

Cross-Examination of a Child Witness

Prof. Laurie Shanks
Clinical Professor of Law
Albany Law School

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Saturday, May 31, 2014
9:00 a.m. – 12:00 p.m.

Mohawk Valley Community College
1101 Sherman Drive
Utica, New York

MCLE Credits: 2 Skills and 1 Professional Practice

Speaker

Prof. Laurie Shanks, *Clinical Professor of Law, Albany Law School*

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IT Room 225
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8:30 a.m. – 9:00 a.m.	REGISTRATION
9:00 a.m. – 10:30 a.m.	Cross-Examination of a Child Witness (Part 1)
10:30 a.m. – 10:45 a.m.	BREAK
10:45 a.m. – 12:00 p.m.	Cross-Examination of a Child Witness (Part 2)

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ALBANY LAW SCHOOL

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**Evaluating Children's Competency To
Testify: Developing A Rational Method To
Assess A Young Child's Capacity To Offer
Reliable Testimony In Cases Alleging Child
Sex Abuse**

58 Cleveland State L. Rev. 575 (2011)

Professor Laurie Shanks
Clinical Professor of Law

**EVALUATING CHILDREN’S COMPETENCY TO
TESTIFY: DEVELOPING A RATIONAL METHOD TO
ASSESS A YOUNG CHILD’S CAPACITY TO OFFER
RELIABLE TESTIMONY IN CASES ALLEGING
CHILD SEX ABUSE**

LAURIE SHANKS*

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I. INTRODUCTION

This Article discusses the testimony of young children, the inadequacy of the traditional hearing used to determine the competency of such children to testify, and the ways in which the hearing might be changed to make it a meaningful process for determining the ability of a child to give reliable testimony.

Criminal trials involving allegations of the sexual abuse of a young child are particularly susceptible to wrongful convictions due to sympathy for the small “victim,” intense revulsion elicited by the nature of the charges, and the ineffectiveness of traditional methods of impeachment when used with a child witness. The conventional competency determination, made on the basis of a pre-trial hearing, makes little or no attempt to accurately ascertain the child’s level of developmental maturity or ability to reliably relate a series of events. There is rarely

* Laurie Shanks is a Clinical Professor of Law at Albany Law School. The author wishes to thank her research assistant, Molly Adams Breslin, Esq., an Albany Law graduate, for her invaluable assistance.

a meaningful attempt to ascertain whether the child witness is able to distinguish reality from fantasy. Rather, the child is often allowed to testify based upon a brief and essentially meaningless inquiry designed to test her knowledge of colors and her ability to parrot the difference between “the truth” and “a lie.”

While many studies have discussed the dangers inherent in the improper questioning of children during the investigation of alleged sexual abuse,¹ there has been little exploration of how to determine whether a child is competent to testify. This is unfortunate as the failure to adequately evaluate a child’s ability to testify in a meaningful way can have catastrophic consequences. The lives of many individuals, including the child, will be changed forever as a result of the determination made at the competency hearing. This article will address the failures of the present system and offer suggestions for effecting reform.

II. THE MEANINGLESS NATURE OF TYPICAL COMPETENCY QUESTIONING: *HOW WILL GOD FEEL?*

“Are we ready to proceed with the competency hearing?” “Yes, Your Honor,” the prosecutor replies and turns to ask the victim-witness advocate to bring in the star, and *only*, witness of the day. She returns in a moment, hand-in-hand with Suzi, an adorable five-year-old in a freshly-pressed dress, matching bows in her hair, ruffled white anklets, and black, patent leather ballet slippers on her little feet. The advocate shepherds Suzi to the witness chair where she sits, tiny and fragile, legs swinging as she clutches the teddy bear given to her by the state police “special victims unit.”

“Can you tell us your name?” the prosecutor begins. “Suzi,” the child responds in a barely audible whisper. “Don’t be afraid. Where do you go to school?” No answer. “Do you know your teacher’s name?” “Miss Cindy,” Suzi mumbles. “Very good,” the attorney smiles and nods. “Is Miss Cindy nice?” Nod of head. “How old are you?” Holds up her hand, palm out, with all five fingers extended. “Five—what a *big* girl you are!” “Can you count to ten?” Suzi does so, and the prosecutor praises her effusively.

With the preliminaries over, the prosecutor now straightens, takes out a black pen and waves it in front of Suzi. “What color is this pen, Suzi?” “Black.” “You’re right! Good girl. Is that the truth?” “Uh-huh.” “You’re right, it is the truth. You are very smart.” The prosecutor pauses for a moment and asks in a serious tone, “Okay, Suzi, now if I tell you that this pen is red,” holding up the same black pen, “would that be the truth or a lie?” “A lie,” replies Suzi. “That’s right! Perfect! You are doing *such* a good job,” the prosecutor beams, as he nods and smiles. He then frowns and deepens his voice. “Now,” he says, “is it a good thing or a bad thing to

¹ See generally Stephen J. Ceci, Maggie Bruck & David B. Battan, *The Suggestibility of Children’s Testimony*, in FALSE-MEMORY CREATION IN CHILDREN AND ADULTS: THEORY, RESEARCH AND IMPLICATIONS 169 (David F. Bjorklund ed., 2000) (highlighting the importance of this issue by the staggering lack of reliability in allegations of abuse, “[o]nly 36% of nearly two million maltreatment investigations involving nearly three million children resulted in substantiated or indicated reports of child abuse, neglect, or both”); Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAGAZINE, Sept. 19, 2004, at 77 (providing a terrifying look at the lasting psychological effects of false allegations on not only the accused, but the onetime child accuser twenty years after the incident). See also THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY (John Doris ed., 1991).

tell a lie?” “A bad thing,” Suzi says sinking a bit lower in the chair. Again, the prosecutor is all smiles. “That is exactly right. You are such a smart girl.” He takes a dramatic pause, frowns, and with a gloomy voice adds, “What would happen if you told a lie?” “Mommy would be mad and put me in timeout, and God would be sad,” Suzi whispers, again to accolades from the prosecutor.

After a few more questions, which elicit testimony that Mommy would be proud and God would be happy if she correctly identifies the color of the pen as black, which is “the truth,” Suzi is asked if she understands who the judge is and what role he has in the courtroom. Suzi responds, “Judges are the boss. They put bad people in jail.” When prompted, Suzi confirms that judges are “really nice to little girls who tell the truth.” The judge, as well as the prosecutor, is now nodding and assuring Suzi that she is doing a terrific job.

Next, Suzi is asked whether she will promise to tell the truth in court so that the judge, in addition to God and Mommy, will be happy and proud of her. She again answers in the affirmative, and the competency hearing draws to a close. The prosecutor tenders the witness, maintaining that he has demonstrated that she knows the difference between the truth and a lie and understands that there are adverse consequences to telling a lie. The judge rules that the child may testify. The entire proceeding may have taken less than fifteen minutes.²

The above scenario is reflective of the competency hearings that occur in most jurisdictions to determine whether young children should be permitted to testify in serious felony cases, including those alleging child sexual abuse.³ The defense attorney is often relegated to the role of a proverbial “potted plant” during the proceedings. She may be given the opportunity to inquire of the witness directly, or she may be required to submit any requested questions to the court for the judge to ask. Even if the attorney is permitted to address the child directly, the questions may have to be submitted in advance for approval by the court. The judge may strictly

² The scenario described is played out daily in courtrooms across the country. The author was formerly an Assistant County Attorney and Assistant Public Defender in Maricopa County, Arizona, and is admitted to practice law in Arizona, Indiana, and New York. She has prosecuted and defended cases involving allegations of child sexual abuse. In addition, the author has lectured in approximately fifteen states on the topic of cross-examination of child witnesses and has conducted workshops for lawyers from numerous states at the National Criminal Defense College in Macon, Georgia, on child competency hearings and cross-examination of child witnesses. The participating attorneys describe the hearings held in their states with amazing consistency. The dialogue in this Article is drawn from the author’s own experiences and those of other practicing attorneys.

³ See, e.g., N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2010); see also STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN’S TESTIMONY* (1995). Further exemplifying this concept, a Time Magazine article described a typical courtroom scene:

Lawyers try to frame simple questions that give the youngster a concrete sense of abstract concepts. In the successful California prosecution of kidnaper Kenneth Parnell, for example, Deputy District Attorney George McClure established his witness’s competence by picking up a pen and asking the victim, Timmy White, then six, “Timmy, if I told you this thing in my hand is an ice cream cone, would it be the truth or a lie?” To put children at ease, some judges bend courtroom rules. In one Seattle trial, a 5 1/2-year-old witness was allowed to sit on her mother’s lap.

Laura Meyers et al., *Out of the Mouths of Babes*, TIME, Jan. 31, 1983, at 54.

limit the scope of the defense attorney's inquiry to issues involving the child's ability to distinguish truth from falsity and to articulate that one must tell "the truth" in court.⁴

Even in jurisdictions in which the defense attorney is permitted to directly question the child, the lawyer may have no effective means to do so. It may be difficult to determine what meaningful questions can be propounded within the strictures of the proceeding. Should the defense attorney maintain that the pen is really green and see if the child will agree? Should she inquire whether prior to the hearing the child practiced the precise questions posed and answers elicited during the proceeding? Perhaps she should ask whether the child actually goes to church or what the basis is for her belief in God's or the judge's emotional reactions? What can be done if the child will not answer or begins to cry? More significantly, what, if anything, can be done to combat a judge's *pro forma* attitude toward competency hearings when it is a foregone conclusion that the child will be adjudged competent to testify and that any deficiencies in the child's testimony will go to the weight of the testimony, but not its admissibility?

Alternatively, should the defense attorney use the hearing to try to establish some rapport with the child? Should (or may) questions be asked about the allegations in the indictment—the acts about which the child is being found competent to testify? Perhaps the attorney should try to explore whether Suzi has an imaginary friend, or whether she is known to make up stories to avoid being put in "timeout." Maybe Suzi should be questioned about what activities she has previously engaged in that made God happy and those that made him (or her mother) sad or mad.

While the answers to these questions may not be apparent, what is clear is that the lives of many individuals, including the child, will be changed forever as a result of the determination made at the conclusion of the hearing.⁵ Given that reality, it is both startling and problematic that the typical competency hearing is comprised of the meaningless ceremony portrayed above. Reform is needed.

III. NATURE OF CHILD SEXUAL ABUSE CASES

Cases involving allegations of child sexual abuse evoke intense, emotional reactions from participants in the criminal justice system and the public. The thought of a helpless child as the victim of a sadistic, perverted, or manipulative adult brings out the protective instincts of every prosecutor and turns the "special victims unit" attorney into an avenging angel in the eyes of her "team."⁶ The public reacts with anger and revulsion.

⁴ For a comprehensive catalogue of each state's statute providing for a child competency hearing, see AM. PROSECUTION RESEARCH INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 359 tbl.V.1 (3d ed. 2004); TASK FORCE ON CHILD WITNESSES, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE CHILD WITNESS IN CRIMINAL CASES, app. C at 63 (2002). See also Jane Dever Prince, *Competency and Credibility: Double Trouble for Child Victims of Sexual Offenses*, 9 SUFFOLK J. TRIAL & APP. ADVOC. 113 (2004).

⁵ See Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377 (1985) (highlighting the crucial nature of the competency hearing in sexual abuse cases because these cases often depend solely on the testimony of the child and generally lack witnesses or any corroborating evidence).

⁶ Many jurisdictions have special units composed of police officers, prosecutors, and nurses, among others, who work together utilizing a team-based approach for protecting

Experienced criminal defense attorneys are passionate in their defense of accused murderers, arsonists, and suspected “terrorists.” They do not flinch at the thought of cross-examining the most experienced FBI agent, mob informant, or co-defendant. However, these same champions of the criminal justice system are terrified of facing a five-year-old on the witness stand.⁷ This quandary is not unique to defense attorneys. Judges are reluctant to preside over the cases, prosecutors may be hesitant

victims of sexual abuse. *See, e.g.*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP’T OF JUSTICE, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE (Mar. 2000); William P. Heck, *Basic Investigative Protocol for Child Sexual Abuse*, FBI LAW ENFORCEMENT BULLETIN 19 (Oct. 1999); Maxine Jacobson, *Child Sexual Abuse and the Multidisciplinary Team Approach*, 8 CHILDHOOD 231 (2001) (arguing that “understanding child sexual abuse and developing community-based practice approaches must be informed by broader perspective”). Furthermore, for more than ten years, the Department of Justice has been encouraging the use of a multidisciplinary team approach to the investigation and prosecution of cases of alleged child sexual abuse in which “social workers, physicians, therapists, prosecutors, judges and police officers all have important roles to play.” OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE 3 (2001).

⁷ In a public opinion survey, lawyers were asked whether or not “people *accused* of child sexual abuse should be entitled to the same legal protections as defendants accused of other crimes.” Stephen L. Carter, *The Future of Callings—An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium: What is the Source of the Obligation of Public Service for the Professions?*, 25 WM. MITCHELL L. REV. 103, 115 (1999) (emphasis added). Strikingly, the results indicated that twenty-five percent of lawyers admitted that they believed such individuals did not deserve the same rights as all other criminal defendants. *Id.*

It’s a scenario which is played out in court rooms across the country every day, the hearing of cases involving child abuse and child sexual abuse. Lawyers hate these cases. They are often in a no-win situation because no matter how sensitively they handle a case, there is always the chance of being accused of being heavy-handed in their approach.

Greg Kelton, *Protecting Innocence*, THE ADVERTISER (Adelaide, S. Austl.), Oct. 10, 1998. *See also* Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 888-89 (2003).

The classic example of such a conflict is the lawyer who is asked to represent a person charged with a sex offense against a child. Many lawyers would refuse this representation because their own beliefs and morals are so offended by the alleged offense that they would be unable to zealously represent such a client.

Id. Attorneys’ aversion to defending alleged abusers is not unique to the United States.

One lawyer admitted that it was not always easy to discharge his professional obligation, but that he does his duty nonetheless: “I confess there are particular types of crimes that I prefer not to do—cases involving children, including child killing. I have kids of my own But, you can’t reject a case because you don’t like the crime or the criminal.”

Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495, 511 (2006).

to put child witnesses on the stand, and jurors often opt to recuse themselves from service.⁸

In many respects, the reaction of the participants in the criminal justice system is understandable. The lawyers on each side, the judge, and the jurors are all likely to be parents, aunts, and uncles. Their spouses, parents, neighbors, and the news media have strong, negative opinions and are not hesitant to express them. For the defense attorneys, the question, “How *can* you represent someone *like that*?” is usually followed by, “I can’t believe you would represent him when you have children of your own!”⁹

In addition to the emotional component, there are unique legal concerns that add to the difficulty of prosecuting or defending a case involving an accusation of sexual abuse against a young child.¹⁰ Unlike other crimes, there is typically little or no physical evidence—no weapon, no marked bills, no heroin in small packages, no scales, and certainly no video surveillance.

Although some egregious cases of sexual abuse may involve vaginal or rectal tearing, many allegations of sexual abuse involve improper touching or fondling. Obviously, there will be no physical evidence at all if the child was asked or forced to touch the adult. If the allegation is that the adult touched the child, there may be a medical report indicating that the child has redness or sensitivity in the genital area “consistent with” such touching. Effective cross-examination of the state’s medical witness or use of a defense expert will elicit testimony that such physical findings are also “consistent with” masturbation, tight clothing, improper hygiene, and the use of inexpensive, rough toilet paper.¹¹

⁸ “From the perspective of a judge, the single most difficult criminal case to try is a child sex abuse case.” Phylis Skloot Bamberger & Richard N. Allman, *Some Special Concerns in the Trial of Child Sexual Abuse Case*, 64 N.Y. ST. B.J. 18, 18 (May-June 1992). See, e.g., Ronnie Hall, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of “Sexually Violent Predators” in Texas*, 13 TEX. WESLEYAN L. REV. 175, 211 (2006).

Often prosecutors offer plea bargains to sex offenders to avoid bringing child witnesses, who may be traumatized by the experience, to testify. Another, less laudable reason, is that the offender will be civilly, and indefinitely, committed under the SVP statute immediately upon release from prison. Why bother sentencing to a long term of years when you can commit for a lifetime?

Id. “In the last twenty years, there have been more appeals of child sexual abuse convictions than in the preceding two hundred years.” Judge Charles B. Schudson, *Child Sexual Abuse: A Judicial Perspective*, http://www.nationalcac.org/professionals/trainings/ocourses/judge_charles_schudson/ (speaking about the challenges of presiding over child abuse cases, and the extreme importance of properly protecting children while preserving the criminal justice process) (last visited Jan. 7, 2011).

⁹ Smith, *supra* note 7, at 511.

¹⁰ See Meyers et al., *supra* note 3. “Cross examining a child has its own set of pitfalls. A defense attorney who badgers a young witness risks alienating the jury, so the lawyer must probe inconsistent statements gingerly.” *Id.*

¹¹ See Joyce A. Adams, *The Role of the Medical Evaluation in Suspected Child Sexual Abuse*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 231 (Tara Ney ed., 1995) (dispelling the myths about what is “normal” to find in an examination of a child suspected to have been abused, specifically whether an examination can truly determine if and how frequently a child has been molested).

Two other factors magnify the legal difficulties in child sexual abuse cases. The accused is often an intimate of the child, typically a family member, friend, or neighbor. Motives to encourage, discourage, or influence the child's testimony may be difficult to ascertain.¹² Further, acts of sexual abuse are hidden and secret, and the presence and testimony of independent, disinterested witnesses is virtually nonexistent.

IV. SCOPE OF COMPETENCY HEARING

A. Competency Standards and Their Implementation

In 1895, in *Wheeler v. United States*,¹³ the United States Supreme Court articulated the common law standard with respect to the testimony of young children.¹⁴ The Court considered the question of whether a five-year-old child was competent to testify in a criminal trial for murder:

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the

¹² See Mark J. Blotcky, *The Criminal Defense of Child Molestation Allegations: The Psychiatric Knowledge Base from Which to Evaluate Your Case*, http://www.texas-sexcrimes-defense.com/CM/Articles/child_abuse_talk.pdf (last visited Jan. 7, 2011) (highlighting the complicated social, economic, and familial relationships within which abuse can occur or be alleged). "Sexual abuse, especially within the family is shrouded in secrecy, and confounded by denial, minimization, deflection upon others, exaggeration, and disbelief. And more confounding is that a child's psychiatric illness may cause him to exhibit sexual behavior suggestive of abuse." *Id.* at 8. For an additional example:

Cathy, age 12, accused her father of raping her. One month later she insisted that she had lied about the rape to get back at her father for imposing strict curfews. In reality, Cathy had been raped by her father, but retracted her story under extreme pressure, humiliation, and rejection by her sister and mother. For fear of destroying the family structure, Cathy recanted her allegation.

John C. Yuille, Monica Tymofievich & David Marxsen, *The Nature of Allegations of Child Sexual Abuse*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, *supra* note 11, at 21, 26.

¹³ *Wheeler v. United States*, 159 U.S. 523, 525 (1895) ("To exclude [a child] from the witness stand . . . would sometimes result in staying the hand of justice."). See also Judge Charles B. Schudson, *Child Sexual Abuse: A Judicial Perspective*, NCAC ACADEMY ONLINE, http://nationalcac.org/professionals/trainings/ocourses/judge_charles_schudson/index.html (last visited Sept. 3, 2010) (explaining and criticizing the historical development of child competency standards).

