra note 33, at 50.}
\footnote{298. See M. Popkin, Active Parenting Handbook 10-11 (1983).}
\footnote{299. Dr. Popkin's course, for example, consists of six sessions and draws upon the work of Alfred Adler and Rudolf Dreikurs, among others. The course utilizes videotape and a self-study "Active Parenting Guide." This course is highly recommended. See also T. Gordon, P.E.T. Parent Effectiveness Training (1970).}
\end{footnotes}
would happen if you did that?” etc.). This process involves the child and encourages him to become an effective problem solver. Attorneys must remember that it will be even more tempting than with adult clients to skew or load the discussion toward the attorneys’ view of the “best” choices.  

Third, attorneys can help children in making decisions because attorneys can bring others into the process of searching for solutions much more effectively than children can on their own. In other words, the collaborative process need not—and many times should not—be limited just to the child and the attorney. In doing so, attorneys can facilitate a search for solutions and can help assure that the child is allowed and encouraged to be an active participant in the process.

In this collaborative decision-making approach, then, children are encouraged to arrive at a solution or decision. It is vitally important that the final choice be that of the child—not that of the attorney. In this way, the decision is more likely to be long-lasting. When they thus arrive at solutions, children are more likely to be satisfied, to feel a sense of self-esteem, and to learn responsibility.

VI. CONCLUSION

Lawyers dealing with children face a challenge. They must “bridge the gap” between children and themselves if they are going to be as effective as possible. An important step in doing so is understanding the cognitive and moral stages of child development. Knowledge of these stages can give attorneys useful insights into the child’s capabilities and notions of “truth.” Other important steps include making a constant effort to recognize and overcome potential barriers to communication by establishing good working relationships with children, dealing with their reluctances to talk, and tailoring questions and explanations to their level. Many of these same skills are needed at trial or in depositions involving child witnesses.

Lawyers also must be careful to avoid various pitfalls in interviewing, counseling, examining, and cross-examining children. These pitfalls primarily center on problems of factual accuracy. Lawyers must pay close attention to limitations in children’s perception and recall as well as their ability to order and interpret. Lawyers must be particularly sensitive to problems of suggestibility and undue influence because they often are the keys to identifying likely factual distortions and to successful cross-examinations.

Responsible lawyers also should be aware of the special difficulties of working with children who have been severely injured or with those who have witnessed death or violent injuries. Lawyers need to be aware of the psychological effects of those types of trauma and should encourage professional counseling for such children. Likewise, they need to weigh carefully the possible psychological harm to children that may arise from giving testimony and to search for alternatives or ways of minimizing that harm.

When children are clients, lawyers must remember that they owe a duty of loyalty to them and that the confidentiality of their communications must be respected as a matter of attorney-client privilege and professional ethics. In doing so, they need to encourage children to become responsible decision makers and to resist the strong tendency simply to decide what is best for them. Skill is required too in dealing with parents, particularly when they act uncooperatively.

In sum, lawyers working with children are likely to encounter many frustrations. Awareness of the stages of child development and the counseling approaches of other professionals should help. Still, we recognize that putting into effect the suggestions in this article will not always be easy. Nonetheless, it is hoped that this article will lessen the need for attorneys to learn via the school of "hard knocks." The trouble with such learning by experience, it has been said, is that experience gives the test first, then the lesson is learned. When working with children, this approach usually is inadequate and it even may be damaging—to the child, the attorney, and the legal case.