Most states have followed the federal lead, and presume all witnesses, regardless of age, to be competent. . . . In more and more states children, at least as a matter of written law, are presumed competent and allowed to testify. But what then is the problem? The problem is that sometimes, lawyers and judges don't apply the constitution, but habit and attitude

Id.

¹⁴ *Wheeler*, 159 U.S. at 526.

capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath.¹⁵

In New York, a child's competency is governed by section 60.20(2) of the Criminal Procedure Law (CPL).¹⁶

Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath. If under either of the above provisions, a witness is deemed to be ineligible to testify under oath, the witness may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof. A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.¹⁷

The problem that arises in far too many cases is not so much in the legislative standard, but in its implementation.¹⁸ Perhaps due to the inartful drafting of competency statutes, courts have tended to ignore their obligation to test the intelligence and capacity of young children to accurately relate a series of events. Instead, they have focused on the language relating to whether the child understands the nature of an oath, even in those cases in which no oath will be taken. New York is not alone in this failure to adequately vet young witnesses.¹⁹

¹⁵ *Id.* at 524-25.

¹⁶ N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 2010); *People v. Nisoff*, 330 N.E.2d 638, 641 (N.Y. 1975) (“[A] rebuttable presumption exists that an infant less than [nine] years old is not competent to be sworn.”).

¹⁷ N.Y. CRIM. PROC. LAW § 60.20(2).

¹⁸ Responding to the legal dilemmas created by inconsistent methods of conducting competency hearings, many of which were not grounded in any legal requirements, the State of Michigan repealed its requirement that all children under the age of ten be subject to a competency hearing before he or she may testify. Michigan now presumes that all witnesses are competent, regardless of age, and the burden of proving incompetence is on the party challenging the child's competency. Patricia P. Fresard, *Alice in Wonderland: The Child as Complainant in the Criminal Sexual Conduct Case*, 80 MICH. B.J. 60, 63 (2001).

¹⁹ N.Y. CRIM. PROC. LAW § 60.20(2). Other states have adopted varying standards to determine a child's competence. In Wyoming, courts have been directed to utilize a five-part test for determining the competency of child witnesses:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent

Statutes and case law from various states mandate that the following elements must be taken into consideration when deciding whether the child is competent to testify: (1) present understanding or intelligence to understand an obligation to speak the truth; (2) mental capacity, at the time of the occurrence in question, to observe and register the occurrence; (3) memory sufficient to retain an independent recollection of the observations made; (4) ability to translate into words the memory of those observations; and (5) ability to understand and respond to simple questions of the occurrence.²⁰ If these elements are present, it is an indication that the child is competent to testify. In some courts, these elements are reduced to the simple determination by a judge that the child's competency to be a witness depends on the child's intelligence and moral sense.²¹

Unfortunately, there are no clear standards. Each trial court develops its own method of making a decision as to competency. Some of these assessments address only a small portion of the necessary factors. For example, a court may utilize the "red pen, black pen" technique and find the child competent without ever considering the child's mental or developmental capacity at the time the alleged crime occurred.

The conduct of the hearing itself is also left to the discretion of each judge. Some leave questioning to the prosecutor, others allow both attorneys to examine, and some propound questions themselves. There are trial judges who bring the child into chambers for an "introductory meeting," with or without the lawyers present. Some judges question the child about school, family members, or what gifts were received for his or her birthday or Christmas.

In determining the child's competency to testify, courts have tended to place primary emphasis on the child's ability to differentiate truth from falsehood, to comprehend the duty to tell the truth, and to understand the consequences of not fulfilling that duty.²² The child need not understand the legal and religious nature of

recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

Morganflash v. Wyoming, 76 P.3d 830 (Wyo. 2003) (citing *Larsen v. Wyoming*, 686 P.2d 583, 585 (Wyo. 1984) (quoting *Washington v. Allen*, 70 P.2d 690 (Wash. 1967))). For a comprehensive discussion of the standard in Maine, see Kermit V. Lipez, *The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment and Controversy*, 42 ME. L. REV. 283 (1990). See also Julie Oseid, *Defendants' Rights in Child Witness Competency Hearings: Establishing Constitutional Procedures for Sexual Abuse Cases*, 69 MINN. L. REV. 1377 (1985) (discussing the standard and its challenges as applied in Minnesota).

²⁰ 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

²¹ *Id.*

²² See *In re Noel O.*, 841 N.Y.S.2d 821 (N.Y. Fam. Ct. 2007). This decision provides a narrative of a hearing, both longer and more thorough than most, in which a five-year-old girl was deemed competent to testify under oath. The child, Jessi, testified as to her age and birth date, although she did not know the year in which she was born. In response to questions designed to establish that she could differentiate the truth from a lie, she was asked a series of questions relating to the colors of clothing worn by the Assistant Corporation Counsel. Jessi stated that "it is good to tell the truth" and "not good to tell a lie because her parents would be mad." *Id.* Jessi further indicated that "God was happy when you are nice" and "God is mad if you are bad." *Id.* During cross-examination, the child was not able to describe what an attorney does in the courtroom. She indicated that she learned about God from her mother and "herself." *Id.* She stated that she believed in Santa Claus, but her family also celebrated

an oath; rather, it is sufficient that a child have a general understanding of the moral obligation to tell the truth. The child must also have cognitive skills adequate to comprehend the event he or she witnessed and to communicate the memories of the event in response to questions at trial.²³ If a child is too young to appreciate the concept of an oath, he or she must be able to articulate that there are consequences to knowingly testifying to something that is false.²⁴ For cases involving adults as victims or perpetrators of crimes, the requirement of taking an oath bears with it the same sense of duty to tell the truth.²⁵

The abbreviated “red pen, black pen” competency hearing dispenses with the statutory requirements of various states to evaluate the child’s mental capacity at the time of the occurrence in question.²⁶ The salient questions are whether the child can

Hanukkah. *Id.* She went to temple two times “a long time ago,” but she could not remember what occurred during those visits. *Id.* There is no indication in the opinion that any testing was done to determine the intelligence of the child or her developmental skills. Significantly, there was also no indication that a determination was made as to whether the answers she gave about going to temple were factually correct and, if so, when the visits occurred. There was no inquiry about her ability to tell time or relate a sequence of events. There was also no inquiry as to whether Jessi practiced the questions and answers with the Assistant Corporation Counsel prior to her testimony. *Id.*

²³ Gary B. Melton, *Children’s Competency to Testify*, 5 LAW & HUM. BEHAV. 73, 75 (1981).

²⁴ *People v. Mendoza*, 49 A.D.3d 559, 560 (N.Y. App. Div. 2008); *see also In re Noel O.*, 841 N.Y.S.2d at 821.

A child may give sworn testimony where the trial judge finds that the child understands the difference between truth and falsehood, that he or she understands that there is a duty to tell the truth in court, that there are negative consequences for lying, and that the child can differentiate reality from fantasy. While Jessi is merely five years old, based upon the Court’s opportunity to observe the child in the course of the relatively lengthy hearing at which three different adults, both of the attorneys and the Court, put questions to her, the Court is satisfied that Jessi is competent to give sworn testimony at the fact-finding hearing.

Id.

²⁵ *See, e.g.,* Robert W. Morey, Comment, *The Competency of Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 266-70 (1985) (discussing the different state competency standards and the varying uses and definitions of an oath requirement); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1027 (2000) (providing a comprehensive overview of the challenges presented by child witnesses and oath-taking including cognitive difficulties, difficulties demonstrating an understanding of a truth versus a lie, and the special challenges of the particular form of the oath when a child is deemed competent to testify under oath); SHERRIE BOURG CARTER, *WORKING WITH CHILD WITNESSES: A HANDBOOK FOR LAW ENFORCEMENT OFFICERS AND CHILD PROTECTION WORKERS* 65 (2002).

Most children will not be familiar with the word oath. However, most will understand what it means to make a promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and productive to ask children if they know what it means to make a promise.

Id.

²⁶ *See* 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

observe and register what happened, whether she has memory sufficient to retain an independent recollection of the events, whether she has the ability to translate into words the memory of those observations, and whether she has the ability to understand and respond to simple questions about the occurrence. Unfortunately, these critical skills are rarely explored during the competency hearings.

While there is nothing wrong with using the “red pen, black pen” questions to acclimate the child to the questioner, to the courtroom, or to the concept of differentiating truth from falsehood, they are insufficient. Dr. Sherrie Bourg Carter outlines the shortcomings of such a truncated inquiry: First, although most children can correctly answer these types of questions, they

do not shed very much light on the critical question as to whether the child *understands* the meaning of the truth and lies. While it may be acceptable as a preliminary question, the standard, “*If I said my shirt is white . . .*” type of question mostly establishes whether a child knows his colors . . . and can use that knowledge to determine whether such a statement is correct or incorrect. [Second], these questions do not do a very good job of replicating scenarios similar to . . . the critical question before the court, [which is whether] a child who is placed in a serious situation (the courtroom rather than playing a game) and asked developmentally appropriate questions about a salient event they either witnessed or experienced (ultimately the alleged incident) [can] distinguish what is true from what is not true.²⁷

Clearly, more is needed if the child’s testimony is to have value to the trier of fact. The child must be able to cognitively organize any event that actually occurred and also be able to differentiate it from his or her own thoughts and fantasies. Significantly, the child must be able to maintain these skills under psychological stress and under pressure from adult authority figures in the courtroom.²⁸

The ritualistic and abbreviated hearings illustrated above have resulted from the single-minded focus *only* on demonstrating that the child is aware that some statements are true and others are false, and that there may be unpleasant consequences if one knowingly says something false after promising to tell the truth. The real issue, of course, is that a child’s ability to correctly identify the color of a pen, or to imagine God’s displeasure if she intentionally responds with the incorrect color, is not a reliable gauge of the ability of a young child to testify in a meaningful way.

Rarely are competency hearings used to assess the types of issues that are critical in criminal cases, such as the child’s understanding of the concepts of time and ability to accurately perceive and relate a series of events. Only after such an assessment can a trial court make an informed decision about the capacity of a child to testify.

²⁷ SHERRIE BOURG CARTER, *CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES* 8 (2009).

²⁸ “Alice had never been in a court of justice before . . .” Fresard, *supra* note 18, at 61 (highlighting the vulnerability of child witnesses when faced with the “overwhelming formality and somberness” of the courtroom, coupled with the task at hand of discussing scary occurrences in a room of adults and complete strangers).

Further, in order to make an informed decision about a child’s competency, it is imperative to explore the child’s ability to comprehend the impact of his or her words, both personally and upon others. Children tend to be self-interested. A young child’s understanding of consequences for lying may be limited to the impact it will have upon him or her, perhaps in the form of a “timeout” or other punishment. Even if a child does have some appreciation for how lying may impact others, it is unlikely that the child will understand that if she agrees with the grown-up who is nodding, smiling, and promising her ice-cream, she may condemn an innocent person to life in prison.

Likewise, mastering the skill of counting from one to one hundred does not necessarily demonstrate that a child can pick out twelve objects or prove that something happened twelve times.²⁹ The ability of a child to memorize his or her own birth date does not reflect knowledge of the time differential of days, weeks, months, or years.³⁰ A young child will try to make sense of his world by making his own generalizations, often based on very limited evidence. Child development specialist Dr. Louise Ames gives one such example in her book, *Your Five-Year Old*: “[I]f by chance [the child] has been told that two certain brown dogs were females and two black ones were males, he may conclude that all brown dogs are female and all black ones male.”³¹ Asked, “If I tell you that all brown dogs are female, is that the truth or a lie?” he may say it is the truth. For him, it is.

B. The Ability to Distinguish Fantasy from Reality



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Psychologists and others have spent years researching the developmental capacity of young children, and the breadth of this research is massive. Documented

²⁹ For a comprehensive resource on the emotional and behavioral development of children from ages three to six, see T. BERRY BRAZELTON & JOSHUA D. SPARROW, *TOUCHPOINTS: THREE TO SIX* (2001). With respect to learning and understanding the nature of time, developmental specialists indicate that at the age of three, time is measured by a subjective internal clock tied to important events in the child’s life and can bear little relation to the systematic measurements of time known to adults. *Id.* at 34.

³⁰ *Id.*

³¹ LOUISE BATES AMES & FRANCES L. ILG, *YOUR FIVE-YEAR-OLD: SUNNY AND SERENE* 53 (1979).

³² *Baby Blues*, *TIMES UNION*, July 1, 2009, at B13.

developmental milestones of young children can assist in assessing the required cognitive capacity of a young child to testify reliably. For example, researchers Johnson and Foley found that young children (under age eight) had more difficulty than older children and adults in distinguishing between imagined events and those that actually occurred.³³ Dr. Ames describes the typical five-year-old as someone who

learns that actions have both causes and effects—that is, pushing a switch makes a light go on. But he may still explain outside events in terms of his own wishes and needs: “It rained because I wanted it to.” He may even believe that objects and natural events have human thoughts and feelings: “It rained because the cloud was angry.”

....

Fives still have some difficulty in distinguishing between fantasy and reality. “It happened by magic” is still an acceptable answer to a Five’s question (from his point of view).³⁴

Renowned psychologist Dr. Elizabeth F. Loftus, who has done extensive research on the nature of false memories, developed an experiment in which children as old as fourteen years came to believe that they had been lost in a shopping mall as a child when actually they had not.³⁵ Dr. Stephen J. Ceci, an expert in the development of intelligence and memory, has extensively studied the accuracy of children’s courtroom testimony. In one of his experiments, he demonstrated how some children who repeatedly thought about a “non-event” (for example, that the child’s fingers had been caught in a mousetrap) came to believe that the fictitious event actually happened.³⁶ In these experiments, extensive interviews were conducted with the parents of the children to learn the children’s histories. Only children who had not been lost or harmed with a mousetrap were included in the study. It was clear that the event being “remembered” by the child *never occurred*. The “memory” of the event was created by the researchers. They did so by repeating the story to the children and asking them if they “remembered” the event.

Others have explored the issue of false testimony in cases of alleged child sexual abuse. Ofra Bikel, producer of *Innocence Lost: the Plea*, asked the question, “What is a lie for a child?”³⁷ If a child is led to believe, and actually believes something, then he or she is not telling a lie. The child speaks what is a truth for him or her, although it may very well not be the truth. Bikel writes:

³³ Marcia K. Johnson & Mary Ann Foley, *Differentiating Fact from Fantasy: The Reliability of Children’s Memory*, 40 J. OF SOC. ISSUES 33, 34 (Summer 1984).

³⁴ AMES & ILG, *supra* note 31, at 53.

³⁵ ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 94 (1994).

³⁶ Stephen J. Ceci, Mary Lyndia Crotteau Huffman, Elliott Smith & Elizabeth Loftus, *Repeatedly Thinking About a Non-event: Source Misattributions Among Preschoolers*, in 3 CONSCIOUSNESS AND COGNITION 388, 397 (1994).

³⁷ Frontline, *Out of Edenton: The Legal and Scientific Issues*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/roundtable/> (last visited Jan. 7, 2011).

I know from personal experience that I have always had a strong visual memory of my falling off the bed as a young child, and my older sister dressed in dark shorts and a white T shirt crawling under the bed and playing with me until my mother came in and screamed at her for not calling her to put me back in bed.

When I told my mother of this memory she laughed, saying that I was less than three months old when that had happened. They had told me the story when I was small (but not that small). I realized then that the clothes my sister was wearing in my memory are the clothes she is wearing in a picture my parents had of us when she was four and I was one year-old. Yet, I bet, that to this day I would pass a polygraph test on this story, so clear is it in my mind. Would I be lying? No. Is it the truth? No.³⁸

Bikel concludes that it is almost impossible for a child to tell the truth, the whole truth, and nothing but the truth. “There is always fantasy, impressions, and the wish to please the one who asks.”³⁹

V. A CHILD’S CONCEPT OF TRUTH

In the illustrative hearing described earlier, when Suzi correctly names the color of the pen held by the prosecutor, she knows that she is telling something that is true. She knows her colors, can see the pen, and can accurately relate what she knows about it. While the prosecutor’s nodding, gesticulating, and effusive reinforcement of the correct answer may comfort Suzi, it is not the basis of her answers. Similarly, although it is quite probable that she and the prosecutor (and mommy and the victim-witness advocate) practiced the pen questions and talked in advance about how God would feel, her testimony about the color of the pen is grounded in her knowledge of objects and colors.⁴⁰

Likewise, if Suzi intentionally misstates something or is asked to characterize the misstatement of another (e.g., “What if I told you the pen was green?”), she will know that it is not accurate. She may respond, “That’s silly,” or “no, it’s not, it’s black,” or, if asked, she may characterize the statement as a lie.

Jurors are often asked, during *voir dire*, whether their children ever lie and, if so, to give an example. A juror will almost always describe a time when his or her child lied about starting a fight, whether a cookie was eaten before dinner, or whether the car was taken without permission. Other jurors will nod in agreement, smile, and add their own stories of juvenile misbehavior. The prosecutor follows up with questions about how the jurors knew that the child was not telling the truth. Jurors respond, “He wouldn’t look me in the eye,” “She was shuffling her feet back and

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See generally LYNN M. COPEN ET AL., GETTING READY FOR COURT CIVIL COURT EDITION: A BOOK FOR CHILDREN 9 (2000) (acting as a child friendly picture and coloring book designed to introduce child witnesses to the characters in the court system, the book even provides a blank space for the children witnesses to draw a picture of themselves in court “telling the truth,” showing the extreme focus on the concept of “truth” for child witnesses, rather than the concept of fantasy verses reality).

forth,” “He always starts to stutter,” or “Her face was bright red (or covered with cookie crumbs).”

The prosecutor is setting the stage for the testimony of the child, secure in the knowledge that the child, testifying about a fact that he or she *believes* to be true, will not exhibit any of these tell-tale signs of willful misrepresentation. The prosecutor is counting on the fact that when the child relates a tale of abuse, the jury will feel a grim determination to convict. It is a brave juror who is able to resist the plea to “believe” a child.⁴¹

Of course, the problem of witnesses testifying to events that they believe to be true, but which are in fact false or inaccurate, is not limited to children. A recent *60 Minutes* episode explored the wrongful conviction of Ronald Cotton, who served ten and a half years in prison for a rape he did not commit.⁴² The victim of the rape testified that she was positive that Ronald Cotton was the man who brutally attacked her. Only when DNA evidence conclusively led to the real perpetrator, Bobby Poole (and after he confessed), was Ronald Cotton released from custody.⁴³

Gary Wells, Ph.D., Distinguished Professor of Psychology at Iowa State University, and an expert on eyewitness identification, explained one of the reasons the jury found the testimony of the woman so convincing. “The legal system is set up to . . . sort between liars and truth tellers. And it’s actually pretty good at that. But when someone is genuinely mistaken, the legal system doesn’t really know how to deal with that. And we’re talking about a genuine error here.”⁴⁴ “Cross-examination” is designed to separate those who are telling the truth from those who lie. It is less effective if the witness *believes* the testimony to be the truth.⁴⁵

Sometimes, the tragedy of wrongful conviction may be minimized in cases where there is DNA, other forensic evidence, or witnesses who can counter the testimony of the adult who believes he or she is speaking the truth but is, in fact, mistaken. There is no such safety net in a case where the *only*, or primary, evidence is the testimony of a young child.

VI. LEARNING A STORY

Although there appears to be no hard data to back it up, child protective services workers and police officers in every jurisdiction continue to insist that children do

⁴¹ See *generally id.* (highlighting the concept of “truth” as presented to child witnesses, by presenting the concept of a courtroom and the many players as a place where one must tell “the truth”). This is a key example of the (prosecutorial) system’s focus on “truth” when preparing child witnesses, rather than on the necessity of determining whether the child is developmentally mature enough to accurately relate events that actually occurred.

⁴² See *60 Minutes: Eyewitness: How Accurate Is Visual Memory?* (CBS television broadcast July 11, 2009), <http://www.cbsnews.com/stories/2009/03/06/60minutes/main4848039.shtml> (last visited Jan. 7, 2011). See also *Know the Cases: Ronald Cotton, INNOCENCE PROJECT*, <http://innocenceproject.org/Content/72.php> (last visited Jan. 7, 2011).

⁴³ See *60 Minutes: Eyewitness: How Accurate Is Visual Memory?*, *supra* note 42.

⁴⁴ *Id.*

⁴⁵ *Id.*

not make up allegations of child sexual abuse.⁴⁶ A corollary is that the child could not have knowledge of explicit details of sexual abuse unless it actually occurred.

In fact, children can learn and are taught rather complicated stories on a regular basis. Some of the stories are true, others fictional, but young children do not have the ability to distinguish between the two, particularly if the story has been told to them by someone they trust, such as a parent or teacher.⁴⁷ Compare, for example, a parent relating stories from the parent's childhood, fairy tales, and bible stories. The child has no basis to evaluate the origin of any of the stories or to determine whether the events actually took place. A very young child has no frame of reference to decide whether the Red Sea parted before or after Grandpa moved to the farm, or Goldilocks ate the Little Bear's porridge.

Significantly, if the child hears the story repeated often enough, she will commit it to memory and will be able to retell it upon request. If she believes the story, she will answer that it is "the truth." She will be able to correct a questioner and add details. For example, if asked, "Is it the truth that Goldilocks slept in Papa Bear's bed?" she may well respond that it is "a lie" because "the truth" is that Goldilocks slept in Baby Bear's bed. While she is testifying, the child will reveal no indicia of telling a falsehood, nor will she fear her mother's or God's disapproval. The child is relating something she has learned, and, for her, it is "the truth."

One of my colleagues has a very precocious five-year-old named Jack. When she picked him up from kindergarten one day shortly after Christmas last year, he asked if Santa was real. His mother was taken by surprise, as she did not expect to confront this particular parenting dilemma for several more years. She loved the Santa fantasy and wanted to continue it, not only with her son, but with his little sister, who was only three. While she attempted to formulate a response, Jack continued, "I know who eats the cookies and it's *not* Santa." His mother wondered if he had seen her and his father taking bites and leaving crumbs while wrapping the presents. Luckily, before she launched into a complicated explanation of the true meaning of Christmas, Jack shouted gleefully, "It's Cookie Monster!"

Five-year-old Jack juxtaposed two "stories" that he had learned and created a new one in which two of his favorite "characters" appeared in the same "episode." Was he lying? No. Jack was trying to make sense of his world. Did a puppet from Sesame Street in fact eat the cookies? Obviously not. We can chuckle when a colleague relates the incident, but the consequences of testimony by a child with the same level of sophistication in a criminal case are anything but humorous.

Children can learn and relate complicated stories with appropriate emotional content. When my son was in first grade, he came home from school one day in January quite agitated. "Do you know who Martin Luther King is, Mom?" he asked. I told him that I did. He went on, obviously very upset, telling me that Rev. King had been beaten up and put in jail "just because he sat at a lunch counter." I assured him that I shared his outrage, and that we all had to work toward a world where

⁴⁶ See Connie Burrows Horton & Kimberly A. Kochurka, *The Assessment of Children with Disabilities Who Report Sexual Abuse: A Special Look at Those Most Vulnerable*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 275, 277 (1995).

⁴⁷ See AMES & ILG, *supra* note 31, at 37-39 (discussing the ability of five-year-olds to tell and remember stories, both based on their own experiences and those centered in make-believe, along with those traditional stories known by almost all five-year-olds).

people are not discriminated against because of the color of their skin. He nodded and then said, "I just want to know one thing: What's a lunch counter?" Although he understood the story, its significance, and was able to repeat it to me with appropriate emotional affect, he did not have a frame of reference that would allow him to have a true understanding of the facts. Tragically, the same lack of an appropriate knowledge base can result in a child testifying about events without an awareness of the meaning of her words in the minds of the jurors. This is particularly dangerous when the words elicit a strong emotional reaction, such as those describing sexual acts.

Children can and do learn stories that involve details of sexual knowledge one would not expect them to have. I was an attorney in a case in which a five-year-old girl was the subject of a rancorous custody battle. Brought by her mother to a counselor, the child reported that during the previous weekend visitation, her father had "played with his pee-pee and white stuff came out" while she was sitting on the couch with him. Horrified, the counselor signed an affidavit recommending that the father have no further contact with his daughter.

The court ordered that an evaluation be conducted by an independent psychologist. The child was videotaped in the playroom attached to the psychologist's office. When the child was asked what "the white stuff" looked like, she was unable to answer. The psychologist told her that she could look around the room to see if there was anything that resembled what she was alleged to have seen at her father's home. After bypassing pitchers of water and milk, she stopped at the sand table and pointed to the white sand. She told the psychologist that the sand looked and felt like the "white stuff." When asked how much "stuff" came out, she poured two large buckets of sand from the table onto the floor. After additional questioning, she shared with the psychologist that her mother had urged her to tell the story of the "white stuff" because "Daddy is being mean to Mommy."

Absent zealous representation, adequate client resources, and a trained mental health professional, a young child would have lost contact with a loving parent and the father would have lost not only his daughter, but his freedom and reputation.

VII. POTENTIAL FOR WRONGFUL CONVICTION

In any case alleging the commission of a serious crime, the potential of an innocent person being convicted and sentenced to death or lengthy imprisonment is present. A recently published comprehensive study of the nation's crime labs exposed systemic flaws in nearly every lab and with virtually every type of "scientific" evidence.⁴⁸

⁴⁸ See generally NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), available at http://www.nap.edu/catalog.php?record_id=12589. The study was conducted by the National Academy of Sciences at the direction of Congress. Over a two year period, a committee comprised of federal officials, academics, law enforcement officials, medical examiners, defense attorneys, and forensic science professionals heard testimony and reviewed numerous reports and studies. The final report contains thirteen recommendations for the future use of forensic science in our legal system. To view the entire report and read the final recommendations, see *id.* See also NEW YORK STATE BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009), available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&Template=/CM/ContentDisplay.cfm&ContentID=27188 (highlighting the challenges/dangers presented by the obvious zeal and political pressure to solve high profile cases). But see John Collins & Jay Jarvis, *The Wrongful*

Initiatives such as the Innocence Project, begun by Professors Barry Scheck and Peter Neufeld in 1992, have led to 238 post-conviction DNA exonerations in the United States.⁴⁹ The Project uses DNA testing to exclude the individuals as participants in the crimes for which they were convicted.⁵⁰ Several law schools have begun Innocence Projects of their own, which have led to additional exonerations.⁵¹

State bar associations have also attempted to address the issue of individuals who have been convicted of crimes that they did not commit. Task forces have been formed to attempt to isolate and examine the causes of such wrongful convictions, focusing on areas such as: eyewitness identification procedures, the use of jailhouse informants, prosecutorial misconduct, coerced or false confessions, inadequate defense counsel, and problems with forensic evidence.⁵² One factor cited by many of the reports is the pressure felt by police and prosecutors to solve high profile, emotionally intense cases, such as the murder of a police officer or the abduction of a child.⁵³ The vast majority of studies have concluded that wrongful convictions are a pervasive problem, and that systemic changes must be implemented to prevent the widespread failures.⁵⁴

Conviction of Forensic Science, CRIME LAB REPORT (July 2008), available at http://www.crimelabreport.com/library/pdf/wrongful_conviction.pdf (analyzing and explaining the limited role of forensic science mistakes in wrongful convictions, specifically emphasizing that, of the two hundred wrongful convictions that were overturned, only 13% were reversed due to forensic science misconduct, data that stands in marked contrast to the previously toted statistic of 57%, which merely reflected the number of overturned cases in which forensic data was used).

⁴⁹ See generally *Innocence Project Case Files*, INNOCENCE PROJECT, <http://innocenceproject.org/know/> (last visited Jan. 7, 2011).

⁵⁰ See generally *id.* For additional information on the project, particularly the contributing causes of wrongful convictions, see *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://innocenceproject.org/understand/> (last visited Jan. 7, 2011).

⁵¹ See, e.g., THE CENTER ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited Jan. 7, 2011); THE COOLEY INNOCENCE PROJECT, THOMAS M. COOLEY SCHOOL OF LAW, <http://www.cooley.edu/clinics/innocence.htm> (last visited Jan. 7, 2011); THE INNOCENCE PROJECT, THE UNIVERSITY OF MISSISSIPPI, <http://mississippiinnocence.org> (last visited Jan. 7, 2011); THE NORTH CAROLINA CENTER ON ACTUAL INNOCENCE, <http://www.nccai.org> (last visited Jan. 7, 2011) (This project is a collaboration between each of the law schools in North Carolina, Campbell, Charlotte, Elon, Duke, NCCU, UNC, and Wake Forest.).

⁵² It is important to note that the potential for eyewitness error is not limited to children, but precisely because they are children there must be enhanced scrutiny in determining child competency to testify in cases of abuse. See, e.g., James M. Doyle, *Two Stories of Eyewitness Error*, THE CHAMPION, Nov. 2003, at 24.

⁵³ NEW YORK STATE BAR ASS'N, TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009). See also WISCONSIN CRIMINAL JUSTICE STUDY COMM'N, <http://www.wcjsc.org/> (last visited Jan. 7, 2011) (This was created as a collaboration between the State Bar of Wisconsin, Marquette Law School, the University of Wisconsin Law School, and the Wisconsin Attorney General; the Wisconsin Criminal Justice Study Commission strives to address the problem of wrongful convictions.).

⁵⁴ See, e.g., NEW YORK STATE BAR ASS'N, *supra* note 53 (emphasizing the pervasive problem of wrongful convictions in New York and providing recommendations for the future). Further illustrating the widespread nature of the failings of the criminal justice system

The cases investigated by the various task forces and the Innocence Projects involved scientific and physical evidence and adult witnesses who were subject to cross-examination.⁵⁵ Even so, the adversary system was insufficient in preventing gross miscarriages of justice. Innocent people's lives were destroyed, individuals were wrongfully convicted and imprisoned, and the real perpetrators went free.

These cases, which document the conviction of the innocent, provide a context for the even more difficult cases, those in which there is little or no physical evidence, and the fate of the accused rests solely on the uncorroborated testimony of a young child. Many of the causes of wrongful convictions are exacerbated in cases alleging child sexual abuse. For example, the inability of an adult to describe height, weight, facial hair, or other physical characteristics may well lead the jury to conclude that the witness did not have an adequate opportunity to observe the perpetrator; a similar failure on the part of a child may be forgiven as a function of the child's limited knowledge or ability to articulate such details. As previously discussed, the lack of physical evidence in child sexual abuse cases will make a later exoneration impossible.

It is the lack of opportunity for meaningful cross-examination, however, that may be the most significant problem. Cross-examination has been called "the greatest legal engine ever invented for the discovery of truth."⁵⁶ Done well, cross-examination can significantly erode or limit the testimony of many witnesses. "Done poorly, it succeeds only in reinforcing the direct examination."⁵⁷ Furthermore, cross-examination triggers heightened interest by the jury, who bring with them certain expectations.⁵⁸ Finally, "[c]ross-examination is about creating impressions and conveying emotions. Jurors may forget the details of the cross-

and the potential for wrongful convictions has led to the commutation of death sentences and even the abolition of the death penalty in some states. In reaction to the flawed system and days before his departure from office Illinois Governor George Ryan commuted the sentence of 163 death row inmates and pardoned four others. David Goodman, *The Conversion of Gov. Ryan*, AMNESTY INT'L MAG., Spring 2003, available at <http://www.amnestyusa.org/magazine/ryan.html>. "'Because the Illinois death penalty system is arbitrary and capricious—and therefore immoral—I no longer shall 'tinker with the machinery of death,' he said, quoting Supreme Court Justice Harry Blackman's 1994 indictment of the death penalty." *Id.* See Elizabeth Amon, *Death Row Clemency Attacked by Prosecutors*, THE NAT'L L.J., Jan. 20, 2003, at A1. For more information on the mass commutations in the United States see *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Jan. 7, 2011). Additionally, New Mexico Governor Bill Richardson explained his reason for signing legislation repealing the death penalty in his state: "Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime." Press Release, Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009).

⁵⁵ See INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Jan. 7, 2011).

⁵⁶ 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (2d ed. 1923).

⁵⁷ THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS AND THE NEW POWER OF PERSUASION 211-12 (2005).

⁵⁸ *Id.* at 216.

examination, but they will remember the impressions formed during the cross: about the testimony, about the witness, and about the lawyer.”⁵⁹ Justice Scalia, writing for the court in the landmark case of *Crawford v. Washington*, stressed the vital importance of having an accusing witness present in court and subject to cross-examination as a prerequisite to ascertaining the truth in a criminal proceeding.⁶⁰

It is hard to overemphasize the importance of confrontation and effective cross-examination to the defense of an individual accused of a crime. Jurors are able to observe and evaluate not only the witness’s words, but his or her demeanor. They draw clues as to the witness’s credibility from tone, body movements, and manner of answering questions. They may detect any hesitancy in answering particular questions or determine whether responses are different if the question is posed by the prosecutor versus the defense attorney.

The vital tool of effective cross-examination as a method of determining the truth is missing or compromised in cases of child sexual abuse. The cross-examination that defense attorneys employ to test the veracity of adult witnesses is useless when utilized with a young child. The most obvious example might be “impeachment by prior inconsistent statement,” one of the most common methods of cross-examination. Attorneys using this technique demonstrate to the jury that the witness made one statement about an important detail, at one time, and later (perhaps during the trial itself) made a substantially different statement about the same information. The inconsistency, or the mere fact that the witness is “changing his story,” demonstrates to the jury that the witness is not worthy of belief.

Imagine questioning little Suzi using this technique:

Q. You told the prosecutor, Mr. Smith, that Pop-pop touched your “private” while you were in the bathroom at your house?

A. Nodding.

Q. Do you remember talking to Officer Jones in September?

A. No.

Q. Did you tell him what happened?

A. No response.

Q. Did you tell him that Pop-pop touched you at Grandma’s house?

A. I don’t know.

Q. So, now you are saying it was at your house?

A. No response.

At the conclusion of this line of questioning, even if the jurors have not leapt over the rail to attack both the defense attorney and his client, what will the attorney argue in his summation? Can the lawyer insist, as he or she would if it were an adult who changed the location of an alleged crime while on the witness stand, that the testimony must be false? If so, is the argument one that will sway the jury, or are they likely to feel that the attorney is simply taking advantage of a child?

⁵⁹ *Id.* at 218.

⁶⁰ *Crawford v. Washington*, 541 U.S. 36 (2004). “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .” U.S. CONST. amend. VI. *See also* Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691 (1993) (examining the particular challenges presented by hearsay in child sexual abuse cases along with methods of presenting testimony and competency).

Other standard cross-examination techniques are equally ineffective with a child witness. Jurors are instructed that they may consider factors such as motive, interest, and opportunity to perceive when determining whether to believe the testimony of a witness.⁶¹ A co-defendant who has been given a “deal” to testify can easily be cross-examined to show that he or she stands to gain a lesser sentence, or a favorable recommendation, from the prosecutor in exchange for his or her testimony. A disgruntled business partner can be impeached by showing that he or she is motivated by animus toward the accused.

None of these techniques is effective with a young child. Does the child want to please mommy? No doubt. Will the attorney be able to demonstrate that the child’s testimony has been shaped by these forces through cross-examination? Unlikely. Can the child describe the dimensions of a room or testify as to the placement of the individuals at a given time? If not, will the jury apply the standard they would apply to an adult witness, or will they simply chalk up any inconsistencies to the child’s age?

Another dilemma involves affirmative defenses. In most criminal cases, the accused must be provided with notice of the offense with which he is charged, including a specific date and time.⁶² Such notice permits the defendant to interpose an alibi defense if he or she is able to prove that he or she was at another location at the time charged.⁶³

Conversely, in cases involving allegations of child sexual abuse, the charging document need not contain specific dates, times, or places. For example, if the child told an investigator that the abuse happened “in the pool when it was hot out,” it is legally sufficient if the indictment states that the abuse took place “in the summer” of a particular year.⁶⁴ The defense then faces a nearly insurmountable burden of proof in establishing the accused’s whereabouts at all times during this ill-defined time period, effectively precluding the affirmative defense of alibi.

A particularly pernicious problem with the child witness is in the area of recantation. An adult who makes a claim and then reverses herself, maintaining that the event never occurred, damages her own credibility. Unless there is a compelling reason for the change, it is unlikely that the jury will believe the first story. The opposite can occur in cases alleging child sexual abuse. The *fact* that the child has told inconsistent stories, or that she now denies any abuse, is *itself* used as proof of

⁶¹ See, e.g., STATE OF CONNECTICUT CRIMINAL JURY INSTRUCTIONS: 1.2-7 CREDIBILITY OF WITNESSES (2007), available at <http://www.jud.ct.gov/ji/criminal/part1/1.2-7.htm> (“In deciding the facts of this case, you are the sole judges of the credibility of the witnesses. You will have to decide which witnesses to believe and which witnesses not to believe. You may believe everything a witness says or only part of it or none of it. Every witness starts on an equal basis. You are to listen to all of them with an open mind and judge them all by the same standards.”).

⁶² N.Y. CRIM. PROC. LAW § 200.50 (McKinney 2010). “An indictment must contain . . . a statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time.” *Id.*

⁶³ See *People v. Morris*, 461 N.E.2d 1256, 1258 (N.Y. 1984); *People v. Iannone*, 384 N.E.2d 656, 660 (N.Y. 1978); *People v. Bogdanoff*, 171 N.E. 890, 892 (N.Y. 1930).

⁶⁴ *People v. Keindl*, 502 N.E.2d 577 (N.Y. 1986).

the abuse.⁶⁵ It becomes a classic Catch-22: If the child says that abuse occurred, it occurred; If the child says that abuse did not occur, it occurred. There appears to be no answer to the question of what the child could say to demonstrate that the accused is innocent.

Journalist Lawrence Wright examined some of the most highly publicized cases of child sexual abuse and described the convoluted interpretation given to contradictory statements that the children made about the alleged abuse.

One of the alarming trends in the day-care prosecutions of the '80's was that when children told fantastic stories of ritual sacrifice or bizarre torture scenes, those stories were interpreted as being either literally true, or else a sort of imaginative reconstruction of less spectacular real abuse; on the other hand, when children caught up in those prosecutions denied that anything had happened to them, their denials were interpreted as being products of the abuse itself. In other words, to deny the abuse was a subtle proof that the abuse did, in fact, take place.⁶⁶

Most disturbing, however, are the dire consequences to both the accused and the child when traditional methods of ascertaining the truth in criminal trials are ineffective tools in cases of alleged child sex abuse. To be wrongly convicted of child sexual abuse has immediate and long-lasting effects on the life of the accused, including lengthy prison terms, registration as a sex offender and the conditions and consequences that follow, which may include the loss of professional licenses, inability to live within certain areas, and a lifelong stigma.

Given the nature of child sexual abuse, such convictions can destroy families. The individual accused is not the only victim of wrongful convictions. A spouse who refuses to believe an accusation may lose custody of the child involved or other children in the family. She herself may be charged criminally for refusing to "protect" the child from abuse.⁶⁷

⁶⁵ For additional research indicating that such circumstances and statements are manipulated for the benefit of pro-conviction, anti-abuse advocates see STEPHEN SMALLBONE, WILLIAM L. MARSHALL & RICHARD WORTLEY, PREVENTING CHILD SEXUAL ABUSE: EVIDENCE, POLICY AND PRACTICE 147-48 (2008). See also MARGARET-ELLEN PIPE ET AL., CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL 25 (2007). "[C]hildren may deny because they in fact never were abused; children may take a long time to disclose because it is only with repeated suggestive interviewing that they will make disclosures which are false; and children may recant in order to correct their prior false disclosures." *Id.*

⁶⁶ Frontline, *Out of Edenton: The Legal and Scientific Issues*, *supra* note 37.

⁶⁷ See N.Y. FAM. CT. ACT § 841 (McKinney 2010). For an example of the use of this statute, see *Manhattan Man Held in Sex Abuse of Girl*, N.Y. TIMES, Nov. 29, 1989, <http://www.nytimes.com/1989/11/29/nyregion/manhattan-man-held-in-sex-abuse-of-girl.html?scp=1&sq=Manhattan%20Man%20Held%20in%20Sex%20Abuse%20of%20Girl&st=cse> (last visited Jan. 7, 2011). In that case the mother was charged with endangering the welfare of her daughter after it was discovered her live-in boyfriend sexually abused the child. *Id.* For another account see *Mo. Father Charged with Incest, Killing Infant*, USA TODAY, Jan. 23, 2009, http://www.usatoday.com/news/nation/2009-01-23-missouri-incest_N.htm (last visited Jan. 7, 2011). There, the mother of the abused child was charged with endangering the welfare of her children for failing to report the alleged abuse. *Id.*

In addition, the psychological impact on a young child of falsely testifying to abuse can endure throughout adulthood.⁶⁸ These dangers make the need to properly determine a child's competency to testify vital not only to a fair system of justice, but to the psychological well-being of both children and the accused.⁶⁹

VIII. RECOMMENDATIONS

A. *Expansion of the Competency Hearing*

Clearly, the current system of determining a child's competency to testify in a case of alleged sexual abuse is flawed, and the consequences of such a failure are devastating. It is imperative that changes be made to ensure that there is a meaningful evaluation of any child who is to testify in such a case. The evaluation must be based on a realistic assessment of the child's developmental maturity and her ability to provide reliable information about the events that are alleged in the criminal action.

At a minimum, the competency hearing should be restructured to allow for expanded questioning of the child. While the "red pen, black pen" and "how will Mommy feel if you tell a lie" questioning need not be dispensed with completely, it must represent only the beginning, rather than the totality of the inquiry. Much more must be done to test the child's ability to accurately relate events that actually occurred, to distinguish the truth from a lie, and to differentiate fantasy from reality. This can be accomplished in a variety of ways.

Questioning of the child can be done within the confines of a traditional competency hearing by the court, the prosecutor, and the defense attorney. The defense attorney must be as comfortable examining the child as the prosecutor, and both should know as much about the child as possible.⁷⁰ Information about the child should be obtained before the hearing begins, either by speaking with the parents (if they are not involved in the case), other caregivers, or the child's teacher. In

⁶⁸ See Maggie Jones, *Who Was Abused?*, N.Y. TIMES MAG., Sept. 19, 2004, at 68 (explaining the dire consequences of such behavior induced by investigators, including serious emotional consequences for the children as adults); see also Robert J. Levy, *The Dynamics of Child Sexual Abuse Prosecution: Two Florida Case Studies*, 7 J. L. & FAM. STUD. 57 (2005) (discussing the challenges to prosecutors and defense attorneys presented by such cases).

⁶⁹ This risk is not limited to sexual abuse cases; in fact an untrustworthy system of evaluating a child's competency to testify can have far reaching effects on other cases as well. For example, in a recent case in Texas, the testimony of a four-year-old boy formed the basis for an indictment of a foster parent for the murder of the child's infant brother. *48 Hours Mystery: Witness* (CBS television broadcast Nov. 15, 2002). Although the defendant was eventually acquitted of the murder charges, the case demonstrates the challenges and potential dangers of cases in which a prosecutor's sole evidence is the uncorroborated, unsworn testimony of a preschooler. *Id.*

⁷⁰ See Annabelle Whiting Hall, *Cross-Examination Techniques in Child Sex Cases and Preparation of Child Sexual Assault Cases 4* (Sept. 2-3, 1993) (providing an in depth tutorial for defense attorneys on how to prepare for interviewing child witnesses and how to secure cooperation from prosecutors and parents). See SPECIALIZED TRAINING OF POLICE PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (2008) (highlighting the importance of and specialized challenges presented by eyewitness identifications and expert testimony).

addition, reviewing medical records and talking to neighbors and other family members can all contribute to a “picture” of the child’s development.⁷¹

A particularly effective preparation technique is to visit the child’s nursery, preschool, or grammar school classroom. Cues for potential areas of questioning can be drawn from the bulletin board or the children’s work that is displayed. For example, around Presidents’ Day, there may be pictures of George Washington and the cherry tree, and the child can be asked about the story she has learned. The inquiry will determine the level of the child’s understanding of the story, as well as whether she will add “facts” to please the questioner. It is important to ask the questions in the same tone and respond with the same encouragement that was given to the “red pen, black pen” and “God would be sad” questioning.

Sample questions relating to the Presidents’ Day bulletin board might include the following: “Who cut down the cherry tree?” “Is it the truth or a lie that George Washington cut down a cherry tree?” “What if I said it was an apple tree?” If the child is able to answer these simple questions, the questioner should add facts or see if the child will agree to statements concerning the story that she did not learn at school. “What did George’s father say when he cut down the tree?” “What did his mother say?” (I have never heard George’s mother mentioned in the story, but I am willing to bet that many children would add dialogue by her if given an opportunity to do so). “Did his mother put him in timeout?” “Was she *very* mad?” The child should then be asked if her recitation of what the mother said is “the truth.”⁷²

Another critical area that needs to be explored with the child is her concept of time. Most children are trained, from toddlerhood, to respond correctly to the question, “How old are you?” Being able to raise one, two, or three fingers in response to the question gives very little information about the child’s concept of age or time. The question, “How old is Mommy?” posed to the same child might evoke a blank stare or a shrug. An older child of four or five might guess that her mother is “sixteen” or “thirty-seven,” either because that is the biggest number she knows or because her mother has responded with that answer in the child’s presence.

When Suzi tells the prosecutor that she is five, and he responds with effusive praise that she is “such a big girl,” very little is learned about her ability to accurately relate when the events alleged in the criminal proceeding actually took place. Even being able to respond that she was four last year and will be six next year does not distinguish between how the child has been taught to respond and an ability to understand an abstract concept such as time sequences.

In many cases of alleged child sexual abuse, the dates in the indictment have special significance to the child, such as her birthday, Christmas, or when she went to the town swimming pool for the first time. The dates may have been selected as a

⁷¹ See Mark J. Blotcky, *The Criminal Defense of Child Molestation Allegations: The Psychiatric Knowledge Base from which to Evaluate Your Case*, http://www.texas-sexcrimes-defense.com/CM/Articles/child_abuse_talk.pdf (last visited Jan. 7, 2011).

⁷² *Id.* at 37. This type of questioning can also be used to cross-examine a child who has been found competent to testify in order to demonstrate to jurors that a child can learn a story about an event that did not actually occur and can also add plausible details to enhance what she has learned. In addition to history lessons, children are often taught myths as truth to teach moral concepts, whether the stories are from Aesop’s Fables, Greek Mythology, or religious texts.

result of suggestive questioning, e.g., “Did Pop-pop hurt you on your birthday?”⁷³ It is important to determine whether the child has a grasp of time that would have allowed her to truthfully proffer these dates in the first instance or knowingly agree to them when suggested by the questioner. The child should be asked how many days there are in a week and how many weeks in a month.

Every classroom for young children has a calendar chart, and most teachers use it every day, discussing the days, weeks, months, weather, and holidays. The charts are very inexpensive and can be purchased by the court, the prosecutor, or the defense attorney. They allow the child to be questioned in a way that is familiar and non-threatening. They can be used with children who do not yet read, as they come with stickers for birthdays, holidays, and weather events.

As noted, most young children have learned how old they are and can name a date for their birthday. While the child is on the witness stand, she can be asked to take the birthday cake sticker and put it on the right day and month of her birthday. Whether she places it on the correct date or not, she should be asked if it is “true.” If she believes that it is, she will answer in the affirmative. The sticker can then be moved (to the correct date if the child has misplaced it) and the child asked whether it is now a “lie.”

The important fact, of course, is that the child will show no indicia of telling a lie, whether the sticker is placed correctly or not. Even if she is inaccurate, *she is telling something that she believes to be the truth.*⁷⁴ As long as she believes it to be true, she will repeat it, acknowledge its truthfulness, and declare anything contrary to be a lie.

The next step is to determine whether the time sequences contained in the indictment and police reports could have been supplied by the child, were the result of conjecture by the investigators, or were supplied by a person with a vendetta against the accused.

As with the calendar, use of props is helpful, as the child will feel at ease if she is asked to engage in what she will perceive as play. Again, for a nominal sum, the court or the attorneys can obtain cutouts on a felt board, or tag board strips with dates that relate both to the dates in the indictment and to important events in the child’s life, such as her birthday, Halloween, Christmas, birth of her baby brother,

⁷³ For a more detailed discussion of the accuracy and reliability of children’s testimony with respect to suggestibility, see Maria S. Zaragoza, *Preschool Children’s Susceptibility to Memory Impairment*, in *THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS*, *supra* note 1, at 27; see also Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness*, in *THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS*, *supra* note 1, at 60.

⁷⁴ The importance of this fundamental disconnect is illustrated by a recent case from Massachusetts in which the 1985 conviction of a child care worker for molesting five children was overturned because, although by the time of the trial the children had come to believe that they were molested, their belief was not based on fact but created by improper investigation and questioning. *Commonwealth v. Baran*, 905 N.E.2d 1122 (Mass. App. Ct. 2009). The defense attorney discussed the significance of proper questioning: “The Amirault case taught us how important it is that children in these kinds of situations are questioned properly, and how improper questioning techniques, even if done with the best of intentions, can lead to unreliable and false accusations.” Jack Dew, *Parallels Drawn Between Amiraults*, *Baran*, *BERKSHIRE EAGLE* (Pittsfield, Mass.), June 11, 2009, <http://berkshireeagle.com/archivesearch>; see *Commonwealth v. Amirault*, 506 N.E.2d 129 (Mass. 1987); *but see Commonwealth v. Baran*, 905 N.E.2d 1122 (Mass. App. Ct. 2009).

etc. The child can be asked to put them in order: “Let’s start with your birthday. What happened next? How about after that?” What is critical to determine is whether concepts such as “prior” and “subsequent”—“What happened first? What happened after that?”—or even “before and after” have meaning to the child.

Next, the child should be asked to give a narrative account of some event that was important to the child, such as a vacation, a birthday party, or a visit with a grandparent. A conversation with a parent, teacher, or caregiver will reveal the details of such an event. Optimally, the event will have taken place during the same time frame as the events alleged in the criminal action. It is critical that the person providing the information about the event not be given an opportunity to “practice” with the child. The child should then be asked to describe the event so that her version can be compared with that given by the adult. Again, details, both accurate and inaccurate, may be presented to see if the child can distinguish between them.

Of course, the purpose of all of this questioning is to provide the court with the needed information to make a determination about the child’s competency based on the five-part test previously outlined. The judge must determine the child’s

- (1) present understanding or intelligence to understand . . . an obligation to speak the truth; (2) mental capacity at the time of the occurrence in question to observe and register the occurrence; (3) memory sufficient to retain an independent recollection of the observations made; (4) ability to translate into words the memory of those observations; and (5) ability to understand and respond to simple questions about the occurrence.⁷⁵

B. Appointment of a Law Guardian

Judges, prosecutors, and defense attorneys may feel that they are not equipped to conduct the expansive questioning outlined above. An alternative is to appoint a law guardian or guardian *ad litem* to conduct the examination. Presently, many states utilize law guardians to represent the interests of children in custody and other familial disputes.⁷⁶ The role of the law guardian in these proceedings is to protect and advocate for the interests of the children.⁷⁷ Although law guardians are not presently utilized in criminal cases, such appointments could significantly facilitate the effectiveness of the competency hearing.⁷⁸

The responsibility of a law guardian in a criminal case alleging child sexual abuse would be multi-faceted and should be carefully crafted. It is critical that the law guardian be truly independent and not part of either the prosecution or defense “team.” A child who has been abused must be supported if she is competent to testify. A child who has not been abused must be protected from the trauma of testifying falsely. Further, it would be the responsibility of the law guardian to ensure that proper questioning techniques are utilized with children in both categories.

⁷⁵ 35 AM. JUR. PROOF OF FACTS 2D 665 (2010).

⁷⁶ See, e.g., NEW YORK APPELLATE DIV. THIRD DEP’T, LAW GUARDIAN PROGRAM SUMMARY, available at <http://www.courts.state.ny.us/ad3/lg/index.html>.

⁷⁷ *Id.*

⁷⁸ It must be noted that legislation may be required to expand the role of a law guardian to representation in criminal cases.

The law guardian could be charged with the task of reviewing the child's medical and school records and speaking with adults who are knowledgeable about her developmental capabilities. The law guardian would visit the child's school to prepare the questions for the competency hearing. The law guardian would also speak with those close to the child to learn about important events in the child's life that could be used to test the child's memory and ability to relate those occurrences.⁷⁹

A preliminary examination could be conducted by the law guardian using a developmentally appropriate book, such as Dr. Sherrie Bourg Carter's *The "Do You Know" Book*.⁸⁰ The book clearly and easily tests the child's ability to distinguish between fantasy and reality, truth and lie, and the consequences of saying something that is false. For the examination and the book to be of use, it must be something that the child has not seen. If a member of either attorney's "team" practices with the child, the resulting examination will be of little value.

The law guardian's interview with the child could be videotaped so that it can be viewed by the court, prosecutor, and defense attorney. It would also be preserved so that it could be reviewed by an appellate court if necessary. Videotaping would ensure that the answers given are those of the child and that there was no prompting by the law guardian. An analysis could also be made of the child's attention span and verbal or non-verbal cues.

As a corollary, prosecutors, police, and victim-witness advocates should be mandated to videotape any sessions or meetings in which the child is prepped for the competency hearing. The judge would then be in a position to assess the extent of any "coaching" or improper suggestions to the child with respect to the questions to be asked at the hearing.

C. Appointment of an Expert Witness

An expert witness could be appointed if the results of the expanded competency hearing and/or the evaluation by an independent law guardian are ambiguous, or the court feels that additional information about the child's developmental maturity is still in question. A child psychologist could evaluate the child using developmentally appropriate testing, such as tests used to determine whether a child is ready to attend kindergarten.⁸¹ The testing should be videotaped, both for the trial court and for any appellate review.

⁷⁹ While many states do require the law guardian to be a licensed attorney, there are some without this requirement. See, e.g., HAW. REV. STAT. § 551-2 (2000); see also ALASKA STAT. § 13.26.025 (2009). In those states where the guardian *ad litem* or court-appointed special advocate is a non-lawyer who represents the child, a separate and independent lawyer could conduct the examination.

⁸⁰ See SHERRIE BOURG CARTER, *THE "DO YOU KNOW" BOOK* (on file with author).

⁸¹ See, e.g., JUDITH K. VORESS & TADDY MADDOX, *DEVELOPMENTAL ASSESSMENT OF YOUNG CHILDREN* (Western Psychological Servs.) (measuring children from birth to five years, eleven months, which measures cognition, communication, social-emotional development, adaptive behavior, physical development); DEVEREUX EARLY CHILDHOOD ASSESSMENT KIT (Kaplan Early Learning Co.) (measuring children ages two to five, which provides a balanced picture of children's social emotional strengths and concerns); JANE SQUIRES & DIANE BRICKER, *AGES AND STAGES QUESTIONNAIRES* (3d ed. 2009) (measuring ages zero to five years).

The expert must be appointed by the court and independent of either the prosecutor or defense attorney. The expert must be confident that the court is interested only in an accurate appraisal of the child's ability to testify under the standard set forth above—not in "preparing" an incompetent child to take the stand or preventing a competent one from doing so.

The appointment of an expert might be particularly appropriate in a case with no physical evidence or any corroboration of the allegation, i.e. where the testimony of a young child is the only evidence of a serious criminal accusation.

IX. CONCLUSION

Allegations of the sexual abuse of a young child evoke strong emotions in society at large, as well as among the participants in the criminal justice system. The charged emotional atmosphere engendered by the nature of the cases, the frequent lack of corroboration, and the ineffectiveness of traditional adversarial techniques enhance the potential for wrongful convictions. The conventional competency hearing is seriously flawed and does not provide a forum for a meaningful analysis of the child's capacity to offer reliable testimony.

The competency hearing must be restructured to appropriately ascertain the child's level of developmental maturity, her ability to accurately relate a series of events, and her capacity to distinguish reality from fantasy. This can be done by training of judges, prosecutors, and defense attorneys and by the appointment of a law guardian or expert witness in appropriate cases. It is imperative that improvements be made to ensure that individuals are not convicted of crimes they did not commit and that children are not the unwitting accomplices in such miscarriages of justice.



ALBANY LAW SCHOOL

Child Sexual Abuse: How to Move to a Balanced and Rational Approach to the Cases Everyone Abhors

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CHILD SEXUAL ABUSE: HOW TO MOVE TO A BALANCED AND RATIONAL APPROACH TO THE CASES EVERYONE ABHORS

Abstract

Laurie Shanks

Society as a whole and participants in the criminal justice system have great difficulty dealing with allegations of child sexual abuse in a coherent and consistent fashion. Our social and judicial reactions are erratic. On the one hand, for many years there was a pervasive disbelief that individuals in positions of reverence and respect, such as priests and scout leaders, could possibly harm the children entrusted to their care. Perhaps as a result of the collective guilt caused by disbelieving the true victims of this abuse, in recent years the pendulum has swung in the opposite direction, to an unwavering conviction that a young child is incapable of fabricating a story of abuse, even when the tale of mistreatment is inherently incredible.

The pendulum has swung from a reluctance to believe *any* charge by a child against an adult to a non-reflective embrace of *every* accusation made, no matter how implausible or fanciful. Therefore, a more exhaustive analysis is required to highlight the unique challenges posed by these cases. As judges, prosecutors and defense attorneys, we must learn to deal with the unique challenges presented by cases involving allegations of child sexual abuse so that the innocent are protected, whether those innocents are the children, the accused, or both. This article will highlight some of the difficulties posed by these cases and provide suggestions for ameliorating them.

This article focuses on how prosecutors, judges, defense attorneys and police investigators must all take responsibility for bridging this systemic gap. Each individual can utilize his or her unique role to ensure that proper procedures are followed to protect victims and the wrongly accused. Practical solutions and guidance is offered from the investigation stage through the trial process.

CHILD SEXUAL ABUSE: HOW TO MOVE TO A BALANCED AND RATIONAL APPROACH TO THE CASES EVERYONE ABHORS

Laurie Shanks¹

I. Introduction

Society as a whole and participants in the criminal justice system have great difficulty dealing with allegations of child sexual abuse in a coherent and consistent fashion. For many years there was a pervasive disbelief that individuals in positions of reverence and respect, such as priests and scout leaders, could harm children entrusted to their care. In recent years, however, the pendulum has swung in the opposite direction. Perhaps as a result of the collective guilt caused by disbelieving the true victims of this abuse, there presently exists an unwavering conviction that a young child is incapable of fabricating a story of abuse, even when the tale of mistreatment is inherently incredible. Neither approach protects the children making the allegations or the adults charged with the abuse.

When children's allegations of abuse were discounted out of hand, they were victimized not only by their abusers but by a society that neither believed nor protected them. Conversely, when allegations that have no basis in fact are believed, innocent adults can face a lifetime of imprisonment, shame, ostracism, and devastation.

Judges, prosecutors and defense attorneys must all learn to deal with the unique challenges presented by cases involving allegations of child sexual abuse so that the innocent are protected, whether those innocents are the children, the accused, or both. This article will highlight some of the difficulties posed by these cases and provide suggestions for ameliorating them.

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II. The Cases

The indictments read like badly crafted soft porn novels: Seventeen counts setting forth crimes against a fourteen-year-old girl, with each charge graphically detailed, e.g., prior to being assaulted, the teen was drizzled with chocolate sauce and whipped cream, dressed up in costumes, plied with alcohol, and bribed with money and gifts. Further, that she was threatened with exposure and humiliation. The indictment continues to lay out the prosecutor's theory – that all these acts were done to satisfy the sexual desires and prevent the detection of a man who professed to love her mother. Other indictments contain even more inflammatory charges: oral sex over a several month period with a pre-schooler, with most of the acts alleged to have taken place on the child's birthday and Christmas; a beloved coach at the local high school charged with fondling girls while driving them to cross-country meets who promises the students that he can help them obtain college scholarships as he undresses them. Depending on the jurisdiction, the designation of the charge itself evokes horror – “Predatory Sexual Abuse of a Child,” in New York State, for example.² Some of the statutes are even known by the name of a particular child who was abused or killed, such as twelve-year-old Brooke Bennett.³

The allegations are disturbing, horrifying, nauseating. As parents, grandparents and citizens, we are outraged. Our protective instincts surge, and we are concerned about the children alleged to have been exploited and abused. It is our reaction as attorneys, however, that

² N.Y. PENAL LAW §130.96 (McKinneys 2006). *See ALSO* ILLINOIS CRIMINAL CODE 720 ILLINOIS COMPILED STATUTES ANNOTATED §12-14.1 (2010).

³ “BROOKE’S LAW” V.T. CRIMES AND CRIMINAL PROCEDURE 13 V.S.A. § 3258 (2009). This law was the result of the horrific abduction, sexual assault and murder of twelve-year-old Brooke Bennett, at the hands of her uncle Michael Jacques, a convicted sex offender. Sam Hemingway, *Jacques' Friend: Scheme to Exonerate Slaying Suspect Seemed 'Fishy'*, BURLINGTON FREE PRESS (December 9, 2010) available at <http://www.burlingtonfreepress.com/apps/pbcs.dll/article?AID=2010101209016>.

must be analyzed in order to insure that an accused's constitutional rights are protected, and that only the truly guilty are convicted.

Murder, drunk driving, sale of heroin, fraudulent home foreclosures and a host of other crimes cause devastation, maiming and death to children and their families. Yet, prosecutors and defense attorneys try these cases and judges preside over them as a routine part of their caseload. When confronted by the "typical" criminal case, lawyers spring into action, investigating, brainstorming, developing theories of prosecution and defense and preparing to do battle in the courtroom if the case cannot be resolved with a plea bargain. Judges handle motions to suppress based on improper search warrants, faulty identification techniques or an allegation that a confession was obtained in violation of *Miranda*.⁴

Cases involving allegations of child sexual abuse are different. Experienced trial attorneys, both prosecutors and defense attorneys, react not with zeal but with fright, and in some instances, with repugnance and paralysis.⁵ The fact that prosecutors, defense attorneys and

⁴ U.S. CONST. 5TH AMEND; NY CRIM. PROC. L. §710.20(2) (McKinney 2010) ("Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it: Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant . . ."). See e.g. *U.S. v. LeBron*, 729 F.2d 533 (C.A. Neb. 1984) (holding that evidence seized after the discovery of items specifically described in a search warrant was impermissibly broad and should be suppressed); *U.S. v. Souther* 2007 WL 152120 (W.D.N.C.,2007) (denying a motion to suppress based on improper identification procedures); *Miranda v. Arizona* 384 US 436.

⁵ Disdain for these cases is not limited to the community at large. Lawyers and judges alike are parents, aunts and uncles. This aversion to sex abuse cases is illustrated by a survey which asked lawyers whether or not "people *accused* of child sexual abuse should be entitled to the same legal protections as defendants accused of other crimes." The results indicated that twenty-five percent of *lawyers* admitted that they believed such individuals did not deserve the same rights as all other criminal defendants. If this is the perspective of lawyers, how are we to expect the community to view these cases in rational frameworks of justice? For more information see, Stephen L. Carter, *The Future of Callings- An Interdisciplinary Summit on the Public Obligations of Professionals into the Next Millennium: What is the Source of the Obligation of Public Service for the Professions?*, 25 WM. MITCHELL L. REV. 103, 115 (1999). "The classic example of such a conflict is the lawyer who is asked to represent a person charged with a sex offense against a child. Many lawyers would refuse this representation because their own beliefs and morals are so offended by the alleged offense that they would be unable to zealously represent such a client." *Id.* As noted above, judges are not immune from the moral dilemma that can be raised by presiding over a child sex abuse case. See Phylis Skloot Bamberger & Richard N. Allman, *Some Special Concerns in the Trial of Child Sexual*

judges may be parents or grandparents is insufficient to explain the dichotomy between their reactions to cases involving allegations of child sexual abuse and to all other types of cases. A more exhaustive analysis is required to highlight the unique challenges posed by these cases.

The difficulties that participants in the criminal justice system experience in dealing with cases of child sexual abuse are a reflection of the differing reactions with which these cases are viewed by the larger community. There have been enormous shifts in how we, as a society, view those accused of child sexual abuse and those making the accusations. Our social and judicial reactions have shifted from widespread disbelief of any victim to an immediate reflexive belief of every victim. There is no guarantee, of course, that the pendulum will not swing once again.⁶

The most staggering example of the refusal to believe abuse allegations is the long hidden abuse in the Catholic Church.⁷ Similarly, documented sexual maltreatment of their charges by leaders of the Boy Scouts was only recently exposed.⁸ For many years, society was unwilling to believe that such a sacred trust could be broken, and victims were marginalized and dismissed as troublemakers.

In recent years, perhaps in an effort to compensate for society's longstanding unwillingness to give credence to allegations of child sexual abuse, the pendulum has swung in the opposite direction. Allegations of sexual abuse of a child are accepted as true without any real or meaningful investigation. The recent acquittal of kindergarten teacher and mother, Tonya

Abuse Case, N.Y. ST. B. J., May-June 1992, at 18, 18. See, e.g., Ronnie Hall, *In the Shadowlands: Fisher and the Outpatient Civil Commitment of "Sexually Violent Predators" in Texas*, 13 TEX. WESLEYAN L. REV. 175, 211 (2006).

⁶ See e.g., Sean Webby, *DA Won't Charge San Jose Sub Teacher Accused of Sex Assaults in Classroom*, SAN JOSE MERCURY NEWS, December 23, 2010, available at http://www.mercurynews.com/crime-courts/ci_16931774?nclick_check=1 (providing one example of a case in which there were many potential victims, however the district attorney refused to file charges citing insufficient evidence).

⁷ See e.g., Rachel Donadio, *Vatican Preparing New Guidelines to Deal With Sexual Abuse*, N.Y. TIMES (November 19, 2010) available at http://www.nytimes.com/2010/11/20/world/europe/20vatican.html?_r=1&ref=romancatholicchurchsexabusecases.

⁸ CBS News, *Jury Awards \$1.4M in Boy Scout Sex Abuse Case* (April 13, 2010) available at <http://www.cbsnews.com/stories/2010/04/13/national/main6392028.shtml>.

Craft, illustrates this point.⁹ Ms. Craft was acquitted of all twenty-two counts of molestation against three children; one of the alleged victims was her own daughter.¹⁰ Although she was acquitted and has been reunited with her child, the pain that remains in her life, and that of her family and community, will be long-lasting. As Ms. Craft explains, “It wasn’t a victory ... There’s nobody that wins in this situation.”¹¹

The problem of either rejecting a child’s allegation out of hand or unreflectively accepting it persists throughout the criminal justice system. What we must learn from these drastic shifts is that all of the players - prosecutors, defense attorneys, judges, and jurors – have a role to play in protecting the innocent. Those innocents include both children who have been sexually abused and adults who have been wrongfully accused of committing such crimes.

This article will not address all of the challenges posed by such cases, but will highlight some of the important areas in which serious mistakes are made, and provide suggestions to ensure a more just result.

III. CONCERNS OF THE PROSECUTOR

It is the ethical obligation of a prosecutor to insure that justice is done in each case, not simply to obtain convictions.¹² Nevertheless, many prosecutors are elected to office by a

⁹ See Good Morning America, *Tonya Craft, Former Georgia Teacher, Acquitted of Molestation Charges* (ABC News television broadcast) transcript available at <http://abcnews.go.com/GMA/georgia-kindergarten-teacher-tonya-craft-acquitted-molestation-charges/story?id=10620993>;

¹⁰ The Today Show, *Teacher Cleared of Molestation: ‘Nobody Wins,’* (NBC News television broadcast May 12, 2010) transcript available at http://today.msnbc.msn.com/id/37103788/ns/today-today_people/show.

¹¹ The Today Show, *Teacher Cleared of Molestation: ‘Nobody Wins,’* (NBC News television broadcast May 12, 2010) transcript available at http://today.msnbc.msn.com/id/37103788/ns/today-today_people/show.

¹² MODEL RULES OF PROF’L CONDUCT, RULE 3.8 (2010); *Berger v. United States*, 295 U.S. 78 (1935) (Describing the role of the prosecutor as “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilty shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”). For further limits on prosecutorial

constituency that expects them to maintain high conviction rates. Consequently, these prosecutors become invested in obtaining convictions in those cases that proceed to trial. Generally, prosecutors are successful in maintaining high conviction rates because they possess enormous power to determine which crimes to charge, whether to offer a plea bargain, which suspects to charge and when to decline a prosecution.¹³ If more than one individual is involved in a particular case, the prosecutor may decide to dismiss charges or offer a generous plea bargain to one in exchange for testimony against another.¹⁴

In cases of child sexual abuse, however, prosecutors are presented with unique challenges. They must decide whether to pursue cases involving highly charged emotions and, at times, a great deal of publicity.¹⁵ In cases involving allegations of fondling or sexual contact, there is often a dearth of physical evidence.¹⁶ Many cases involve allegations against family members or

discretion and the obligation of prosecutors to seek justice Nina Totenberg, *Justice Dept. Seeks to Void Stevens' Conviction*, NPR NEWS, April 1, 2009 (discussing Attorney General Eric Holder's decision to drop the case against Senator Stevens citing among other things the discovery of prosecutorial notes not disclosed to the defense); Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 363 (2001).

¹³ See e.g., *People v. Wallace*, 169 Cal.App.3d 406 (Cal. App. 5 Dist, 1985)(holding that the statute allowing for prosecutorial discretion in California does not violate equal protection); *Brooks v. State of Okl.*, 862 F.Supp. 342 (W.D. Okl. 1994).

¹⁴ See generally PAUL BERGMAN & SARA BERMAN, *THE CRIMINAL LAW HANDBOOK: KNOW YOUR RIGHTS, SURVIVE THE SYSTEM* 147 (2009). See e.g., Paul Elias, *Lawyers Seek to Keep Players From Bonds' Trial*, ASSOCIATED PRESS (December 17, 2010) available at <http://sports.yahoo.com/mlb/news?slug=ap-bonds-steroids> (providing an example of a case where charges were dropped against a suspect who is now a star witness for the prosecution).

¹⁵ Emily Friedman, *Pediatrician Earl Bradley Charged With Molestation of 103 Children: Delaware State Attorney General's Office Says There Could Be More Victims* (ABC News, Feb. 23, 2010) available at <http://abcnews.go.com/WN/delaware-pediatrician-earl-bradley-indicted-103-counts-sexual/story?id=9921990>; Karen Zraick, *Driver of School Bus Arrested After Accusations of Sex Abuse*, N.Y. TIMES, (November 19, 2010) available at <http://cityroom.blogs.nytimes.com/2010/11/19/driver-of-school-bus-arrested-after-accusations-of-sex-abuse/?partner=rss&emc=rss>; Good Morning America, *Tonya Craft, Former Georgia Teacher, Acquitted of Molestation Charges* (ABC News television broadcast) transcript available at <http://abcnews.go.com/GMA/georgia-kindergarten-teacher-tonya-craft-acquitted-molestation-charges/story?id=10620993>.

¹⁶ See e.g., Jamie L. Wershba, Note, *Repudiated Allegations of Child Sexual Abuse: How Much Corroboration is Enough?* 9 FLA. COASTAL L. REV. 613 (2008) (discussing an example of the general lack of physical evidence in child sex abuse cases, and the challenges that creates); Judy Yun, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 COLUM. L. REV. 1745, 1745 (1983) (“Detecting sex abuse, as well as convicting its perpetrators, is exceptionally difficult, due to the lack of witnesses and corroborative physical evidence, and to the reluctance or inability of the victim to testify against the defendant.”).

other intimates, and the acts are alleged to have occurred in private, with no independent witnesses. There is often only one witness - the alleged victim - and that witness may be a child not yet in school. While an adorable five-year-old might elicit sympathy and great latitude on the part of the jurors, she might also freeze on the stand and refuse to answer any questions. The experience of testifying and confronting her abuser might cause the child additional trauma.¹⁷

Finally, irrespective of the verdict, the government attorney is presented with a potentially no-win situation in these types of cases. On the one hand, the prosecutor may be blamed if the public believes that a child molester is free because of a misstep by the attorney. On the other hand, the prosecutor has a special duty to prevent a wrongful conviction when presented with the probability that the person being prosecuted is in fact innocent.¹⁸

IV. CONCERNS OF THE DEFENSE ATTORNEY

Like the prosecutor, the defense attorney has a storehouse of concerns when representing the interests of the accused in cases involving allegations of sexual abuse against a child. While the prosecutor has the benefit of being able to tell the jury that he or she represents the interests of “the people,” the defense attorney must sit silently next to the accused as the explicit allegations contained within each indictment are read aloud.

¹⁷ See e.g., Frank E. Vandevort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 JCRLC 1353 (2006) (“The United States Supreme Court has recognized a compelling state interest in protecting children's well-being, physical as well as emotional. This interest in the child's welfare extends to protecting sexually abused children from ‘further trauma and embarrassment.’ Yet, it has long been recognized that the way in which cases of suspected child sexual abuse are investigated and pursued within the legal system can have traumatic impact upon children. Repeated interviewing, making unwarranted assurances to the child, testifying in court--especially more than once--are but some of the sources of trauma children experience in the legal system. The courtroom in particular can be a forbidding, even hostile place for child sexual abuse victims.”).

¹⁸ Joshua Marquis, the district attorney in Astoria, Oregon and a member of the board of the National District Attorneys Association remarked, “The worst nightmare of a prosecutor is not losing a case; it’s convicting an innocent person . . . I think a prosecutor’s always got to be willing to look back and say, ‘Hey, did we do the right thing?’” John Eligon, *Prosecutor in Manhattan Will Monitor Convictions*, NY TIMES, March 4, 2010. Cyrus Vance, Jr., the Manhattan District Attorney has even gone so far as to establish the Conviction Integrity Program to establish best practices and safeguards against wrongful convictions. John Eligon, *Prosecutor in Manhattan Will Monitor Convictions*, NY TIMES, March 4, 2010.

In many states there are significant restrictions placed upon the discovery process. One such restriction includes the right of the victim to decline to be interviewed by defense counsel.¹⁹ The prosecutor has the opportunity to meet with the child long before trial, establish rapport and evaluate the child's cognitive and developmental abilities. The child may come to view the prosecutor as a trusted friend.²⁰ Conversely, the defense attorney may see the child for the first time only moments before the child takes the witness stand. If the defense attorney does not use the pretrial competency hearing to test the child's cognitive and developmental abilities, he or she might be in the impossible position of cross-examining a completely unknown witness.²¹

Defense counsel's challenges at trial are therefore even greater than those which the prosecutor must confront. The child may refuse to speak, may cry, or may even add new allegations. Traditional methods of cross-examination are remarkably ineffective with young children.²² In addition, the defense attorney may worry about bad publicity, about being blamed for further traumatizing the child, or about being shunned by members of the community.

The attorney may be terrified that he or she does not possess the skills necessary to represent someone accused of a crime of this nature. The responsibility for another person's liberty can be overwhelming if an attorney believes that it is his or her failures which condemn

¹⁹ See e.g., OREGON CONSTITUTION, ART. 1, § 42(c) ("The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state."); MASS. GENERAL LAWS c. 258B, s. 3 (m) (2010) (which provides "for victims and witnesses, to be informed of the right to submit to or decline an interview by defense counsel or anyone acting on the defendant's behalf, except when responding to lawful process, and, if the victim or witness decides to submit to an interview, the right to impose reasonable conditions on the conduct of the interview."); *Davis v. State*, 218 So. 2d 17 (Miss. 1969) (regarding a limited right to interview witnesses in the custody of the state).

²⁰ See <http://www.pbs.org/wgbh/pages/frontline/shows/fuster/etc/script.html>, last visited January 5, 2011.

²¹ For a comprehensive discussion of competency of child witnesses see Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the CLEVELAND L. REV. Spring 2011.

²² See *infra* discussion on cross-examination pp. 34. For a comprehensive discussion of cross-examination in the context of competency of child witnesses, see, also, Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the CLEVELAND L. REV. Spring 2011.

another to decades in prison.²³ The defense attorney may also be concerned that he or she will be blamed if the defendant is acquitted and is later accused of abusing another child.

V. THE ROLE OF THE POLICE

Prosecutors typically do not independently investigate alleged criminal activity, but rather evaluate cases brought to them by the police.²⁴ Prosecutors rely on the police to interview witnesses, take statements, secure physical evidence, take photographs and obtain admissions or confessions.²⁵ The police are trained in their academies and by their supervisors to perform these tasks. They learn to be wary of individuals who might have a reason to lie to them. They are taught to separate witnesses so that they can compare their stories. They examine and test physical evidence to determine if it corroborates the statements of the witnesses. They master techniques that test the credibility of both witnesses and suspects. A competent police officer will draw on all of this training to insure that a crime is “solved” and that the person responsible

²³ For a general discussion on the role of a defense attorney see Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO STATE J. OF CRIM. L. 647 (2010). For more information on and examples of the draconian penalties for child abuse see *Criminal Law- Sex Offender Notification Statute - Alabama Strengthens Restrictions on Sex Offenders - Act of July 29, 2005* ALA. ACT NO. 2005-301, 119 HARV. L. REV. 939 (2006) (“The Alabama legislature’s “get tough on sex offenders” posturing led it to write a draconian law to calm public fear. This law is an example of a distorted policy outcome generated by the public’s irrational evaluation of risk. Most of the law’s components target notorious but rare crimes, and similar approaches have not proven effective in decreasing even these crimes in other states. By taking the easy and popular route, the Alabama legislature wasted an opportunity to implement effective prevention and education programs that could help address the real dangers of child sexual abuse.”).

²⁴ The well-defined roles of criminal prosecutions include the role of the police to investigate and the role of prosecutors to determine whether sufficient evidence exists to prosecute. For general information on the role of police and the nexus of the relationship between prosecutors and police see generally, LARRY K. GAINES, ROGER LEROY MILLER, *CRIMINAL JUSTICE IN ACTION: THE CORE 140* (2010); EDWARD THIBAUT, LAWRENCE M. LYNCH, R. BRUCE MCBRIDE, *PROACTIVE POLICE MANAGEMENT* (2007); JAMES GILBERT, *CRIMINAL INVESTIGATION* (2006). In contrast to a street crime case where the police take the first steps, in a case investigating tax fraud or public corruption, the investigation may be initiated by a state Attorney General. See e.g., William Rashbaum, *Espada Charged with Stealing from Nonprofit*, N.Y. TIMES: CITY ROOM (December 14, 2010) available at <http://cityroom.blogs.nytimes.com/2010/12/14/espada-charged-with-stealing-from-nonprofit/?scp=1&sq=espada&st=cse>.

²⁵ See generally JANE MORGAN, LUCIA ZEDNER, *CHILD VICTIMS: CRIME, IMPACT, AND CRIMINAL JUSTICE* at 122 (1992) (“In cases of child sexual abuse, prosecutors rely heavily on the expertise of the specialist police officers who interview children alleging abuse to provide an indication of the child’s credibility as a witness.”); NANCY E. MARION, *CRIMINAL JUSTICE IN AMERICA: THE POLITICS BEHIND THE SYSTEM*, 269-270 (2002).

is arrested and charged. Of course, there are circumstances when, due to the intentional misconduct or mistake of law enforcement, innocent individuals have been convicted.²⁶

However, in most cases, the prosecutor is able to rely on the police having utilized their training in appropriately conducting the investigation.

Even at this early stage of investigation, child sexual abuse cases are different from other types of cases. In many jurisdictions, there are special “units” devoted to the investigation of child sexual abuse cases.²⁷ Although training is provided to the participants in these special units, they may have a bias which is antithetical to determining whether the alleged crimes actually occurred. As explained in the introduction, the pendulum has swung from a reluctance to believe *any* charge by a child against an adult to a non-reflective embrace of *every* accusation made, no matter how implausible or fanciful.²⁸

This shift has not been lost on police officers. In many cases involving young children who make allegations of sexual abuse, the police disregard their training and make arrests based exclusively on the words of the child, without confirming whether the story makes sense,

²⁶ The existence of such mistakes have led to a number of task forces and initiatives around the country, aimed at addressing wrongful convictions and examining the causes of such wrongful convictions. Specifically, the Innocence Project established in 1992 has led to 238 post-conviction DNA exonerations in the United States. Innocence Project, <http://www.innocenceproject.org/know/> (last visited December 1, 2010). *See also* The Center on Wrongful Convictions at Northwestern University School of Law, <http://www.law.northwestern.edu/wrongfulconvictions/> (last visited December, 2010); The Cooley Innocence Project, Thomas M. Cooley School of Law <http://www.cooley.edu/clinics/innocence.htm> (last visited December 1, 2010); The Innocence Project at The University of Mississippi, <http://mississippiinnocence.org> (last visited December 1, 2010); The North Carolina Center on Actual Innocence, <http://www.nccai.org> (this project is a collaboration between each of the law schools in North Carolina, Campbell, Charlotte, Elon, Duke, NCCU, UNC, and Wake Forest) (last visited December 1, 2010).

²⁷ Most states utilize special units composed of police officers, prosecutors, and nurses, among others, who work together utilizing a team-based approach to protecting victims of sexual abuse. For more information on the development and formation of these team based approaches see e.g., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U. S. DEP’T OF JUSTICE, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE, March 2000; William P. Heck, Basic Investigative Protocol for Child Sexual Abuse, FBI LAW ENFORCEMENT BULLETIN Oct. 1999, at 19; Maxine Jacobson, *Child Sexual Abuse and the Multidisciplinary Team Approach*, 8 CHILDHOOD 231 (2001). Additionally, the Department of Justice continues to encourage the use of a multidisciplinary team approach to the investigation and prosecution of cases of alleged child sexual abuse. *See* OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PROGRAMS, U.S. DEP’T OF JUSTICE, LAW ENFORCEMENT RESPONSE TO CHILD ABUSE (2001).

²⁸ *See infra* note 50.

whether it can be corroborated and whether the physical evidence is consistent with the child's account.²⁹

I tried a case many years ago in Maricopa County (Phoenix), Arizona.³⁰ My client, Danny T., was accused in a multiple count indictment of the sexual abuse of both the 14-year-old and five-year-old daughters of his ex-girlfriend. All of the acts, including the violent vaginal and anal rape of the younger child, were alleged to have taken place in my client's trailer. In her statement, made in the presence and with the prompting of her mother, the little girl told the police that Danny "put his thing into her butt" while she was watching a video on the television in the living room of the trailer. She further shared that her sister was on the couch and her mother was cooking in the kitchen. She told the officer that it hurt her "a lot" and that she screamed as loudly as she could, but that her sister, who was on the couch in the same room, couldn't see what was happening because she and Danny were "under a blanket" and neither her sibling nor her mother, who was in the kitchen, heard her or came to her aid.

Given the physical layout of the trailer, this story was inherently incredible. The trailer was a "double-wide" and one could hear conversation in normal tones from one end of the residence to the other. To credit the child's story, one would have to believe that the older girl was incapable of perceiving a rape of her sister which was taking place within a few feet of her, and that the mother could not hear the frantic screams of her child through the few inches of particle board which separated the living room from the kitchen. Yet, the police officer simply

²⁹ See *supra* note 27.

³⁰ The author was formerly an Assistant County Attorney and Assistant Public Defender in Maricopa County, Arizona and is admitted to practice law in Arizona, Indiana and New York. She has prosecuted and defended cases involving allegations of child sexual abuse. In addition, the author has lectured in approximately 15 states on the topic of cross-examination of child witnesses and has conducted workshops for lawyers from numerous states at the National Criminal Defense College in Macon, GA on child competency hearings and cross-examination of child witnesses. The participating attorneys describe the hearings held in their states with amazing consistency. The dialogue in the article is drawn from the author's own experiences and those of other practicing attorneys.

wrote down the account as it was given to him and the implausibility of the story went unchecked.

The police report concerning the abuse of the older girl was filled with sensational details. Night after night, including on Christmas Eve, Danny was accused of making the teen strip off her clothes while he watched. On some occasions, he covered her with chocolate sauce and whipped cream and told her that she was his “sweet dessert” before having intercourse with her. On other occasions, according to the girl, she was made to watch pornographic movies with him while he masturbated.

The officer also included in his report the spellbinding account of the girls’ ten-year-old brother, whose recitation provided the only corroboration of the tale of abuse related by his sisters. The boy reported hearing suspicious noises coming from the trailer’s bathroom, kneeling down and peering under the bathroom door, and being horrified to see Danny, nude, standing over his older sister in the bathtub. His account was documented in great detail in the police report. The boy described seeing a pile of his sister’s and Danny’s clothes on the floor in front of the bathtub and further related that his sister’s head was visible at one end of the bathtub and her feet were propped up on the other end.

In reality, what could be seen by looking under the bathroom door was approximately five inches of worn linoleum. The bathtub was on the back wall and no part of it could be seen, nor could any objects (such as clothing) placed near it. Obviously, it was also impossible to see anyone laying or standing in the tub.³¹

Although the police obtained a search warrant and went to the trailer to obtain evidence of the alleged events, at no time did they attempt to validate the children’s stories. They did not

³¹ The tub itself was almost six feet long. Thus, given the child’s height of 4’11,” it would not be physically possible for the teen to have her head on one edge and her feet on the other.

look under the bathroom door, take photographs, or even determine what could be heard from one room to the next. Rather, they looked in the refrigerator to see if there was chocolate sauce to buttress the teenager's account of having it drizzled on her and licked off by the accused. They also confiscated sheets and towels to test for DNA. Significantly, when no physical evidence was found that corroborated either of the girls' accounts, the lack of evidence was discounted and dismissed as immaterial and unnecessary to the prosecution of the case.

Similarly, both girls were given complete medical exams. The examination of the older girl revealed that she was sexually active. While this fact was emphasized by both the police and the prosecutor to support the allegations against my client, there was no further questioning of the girl to determine if she had been abused by anyone else or whether she had engaged in any consensual sexual activity.

The examination of the younger child was "inconclusive" according to the nurse assigned to perform the test.³² There was no DNA, sperm, or any other biological evidence linking Danny to either girl. This lack of physical evidence raised no red flags for the police as to the believability of the children's accounts and was simply attributed in the report to the length of time between the assaults and the medical exam. Significantly, with respect to the younger girl, no medical expert was consulted to determine if a violent vaginal or anal rape, as had been described, would cause physical damage that should have been apparent even weeks or months later.

³² Adding another layer of difficulty to conducting a proper investigation is that the symptoms discovered in a medical examination that are determined to be "consistent with sexual abuse" can also be "consistent with" non-sexual reasons such as a urinary tract infection or even the use of rough toilet paper. *See e.g.,* JOYCE A. ADAMS, THE ROLE OF THE MEDICAL EVALUATION IN SUSPECTED CHILD SEXUAL ABUSE *in* TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, 231-241 (1995) (dispelling the myths about what is "normal" to find in an examination of a child suspected to have been abused, specifically whether an examination can truly determine if and how frequently a child has been molested).

A recent case tried by my husband highlights the same phenomenon.³³ His client was charged with sexual abuse of the twelve-year-old niece of his paramour. The girl told the police a very detailed story of the client trapping her in the bathroom of his home and demanding that she perform oral sex while her mother and aunt were sitting by the pool in the backyard of the residence. She explained that the man positioned himself so that he could see the yard from the window so as to avoid detection in the event one of the women began to walk toward the house. The police never investigated this claim, took pictures or even went into the bathroom where the crime allegedly occurred. Had they done so, they would have seen that the bathroom window was made of “frosted” glass that prevented any view of the backyard.

It is doubtful that the police would fail to do such rudimentary investigation in other serious felony cases. Imagine a case in which someone alleged that he was severely beaten but had no bruising, or one in which there was a complaint of a home invasion and burglary but there were no signs of forced entry or missing property. In those cases, it is highly unlikely that charges would be filed with no corroboration of witnesses or physical evidence. Yet, in the current environment of accepting a child’s allegations of sexual abuse at face value, such a lack of investigation and evidence is condoned.

While lack of a thorough investigation by the police can lead to an innocent person being accused of sexual abuse, use of improper investigative techniques can result in a similar miscarriage of justice. The problems caused by improper or suggestive questioning of young children has been extensively documented and will only be discussed here in passing.³⁴ Police

³³ Prominent Albany, New York criminal defense attorney, Terence L. Kindlon, Esq., www.kindlon.com.

³⁴ See e.g., *State v. Michaels*, 642 A.2d 1372, 1380 (N.J. 1994) (where the conviction of Margaret Kelly Michaels was overturned on the basis that the interviews with the alleged victims were overly coercive and suggestive). See also Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2161 (1996); Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403, 404 (1993).

departments and governmental agencies have attempted to provide training and guidance to lessen the prejudicial effects of such inappropriate examinations.³⁵

In addition to the risks of improper questioning of young children, the use of other techniques has also come under scrutiny. One practice employed by some police agencies and child advocacy groups is to have the child “demonstrate” alleged abuse by positioning anatomically correct dolls. This method of having the child “show what happened” has been discredited by studies demonstrating that the use of such dolls is not a trustworthy test of whether sexual abuse occurred, and that reliance on the use of such dolls may result in false allegations of abuse.³⁶ In one such study, researchers gave non-abused children anatomical dolls and observed how the children interacted with them. The results were startling: Nearly half the children

³⁵ See NEW YORK STATE CHILDREN’S JUSTICE TASK FORCE, FORENSIC INTERVIEWING BEST PRACTICES (2003).

³⁶ For a thorough discussion of the research surrounding the failures and suggestibility of anatomically correct dolls see Andrew M. Luther, *The Deadly Consequences of Unreliable Evidence: Why Child Capital Rape Statutes Threaten to Condemn the Innocent Defendant to Death*, 43 TULSA L. REV. 199 (2007)

Many experts feel that anatomical dolls are a poor analytical tool in identifying abuse and are sexually suggestive because the “genitals and orifices of the dolls suggest a play pattern to children.” Recent scientific studies reinforce the proposition that the overly suggestive nature of anatomical dolls renders them poor indicators of abuse. Beyond their suggestibility, anatomical dolls may also be ineffective in identifying abuse, as research indicates that abused and non-abused children often engage in indistinguishable sexualized play with dolls. In a study conducted by McIver, Wakefield, and Underwager, researchers discovered that abused and non-abused children were equally likely to engage in sexualized play with anatomical dolls. Moreover, the researchers found that the abused children were actually less likely to engage in sexualized play than the non-abused children were. Additional studies have found that while there is no correlation between children’s sexualized play with a doll and abuse, there may be a socio-economic correlation with such play. The researchers Everson and Boat conducted a study where two-hundred children interacted with anatomical dolls. The study found that black boys and girls from lower social classes were most likely to engage in sexualized play with the dolls. However, the researchers concluded that these findings did not suggest that abuse was more prevalent in certain communities, but instead, “suggest[ed] the existence of demographic pockets in [American] society [where] the exposure of preschool-aged children to the mechanics of sexual intercourse is [more] commonplace.” The almost universal conclusions that abused and non-abused children both engage in similar sexualized and non-sexualized play with anatomical dolls has led one researcher to conclude, “[a]t present, insufficient information exists to permit play with the dolls to be regarded as a clinically reliable screening test for sexual abuse.”

The effectiveness of anatomical dolls is also undermined because many investigators utilizing dolls during an interview may use them incorrectly. Astonishingly, only forty-three percent of social workers and forty-seven percent of police officers receive even the most rudimentary training in the proper use of dolls. A final, related problem with anatomical dolls is that no uniform, accepted protocol exists that clearly identifies what kind of sexualized play by a child may suggest abuse. Therefore, even individuals supposedly trained in the proper usage of dolls may nevertheless come to very different conclusions about a child’s interaction with a doll, because each uses a different method in identifying abuse.

“showed several behaviors which could have been interpreted by other interviews as indicating likely sexual abuse.”³⁷ Beyond their suggestibility, anatomical dolls may also be ineffective in identifying abuse, as research indicates that abused and non-abused children often engage in indistinguishable sexualized play with dolls.

Given the challenges such cases present, the police investigation in cases of allegations of child sexual abuse must be extensive and thorough, but must also avoid the dangers of improper questioning and untrustworthy investigative techniques.

VI. Suggestions for Improvement

The challenges of child sexual abuse cases make it difficult to obtain justice for true victims while also protecting the accused from wrongful convictions. The stakes are incredibly high for both the alleged victim and the accused. For the accused, the mere accusation of sexual misconduct with a child may lead to financial devastation, job loss, family destruction and social and professional ostracism. For the child who was not in fact abused, the repeated retelling of a fabricated and salacious story can turn an otherwise unharmed child into a victim. For the child who was in fact abused, the feelings of distrust and abandonment that can result if he or she is not believed, or if a conviction is not obtained, can be devastating and last a lifetime.

While, presumably, investigators, child protective service workers, prosecutors, judges, and defense attorneys have the same goal - obtaining justice - a systemic disconnect can occur when it comes to child sexual abuse cases. Given the difficulties inherent in these cases and the potential consequences if mistakes are made, what can and should be done?

The next section will focus on how prosecutors, judges, defense attorneys and police investigators must all take responsibility for bridging this systemic gap. Each individual can utilize his or her unique role to ensure that proper procedures are followed to protect victims and

³⁷ *Id.*

the wrongly accused. Practical solutions and guidance is offered from the investigation stage through the trial process.

A. ROLE OF THE PROSECUTOR

As noted above, it is the obligation of the prosecutor to seek justice, not merely a conviction.³⁸ In order to ethically prosecute a case, the lawyer must be sure that an appropriate investigation was done to determine whether crimes have actually been committed.³⁹ As previously discussed, a prosecutor's assumption that the police can be relied upon to have completed such an investigation may be misplaced. It is therefore imperative that the prosecutor thoroughly investigate the allegations made by alleged victims and witnesses, even those that are detailed and appear to be legitimate.

In the first instance, there is no substitute for going to the scene of the alleged criminal activity to see if the physical layout matches the information obtained by the police.⁴⁰ In addition, a thorough examination of all available information about the alleged victim must be conducted. Medical, school, psychiatric, and social services records should be obtained, either by request, subpoena or releases signed by the parent or guardian. The records need to be carefully scrutinized to determine if the child has a history of physical or sexual abuse or has been diagnosed with any mental health issues. Determining whether the child was examined by a physician during the time frame of the alleged abuse can also be critical.

³⁸ See ABA MODEL RULE 3.8 (infra Fn 5).

³⁹ See ABA MODEL RULE 3.8 (infra Fn 5).

⁴⁰ The classic lawyer movie, *My Cousin Vinnie*, contains many examples of information that can be found with a proper investigation. Examples range from evidence gleaned from the physical observation of tire tracks to photographs of trees, dirt and other barriers which clearly obstructed the witnesses' "clear view." *My Cousin Vinnie*, Twentieth Century Fox Film Corporation (1992). In the example set forth, *infra*, of Danny T., it took under a minute to determine that the brother's tale of what could be seen under the bathroom door was patently false. The same is true of the case with the "frosted" window.

The prosecutor should explore whether the child has a motive to fabricate an allegation of abuse, or if there is an adult in the child's life who has a motive to encourage the child to relate such a falsehood. Pending divorce, family discord and financial incentives may all lead to false allegations.⁴¹

The prosecutor should search out potential witnesses who know either the child, the accused adult, or both. If the adult regularly comes in contact with other children, those children should be interviewed in a non-suggestive, objective manner to determine their relationship with the adult. If the child is in day care or school, the teachers should be interviewed concerning their observations of the child. It is important to determine whether the child's behavior changed in any way during the time span of the alleged abuse, whether the child is prone to "making up stories" and whether the teachers are aware of any difficulties the child might be experiencing.

Finally, the prosecutor must determine if the child is competent to testify. Very young children are unable to distinguish fantasy from reality and may very well be telling a story that is "true" to them but has no basis in fact.⁴²

B. ROLE OF THE DEFENSE ATTORNEY

⁴¹ MARK J. BLOTCKY, M.D., *THE CRIMINAL DEFENSE OF CHILD MOLESTATION ALLEGATIONS: THE PSYCHIATRIC KNOWLEDGE BASE FROM WHICH TO EVALUATE YOUR CASE* (highlighting the complicated social, economic and familial relationships within which abuse can occur or be alleged). "Sexual abuse, especially within the family is shrouded in secrecy, and confounded by denial, minimization, deflection upon others, exaggeration, and disbelief. And more confounding is that a child's psychiatric illness may cause him to exhibit sexual behavior suggestive of abuse." *Id.* at 8. For an additional example, "Cathy, age 12, accused her father of raping her. One month later she insisted that she had lied about the rape to get back at her father for imposing strict curfews. In reality, Cathy had been raped by her father, but retracted her story under extreme pressure, humiliation, and rejection by her sister and mother. For fear of destroying the family structure, Cathy recanted her allegation." John C. Yuille, Monica Tymofievich, & David Marxsen, *The Nature and Allegations of Child Sexual Abuse in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT*, Ch. 2 at 26 (1995). One very public example of financial incentives leading to allegations of sex abuse is the case against Michael Jackson. *The People of the State of California v. Michael Joseph Jackson* (1993).

⁴² See Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the *CLEVELAND L. REV.* Spring 2011.

Unlike the prosecutor, who has an opportunity to investigate or review allegations of child sexual abuse and then decide whether to continue the criminal prosecution, it is often not until charges have been filed that a defense attorney is appointed or retained.⁴³ Upon commencing the representation, the lawyer must in the first instance confront his or her own concerns about the type of charges involved to insure that the zealous defense to which the client is entitled will be provided.⁴⁴

As in any serious case, the lawyer must conduct an appropriate investigation in order to competently represent his or her client. This task is particularly imperative in cases involving sexual abuse allegations given the very real possibility that the police have not conducted a thorough investigation.

Most experienced defense attorneys cross-examine police officers, DNA experts, firearms examiners and cooperating co-defendants on a regular basis. They are very familiar with police reports, autopsy results and weapon comparisons. Conversely, the physical, emotional and developmental attributes of a pre-school aged child may be outside their frame of reference. Just as it is imperative to learn how accelerants can be detected if one is going to try a

⁴³ *Rothgery v. Gillespie County, Tex.*, 544 U.S. 991 (2008) (holding that the attachment of Sixth Amendment right to counsel occurs at the initial appearance, where charges are brought). *See also Estelle v. Smith*, 451 U.S. 454, 469 (1981) (“[T]he right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer at or after the time that adversary judicial proceedings have been initiated against him...”; *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (“[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him ...”).

⁴⁴ *See ABA MODEL RULES OF PROF'L CONDUCT, PREAMBLE AND SCOPE* (2010) (“As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others...[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”).

case of alleged arson, information about a child's physical, emotional and developmental make up must be mastered if the attorney is to effectively try a case of alleged child sexual abuse.

The defense attorney must become educated about children in general, as well as the particular child who is the alleged victim. To learn about developmental milestones and cognitive abilities of particular age groups, the attorney can read books that are widely available in any local bookstore or on the internet.⁴⁵ If personal research is insufficient, the lawyer may be required to engage the services of an expert, both to prepare for and to testify at trial if necessary to educate the jury.

Specifically, the attorney needs to familiarize himself or herself with the child's age group in terms of ability to distinguish truth from fiction and fantasy from reality.⁴⁶ It is also important to learn whether children in the particular age group are able to understand date and time sequences such as "before and after." This information is critical in order to analyze the police reports and statements that are attributed to the child.

Acquiring information about the child who is the alleged victim is more difficult for the defense attorney than it is for the prosecutor. Some information, of course, will be included in the police reports. If the prosecutor has obtained the medical, school and psychiatric records (if any), they should be accessible to the defense through the discovery process. Depending on the jurisdiction, this will be more or less of a challenge.⁴⁷

⁴⁵ See e.g., JANE HEALY, *YOUR CHILD'S GROWING MIND: BRAIN DEVELOPMENT AND LEARNING FROM BIRTH TO ADOLESCENCE* (2004); LAURA BERK, *CHILD DEVELOPMENT* (8th ed. 2008); JOHN SANTROCK, *CHILD DEVELOPMENT: 12TH EDITION* (2008).

⁴⁶ See Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the *CLEVELAND L. REV. Spring 2011*.

⁴⁷ See e.g., FEDERAL RULE OF CIVIL PROCEDURE, RULE 26 (2010); NORTH CAROLINA CRIMINAL PROCEDURE ACT §15A-902 (2010); Oregon Criminal Procedure in Criminal Matters §135.815 (2010). See also *Brady v. Maryland* 373 U.S. 83 (1963) (holding that the due process clauses of the Fifth and Fourteenth Amendments require disclosure of all evidence favorable to the accused in a criminal trial that is "material to guilt or to punishment"). For further discussion of the limits of discovery see Andrew Smith, *Brady Obligations, Criminal Sanctions, and Solutions in a*

In cases in which the person charged is an intimate of the alleged victim, information about the child can be obtained from the client. The defense attorney will be able to learn where the child goes to school, the pediatrician's name, the identity of neighbors and friends and the client's impressions of the child's intellectual and emotional capabilities. In some instances, subpoenas can be issued to obtain records that were not obtained or provided by the prosecutor.⁴⁸

The defense attorney will want to visit the child's school and interview as many people who know the child as possible, including relatives, teachers, coaches and neighbors. It is important to determine how the child is seen by others in terms of intelligence, cognitive development, and ability to relate events in a meaningful and truthful way.

Of course, depending on whether it is permissible in the jurisdiction, an interview of the child is critical to effective preparation for trial. In some states, formal depositions or informal interviews of a potential witness are allowed. In other states, there is *no* opportunity for the defense attorney to meet or interview the child prior to the competency hearing.⁴⁹

If the defense attorney has the opportunity to meet with the child, he or she should make full use of the opportunity. At the very least, the attorney will be in a position to let the child know that the lawyer is a grown-up "friend" who is not scary or mean. The attorney will have an opportunity to assess the child's abilities in many areas. The attorney should use this occasion to test the child's competency to testify and to determine who else the child has told about the alleged abuse, e.g. mother, teacher, prosecutor, or victim-witness advocate. There are three reasons this information is essential: one, to identify other potential witnesses: two, to determine

New Era of Scrutiny, 61 VAND. L. REV. 1935 (2008); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2009) (citing the example of the Duke lacrosse case to advocate for open-file discovery policies, and highlighting the dangers of limiting disclosure).

⁴⁸ See *supra* note 46.

⁴⁹ For an example of states allowing formal depositions see e.g., FLORIDA RULES OF CRIMINAL PROCEDURE RULE 3.220 (2010); COLORADO CRIMINAL CODE §18-3-413 (2010); WISCONSIN CRIMINAL PROCEDURE LAW § 967.04.

if the child's story has changed over time; and three, to help make a determination as to the number of times the story has been told.⁵⁰

As the examples described above illustrate, it is imperative that the defense attorney go to the scene of the alleged events to determine whether the physical layout is consistent with the statement given by the child.⁵¹ Photographs, diagrams, video recordings or models can be made for use at trial. In addition, time and distance measurements must be determined.

The defense attorney must determine how many times the child was questioned by others. Each statement of the child must be analyzed to ascertain when it occurred, who was present, what questions were asked, what answers were given and how it was memorialized. Was there an audio recording or videotape? Were notes taken and by whom? Who asked the questions? What training did that person have? Were anatomically correct dolls used? Were leading questions asked? Was the child's mother or another adult intimate of the child present? If so, were they allowed to participate in the interview? Did the adult encourage the child to tell a particular version of the alleged events? Was the child given candy or ice cream or promised a

⁵⁰This phenomenon of unreliability that results from the child repeatedly telling the story is seen over and over again. For more information on the social science research of this phenomenon see Stephen J. Ceci & Maggie Bruck, *Suggestibility of the Child Witness: A Historical Review and Synthesis*, 113 PSYCHOL. BULL. 403, 404 (1993). See also Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S.CAL. L. REV. 2117 (1996); Robert G. Marks, *Should We Believe the People Who Believe the Children?: The Need for A New Sexual Abuse Tender Years Hearsay Exception Statute*, 32 HARV. J. ON LEGIS. 207 (1995). For additional information on the high stakes of ensuring the reliability of the child witness and ensuing investigation see Andrew M. Luther, *The Deadly Consequences of Unreliable Evidence: Why Child Capital Rape Statutes Threaten to Condemn the Innocent Defendant to Death*, 43 TULSA L. REV. 199, 212 (2007).

⁵¹ The examples in this article are not even among the most extreme. One of the most astonishing examples occurred in California at the McMartin Preschool. "In August 1983, a woman complained that her two-year-old son had been sodomized by a male preschool teacher. Within a year, 208 counts of child abuse were filed against seven adults. Allegations surfaced that the teachers belonged to a satanic cult, peddled child pornography, and engaged in animal sacrifices. The McMartin trial stretched to 1990 at a cost exceeding \$15 million. It was the most expensive criminal prosecution in U.S. history. Only two defendants went to trial: Peggy Buckley, who was acquitted, and her son, Ray, whose two trials resulted in hung juries, after which all charges were dropped. He was jailed for five years during the trials." Robert S. Wolfe, *Where the Law Was Made in L.A. Short Tours Through Various Parts of Los Angeles Can Reveal the Many Places Where Legal History Occurred*, L.A. Law., March 2003, at 18, 28. For additional information on the McMartin Preschool case see Famous Trials: The McMartin Preschool Abuse Trials, <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/mcmartin.html>.

treat if he or she told “what really happened?” Was the child told that other children in the pre-school had already made accusations, e.g. “Billy was a brave boy and told us about Mr. Rick. Can you be a brave boy like Billy?”⁵²

If special investigation teams, sexual abuse units, or victim-witness advocates were involved in the investigation, the defense attorney must find out everything he or she can about the policies of such individuals and their offices. Do they have a policy that they “believe” children who make allegations of abuse? Do they allow parents or other individuals to be present when they take statements? Do they make any attempt to investigate to determine whether the accused is innocent? Do they consider themselves to be “investigators” or “advocates?”

As in any case, the defense attorney must learn as much as possible about his or her own client. What is the client’s background, level of education, and employment history? Is there any prior criminal background? What family members, employers, and support people are present in his or her life? Was the client a victim of physical or sexual abuse?⁵³ The lawyer must explore the relationship of the client with the child making the accusation, with any other children in the family, and with any grown-ups involved. Every type of interaction that the client has with children should be investigated. Does the client have children from other relationships or marriages? Is he or she involved with nieces and nephews, grandchildren, neighborhood children, sports teams, church groups or other activities?

The context in which the allegation arose must also be investigated. Was the child being punished? Is there a divorce action pending? Did the child hear a lecture on “good-touch – bad

⁵² See *supra* note 32.

⁵³ The importance of client-centered representation is illustrated by these challenging cases. See NEW YORK STATE DEFENDERS ASSOCIATION, CLIENT ADVISORY BOARD, CLIENT CENTERED REPRESENTATION STANDARDS (July 2005), available at http://www.nysda.org/05_ClientCenteredStandards.pdf (providing guidance for providing such client-centered representation).

touch” at school? Was the child inadvertently exposed to pornography or did the child observe adults engaged in sexual activity? Did the child overhear his or her mother or another trusted grown-up make disparaging remarks about the accused?

Once the investigation is complete, the defense attorney must formulate a theory of defense.⁵⁴ Vital to any criminal case is the theory of defense, which essentially tells the client’s story. The defense attorney should be able to explain the theory of defense in a few sentences that summarize the legal, factual, and emotional reasons supporting the client’s innocence. In addition, the theory must answer two questions that will be in the minds of the jurors: “Why would the child say that abuse occurred unless it was true?” and “How would the child know about sexual activity unless he or she had experienced it?” Of course, each case is different and the facts, age of the child, physical evidence and potential witnesses will determine the theory of defense.

Often, the defense is built around circumstances involving inadequate police investigation, a child confused by sexual information he or she is unable to process appropriately, improper questioning by a parent, police officer, child protective services worker or health care professional, or the phenomenon of a false memory being implanted in the child.⁵⁵ Less frequently, the defense presented may involve an older child that intentionally made a false accusation to avoid punishment for some wrongdoing or to curry favor with an adult. Nor is it

⁵⁴ For more practical information on the importance of a theory of defense see, IRA MICKENBERG, STORYTELLING: PERSUADING THE COURT TO ACCEPT YOUR THEORY OF DEFENSE, NORTH CAROLINA APPELLATE ADVOCACY TRAINING CHAPEL HILL, NORTH CAROLINA (October 17, 2007) *available at* <http://www.ncids.org/Defender%20Training/2007%20Appellate%20Advocacy%20Training/Storytelling.pdf>. *See also* Blythe v. Oklahoma, Oklahoma Court of Criminal Appeals Case No. M-2006-555 (April 12, 2007)

⁵⁵ *See e.g.*, State v. Michaels, 136 N.J. 299, 642 A.2d 1372 (1994) (case dismissed based on improper interrogation of child sexual abuse victim). Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000) (child competency); Jacqueline Hough, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 69 S. Cal. L. Rev. 855 (1996) (false memory).

unusual to have a combination of circumstances in the same case. In Danny T., the older girl, who was sexually active with a boyfriend and was therefore able to convincingly describe sexual activity, had been placed in foster care because her mother was physically abusive toward her. The teen wanted to be reunited with her family and believed that by testifying that Danny had molested her, she would please her mother and be allowed to return home. On the other hand, the pre-school aged child in the same case simply agreed with any question or statement made by a trusted adult, whether the information given made any sense at all.⁵⁶

C. ROLE OF THE JUDGE

The judge plays an important role in any criminal case by ruling on pre-trial motions, determining the admissibility of evidence, and overseeing the trial itself.⁵⁷ In a case of child sexual abuse, the judge's role is critical, both before and during the trial. The judge possesses the authority to compel discovery, and is therefore able to insure that the prosecution and the defense have equal access to the child's medical, school and psychiatric records. In some jurisdictions, it is within the judge's discretion to authorize a deposition or interview of the child.⁵⁸

In the case of a young child, it is the judge's obligation to conduct a hearing to determine if the child is competent to testify.⁵⁹ It is the responsibility of the judge to insure that the

⁵⁶ See *supra* page 13.

⁵⁷ For a discussion on the modern role of judges see Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge As the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945 (2008). For a recent example of the vast discretion left in the hands of judges see the case of Earl Bradley. Emily Friedman, *Pediatrician Earl Bradley Charged With Molestation of 103 Children: Delaware State Attorney General's Office Says There Could Be More Victims* (ABC News, Feb. 23, 2010) available at <http://abcnews.go.com/WN/delaware-pediatrician-earl-bradley-indicted-103-counts-sexual/story?id=9921990>.

⁵⁸ See generally *Discovery*, 91 GEO. L.J. 307 (2003).

⁵⁹ See e.g., WASH. REV. CODE ANN. § 9A.44.120 (West 2010) ("A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if: (1) The court finds, in a hearing conducted outside

competency hearing is a meaningful one that appropriately tests the child's developmental and intellectual capabilities. Nevertheless, in many jurisdictions, the competency hearing has been reduced to a meaningless exercise that tests only whether the child can appropriately answer simplistic questions about the color of a pen or whether "Mom will be mad and God will be sad" if untruthful testimony is given. Rarely is there an appropriate inquiry to determine the child's understanding of time or distance or his or her ability to differentiate fantasy from reality.⁶⁰

The integrity of a competency hearing depends upon the judge's ability and willingness to fairly assess a child's developmental and intellectual capabilities. If a child cannot distinguish fantasy from reality or cannot relate a series of events in a coherent and credible fashion, the judge must preclude the child's testimony. The stakes are high should a judge fail to uphold his or her responsibility. Innocent individuals may be convicted of crimes they did not commit and children may be traumatized later in life because of their involvement in a miscarriage of justice.⁶¹

the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: Provided that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement."); Conn. Gen. Stat. Ann. § 54-86h (West 2010) ("No witness shall be automatically adjudged incompetent to testify because of age and any child who is a victim of assault, sexual assault or abuse shall be competent to testify without prior qualification. The weight to be given the evidence and the credibility of the witness shall be for the determination of the trier of fact. *See also* Nancy Thoennes, *Child Sexual Abuse: Whom Should A Judge Believe? What Should A Judge Believe?* 14 JUDGES' J. (1988) (discussing the challenges presented by child victims as witnesses).

⁶⁰ *See* Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the CLEVELAND L. REV. *Spring 2011*. As illustrated by this article, the current use of the competency hearing is effectively meaningless. While it is important that there be a test of a child witness's ability to truthfully and accurately testify, it is insufficient to test whether a child may discern what they have learned as "the truth" or a "lie" but rather, the test must be of the child's ability to distinguish fantasy from reality.

⁶¹ Maggie Jones, *Who Was Abused?* N.Y. TIMES MAGAZINE, September 19, 2004 (providing a terrifying look at the lasting psychological effects of false allegations on the accused, and the child accuser twenty years after the incident); *See e.g.*, NEW YORK STATE BAR ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT (2009) (emphasizing the pervasive problem of wrongful convictions in New York and providing recommendations for the future).

During the trial, it is important for the judge to realize that he or she may need to permit the attorneys to use some unconventional trial techniques during the direct or cross-examination of the child. It is imperative that the judge understands the legal and practical difficulties involved with this type of case and remains open to the requests of counsel. The attorneys may ask for leeway to move more freely in the courtroom, to sit in front of the child during questioning, to use leading questions, or to utilize testimony of the child by closed-circuit video.⁶² Moreover, the defense attorney will not be able to cross-examine the child in the same way he or she would cross-examine another witness.⁶³

The judge also has the responsibility to thoroughly and accurately instruct the jury on the law. It is essential that the judge emphasize to the jury that the charges are not evidence. While such an instruction is axiomatic and true in every criminal case, it is critical in cases involving crimes with emotionally charged names such as “Predatory Sexual Assault on a Child,” as compared to a more innocuous crime, “Petit Larceny.”⁶⁴ The judge must also give meaningful instructions on how to evaluate the credibility of the child witness and on the theory of defense.⁶⁵

VII. VOIR DIRE

Voir dire is an opportunity to explore with potential jurors some of the unique aspects of cases involving allegations of child sexual abuse. The judge should allow questions which will

⁶² N.Y. CRIM. PROC. LAW § 65.20(2) (McKinney 2010) (“2. A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness' ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.”); VA. CODE ANN. § 18.2-67.9 (West 2010).

⁶³ *Infra discussion of cross-examination pp. 34.*

⁶⁴ See NEW YORK CRIMINAL JURY INSTRUCTIONS2D PENAL LAW §130.96 (2010)(predatory sexual abuse on a child); See NEW YORK CRIMINAL JURY INSTRUCTIONS2D PENAL LAW §155.25 (2010) (petit larceny).

⁶⁵ See e.g., GA. CODE ANN. § 24-9-80 (West 2010) (“The credibility of a witness is a matter to be determined by the jury under proper instructions from the court.”); MD.RULE 4-325(c). (West 2010) (“Defendant is entitled to have the jury instructed on any theory of the defense that is fairly supported by the evidence.”).

permit the jurors to voice their reaction to the nature of the charges.⁶⁶ A simple statement by the judge that the jurors “are not to consider the charges as evidence” will not be sufficient to identify jurors who are so repulsed by the idea of sexual abuse of a child that they will not listen to the evidence in an open-minded manner. Further, the attorneys must explore with the members of the jury panel whether they have children, the gender and the ages of the children, whether they believe that children are capable of intentionally lying or “making up stories,” and whether a young child can relate an incident in a factually accurate manner.

One critical area of inquiry is whether the jurors believe that there are indicia of reliability in small children that are readily identifiable. For example, jurors are often asked if they know when their own child is telling something that is untrue. Often, jurors will relate stories akin to that of a child sneaking chocolate icing from a cake and denying it while the evidence is smeared around his mouth. Other jurors laugh and relate their own child’s misdeeds. Most are confident that they can tell when the child is covering for misbehavior because of a red face, failure to make eye contact or inability to keep a story straight.⁶⁷

These shared anecdotes permeate the selection process and often leave potential jurors with the impression that it is relatively easy to determine whether a child is telling the truth. Unfortunately, these stories may in fact mislead the potential jurors because they only relate to fabrications that the child in the story *knows to be untrue*, e.g. the child is aware that he took frosting off the cake and denied it when questioned. It is imperative that the attorneys explore with the panel members the phenomenon of implanted memory, suggestive questioning and the inability of very young children to distinguish fantasy from reality. This conversation is

⁶⁶ See also Judge Gregory E. Mize & Paula Hannaford-Agor, *Building A Better Voir Dire Process*, JUDGES' J., 6 (Winter 2008).

⁶⁷ Laurie Shanks, *Evaluating Children’s Competency to Testify: Developing a Rational Method to Assess a Young Child’s Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the CLEVELAND L. REV. Spring 2011.

necessary to allow the jury to distinguish between a child who is aware that he or she is telling a falsehood and one who lacks that awareness.

A child who is telling something that he or she *believes* to be true will show no indicia of unreliability, even if the story is not factually correct. Just imagine the child who snatched the frosting jumping up and down and telling grandma and grandpa excitedly that, “Santa came last night and brought me a new bike and ate all the cookies I left him!” The child *believes* that Santa exists because he has been told so by adults whom he trusts. As a result, he will not exhibit any of the tell-tale signs of falsehood that were evident when he was questioned about the frosting. Thus, when this child states that “Uncle Bob touched me on my private,” it is imperative that counsel be able to explore with the potential jurors the origin of the child’s belief and whether Mommy or another adult may have contributed to the child’s belief.⁶⁸

VIII. PROSECUTION WITNESSES DURING TRIAL

A. THE CHILD

Given the reality that many cases of child sexual abuse are alleged to have taken place in secret, with no independent witnesses, the testimony of the child is critical. The prosecutor is in a delicate position. On the one hand, he or she must work with the child so that the youngster is able to tell a coherent story in an imposing courtroom in front of a host of adults that the child does not know. On the other hand, the prosecutor must refrain from coaching the child or suggesting “facts” that the child will adopt even if they are untrue.⁶⁹

⁶⁸ Countless studies have been conducted by social scientists demonstrating this precise phenomenon. See PBS Frontline, *Innocence Lost: Out of Edenton: The Legal and Scientific Issues*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/innocence/roundtable>; Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory* (1994); Stephen J. Ceci, Mary Lyndia Crotteau Huffman, Elliott Smith & Elizabeth Loftus, *Repeatedly Thinking About a Non-event: Source Misattributions Among Preschoolers*, 3 CONSCIOUSNESS AND COGNITION 388-407 (1994). For ways to address this in the courtroom see also SHERRIE BOURG CARTER, *CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES* 6 (2009).

⁶⁹ See generally Maria S. Zargoza, *Preschool Children’s Susceptibility to Memory Impairment in THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY*, 27 (1991). See also

There are, however, several acceptable tools that a prosecutor can use to prepare the child for trial. The prosecutor can explain to the child that different grownups will be asking him or her questions. The child can also be taken on a “field trip” to the courthouse and can practice sitting in the witness chair and answering questions. To avoid contamination, these questions should not be about the alleged abuse but rather about school, play time, or upcoming holidays. The prosecutor can have the child practice answering the questions out loud and with an audible response, rather than a nod or shrug.

The defense attorney is in an even more tenuous position than the prosecution. Often, the defense attorney is in the unenviable position of having to cross-examine a child witness who is viewed as vulnerable by the jury. The courtroom atmosphere will be tense and unforgiving after the child’s direct examination, when jurors may be more predisposed to regarding the prosecutor as the child’s advocate. The child may even have been forewarned that the defense attorney is “mean” or “bad” or is someone who will try to “trick” him or her.

Further compounding the situation for the defense attorney, traditional forms of cross-examination are ineffective with a young child. Cross-examination has been called “the most effective method for ascertaining the truth ever devised by man.”⁷⁰ This is certainly true in the case of a testifying co-defendant or snitch. A skillful attorney can highlight for the jury the bias or motive of the co-defendant to testify falsely by bringing out the terms of a favorable plea agreement. In other cases, photographs or video of an intersection can be used to discredit a

Douglas P. Peters, *The Influence of Stress and Arousal on the Child Witness in THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS: IMPLICATIONS FOR EYEWITNESS TESTIMONY*, 60 (1991).

⁷⁰ WIGMORE ON EVIDENCE VOL. II § 1367.; Crawford v. Washington, 541 U.S. 36 (2004). “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor ...” U.S. CONST AMEND. VI. *See also*, Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691 (1993) (examining the particular challenges presented by hearsay in child sexual abuse cases along with methods of presenting testimony and competency).

witness' recitation of distance or demonstrate visual impediments. Production of prior inconsistent statements of the witness can dramatically demonstrate how the witness' story has changed over time. All of these techniques allow the jury to perform its most important function: evaluating the credibility of the witnesses and determining the true facts of the case.

In cases involving allegations against a teenager, some of the traditional forms of cross-examination may be effective as long as the attorney does not appear to be taking advantage of or "beating up on" the child. In the case of Danny T., the older child had been removed from her home because of severe physical and emotional abuse by her mother. She was unhappy in foster care and wished to return to her mother. Significantly, she believed that she "deserved" the beatings and verbal abuse that she endured and was willing to lie about Danny if it would result in her mother "forgiving her" and allowing her to move back into the family home. I learned about the abuse from my client, who had witnessed some of the incidents and had been told about other incidents by his ex-girlfriend and the children.

During cross-examination, I was able to bring out the facts about the mother's abuse of the older child in a very gentle and predominately traditional fashion, e.g. using leading questions. The girl sat on the witness stand with her head down and her long hair covering her face. After a few questions about her age, school, and other innocuous topics, I began to ask questions about the mother's treatment of her. I asked, "Can you tell us the type of things your mom uses to hit you?" She shook her head from side to side. I chose not to employ the conventional tactic of asking the judge to "order" the witness to answer the question and give a verbal response. I was concerned that such a request would be perceived by the jury as hostile, thereby engendering sympathy for the alleged victim and greater animosity toward my client. Instead, I quietly asked, "If I say the name of things, can you tell us 'yes' or 'no'?" She nodded,

thereby conveying to the jury her nonverbal response for “yes.” I then proceeded to ask her “Does she hit you with a belt?” She responded again with a nod. “Does she hit you with a stick?” Nod. “Does she hit you with a coat hanger?” Nod. “Is the scar on your face from when she threw a plate at you?” Nod.

I continued with questions about the verbal abuse. “Can you tell us the names your Mom calls you?” Again, she shook her head from side to side. “If I say the names, can you tell us ‘yes’ or ‘no’?” Nod. “Does she call you a slut?” Nod. “Does she call you a whore?” Nod. “Does she call you a f***ing slut? Nod. “Does she call you a worthless piece of s***?” Nod.

I then confirmed that the child believed that her mother did these things to her because she was “bad” and that, if she was allowed to leave foster care and go back home, she would be “good.” Critically, I was then able to confirm with her that she knew that Mom wanted Danny to be convicted, that she had gone over her testimony many times with her mother and that she knew what she had to say to make Mom “proud of her.”

Clearly, the teenager had a very strong incentive to lie, and that reason became obvious to the jury. It was crucial to demonstrate to the jury the child’s motive for lying in a manner that allowed the jury to be sympathetic to the child while also being skeptical of her testimony.

Impeachment by prior inconsistent statements can also be an effective cross-examination technique with older children. If the child’s allegations change significantly over time, the child can be questioned about the changes. Any attempt to impeach a child’s testimony must be done in a gentle but firm manner. The jury must perceive the questioning as fair and related to a material fact of the case or the defense attorney runs the risk of appearing to be badgering the child.

These traditional methods of cross-examination are virtually worthless with a young child. Certainly a five-year-old might be asked if she wants Mommy to “be proud of her,” but it is doubtful that any child would answer in the negative, and equally unlikely that a juror would discount testimony based on the reply. Likewise, imagine attempting to impeach an adorable little girl in a frilly dress who is clutching a stuffed animal with the following conventional questioning:

“You testified this morning that your teacher at school is Mr. Pat?”

No verbal response.

“And you said that Mr. Pat touched your private?”

“Uh huh.”

“Is that yes?”

No verbal response.

“Well, you said this morning that Mr. Pat touched you on the playground.”

“He did.”

“Didn’t you tell the police officer that you were on your cot?”

No verbal response.

“Were you on your cot or were you on the playground?”

No verbal response but the child begins to cry.

Cross-examinations that progress in this manner help explain why criminal defense attorneys who willingly take on the representation of accused terrorists, murderers and drug dealers cringe at the prospect of handling a case involving an allegation of child sexual abuse.

If conventional methods of cross-examination are ineffective, then what can be done? First, the same techniques that were used in the competency hearing can also be utilized during

cross-examination to educate the jury so it is better equipped to make an informed decision as to whether the child is able to testify in a credible manner.⁷¹ For example, the lawyer can use a large calendar with numbers or pictures to demonstrate that the child cannot accurately relate to concepts like “before and after” or that the child is unaware of the number of days in a week. If the child has been asked to demonstrate that he or she knows the difference between the truth and a lie by correctly identifying the color of a pen or the prosecutor’s clothing, the defense attorney can show the jury that the child will also claim that “the truth” is that Santa brings presents on Christmas, and that it is “a lie” to say that the Easter Bunny is responsible for the gifts under the tree (but it is “the truth” to say that the Bunny hides the eggs). In order to successfully employ these techniques, it is imperative that the defense attorney is comfortable talking with the child and can do so in a friendly, non-threatening manner.

It is almost never effective for the defense attorney to have the child repeat the story of abuse. Repeated questioning by the defense attorney runs the same risk of contamination as does similar questioning by the police or the prosecutor. However, it can be very valuable to have the child testify again only about the facts contained in the tale of abuse which cannot possibly be true. If the child’s story is inherently incredible, then it is possible for the defense attorney to reveal this to the jury by having the child repeat only the most unbelievable aspects of the story, and to then impeach the child’s testimony through an offer of independent proof. In the McMartin preschool case, there were allegations that animals were sacrificed in the schoolyard.⁷² In this type of case, the defense attorney can ask the child many leading questions prompting more and more outrageous claims: “There was a dog?” “And a cat?” “Three dogs?” “I bet there

⁷¹ For a more comprehensive discussion of these techniques see Laurie Shanks, *Evaluating Children’s Competency to Testify: Developing a Rational Method to Assess a Young Child’s Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in CLEVELAND L. REV. Spring 2011.

⁷² See *supra* note 50.

were 14 cats, is that right?” “And there was a pig?” “And they were all making lots and lots of noise?” “They were all burned up and buried on the playground?” A child who has learned to agree with a grown-up when asked leading questions will certainly mimic the behavior during trial. The defense attorney might subsequently call an investigator who has taken photos that demonstrate that there is no evidence of any burning or displaced grass in the preschool yard, thereby impeaching the child’s testimony that animals were sacrificed in the schoolyard.

Another example of how to effectively utilize only the most unbelievable aspects of a child’s story of abuse is found in the case of Danny T. There, the five-year-old claimed that she was anally raped in the living room of Danny’s trailer while her mother cooked in the next room. She testified that she screamed as loud as she could, but that her mother did not hear her. On cross-examination, I asked her to show us how loud she screamed. She let out a blood-curdling shout and then started to giggle. She had so much fun, I had her demonstrate again. She insisted that her scream was “exactly like” the one she used when “Danny hurt her.” When the mother took the stand, I asked her how loud she would have to speak if she was in the kitchen and wanted to get the attention of someone in the living room. She responded that “The walls are like paper. The way I’m talking now (in the courtroom); you can hear all through the trailer.” She confirmed that she never heard her child scream and, if she had, she would have immediately gone into the next room.

There are other techniques to illustrate to the jury the effects of suggestive or persistent questioning on a child. Annabelle Hall, a renowned criminal defense attorney from Reno, Nevada, perfected one such technique. She shows the child a simple picture that might be found in a coloring book, such as a farm scene. There might be two black horses, a spotted dog, three chickens, a red barn and a yellow duck. After allowing the child to study the picture for a few

moments, she projects it on a screen that can be seen by the jury but not the child. She then asks the child to “remember” what is in the picture. She starts with what is actually there. “Do you remember the horses?” The child nods or answers “yes.” “Do you remember the chickens?” “Do you remember the dog?” At each affirmative answer, Ms. Hall nods approvingly and smiles. She then adds things that are not in the picture. “Do you remember the blue bird on the horse’s head?” “Do you remember seeing the cat right next to the duck?” In most instances, the child will “remember” what is not there, as long as the adult asking the questions continues to nod and smile while suggesting the answer. This is a graphic demonstration to the jury about how easy it is to obtain information from a child that has no basis in reality but is grounded instead in the desire to please the adult asking the questions.

Similarly, it is possible to graphically demonstrate to the jury how a child can learn and repeat a story - even one that is quite detailed or complicated. This is important both to answer the jurors’ question of how a child could talk about sexual activity unless it actually happened, and to examine whether the child is capable of distinguishing fantasy from reality.⁷³

Most pre-school aged children know about Santa Claus, The Three Bears, and the Three Little Pigs. Once they are in grade school, they learn about George Washington, the First Thanksgiving, and Martin Luther King, Jr. Of course, what they know about both the fantasy (fairy tales) and the reality (the Civil Rights struggle) is what is taught to them by their parents or teachers. When they respond to questions about the temperature of the porridge in Papa Bear’s

⁷³ There are detailed examples set forth in Laurie Shanks, *Evaluating Children’s Competency to Testify: Developing a Rational Method to Assess a Young Child’s Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, publication forthcoming in the CLEVELAND L. REV. Spring 2011, for use in a competency hearing. The same techniques can be employed in front of the jury. They are particularly effective in helping the jury to ascertain whether the child has the developmental capacity to understand concepts of time and the difference between “pretend” and “real.”

bowl or the lunch counter in Atlanta, they are repeating parts of the story that they have learned.⁷⁴

There are child advocates who will testify that a child's story of abuse is credible if the child can add details or correct a misstatement about the event when asked for a narrative.⁷⁵ It is therefore imperative that the attorneys involved in the case understand that a child can also add details to a story that is not true if the child has learned or practiced the story. The fact that the child can offer that it was "baby bear's chair" that was broken by Goldilocks, or correct a questioner who suggests that it was "mama bear's chair," does not prove that the bears actually lived in the woods and were burglarized by a blond-haired miscreant. The child's ability to add accurate details or correct misstatements in a story does not render the entirety of the story, or more importantly, the material aspects of the story, reliable.

In some cases, the child has been asked to tell the story of his or her alleged abuse so many times that it is impossible to accurately determine credibility from the child's demeanor during his or her recitation of the events.⁷⁶ It is important for the jury to have information about the number of times that the child has been asked about the alleged abuse and about the effect such retelling may have on the child's demeanor and ability to independently distinguish what happened from what was suggested by the questioners. In the case of Danny T., I purchased a package of inexpensive markers and allowed each of the three children who testified to choose

⁷⁴ SHERRIE BOURG CARTER, *CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES* (2009).

⁷⁵ See generally John E.B. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, 14 U.C. DAVIS J. JUV. L. & POL'Y 1, 44-46 (2010); Thomas D. Lyon & Jonathan J. Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43 (1996); Dione Marie Enea, *Justice for Our Children: New Jersey Addresses Evidentiary Problems Inherent in Child Sexual Abuse Cases*, 24 SETON HALL L. REV. 2030 (1994).

⁷⁶ See generally Stephen J. Ceci, Maggie Bruck & David B. Battan, *The Suggestibility of Children's Testimony in FALSE-MEMORY CREATION IN CHILDREN AND ADULTS: THEORY, RESEARCH AND IMPLICATIONS* (David F. Bjorklund ed.) (2002)

their favorite color while they were on the witness stand. I had a large poster board on an easel and wrote the name of each person the child had talked to about the case along one side. As each child testified, I used his or her marker to make hash marks for each time the child spoke about the alleged abuse to one of the grown-ups identified on the board. After the child testified, I gave the marker back as a treat. By the time the third child finished, the jury had a very colorful demonstrative aid showing that the “story” of abuse had been practiced over 100 times by each of the children. I had an expert witness prepared to testify about the effect such excessive questioning would have in assessing the credibility of the witnesses.

It is also important for the jury to know whether the child was made any promises or given any treats to induce his or her testimony. A sophisticated adult co-defendant may know to plea bargain his testimony in exchange for a substantial reduction in his potential prison sentence, whereas a child might be willing to tell of abuse in exchange for a lollipop or ice cream cone. Often, the child simply wants to please the adult asking the questions and learns what the questioner wants to hear by virtue of what is being offered. For example, “Debbie was a brave girl and told us about Mr. Bob touching her private. If you are a brave girl like Debbie, you can have some Skittles. Will you be brave?” If the child says Mr. Bob did nothing, and the questioner frowns and tells her that she is “not brave” and withholds the treats, there is a great inducement for her to tell “what really happened,” even if it did not.

It is important for defense attorneys to educate the jurors about the susceptibility of children to suggestive questioning and the minimal degree of influence that is needed to shape the testimony of a young child. Utilizing the picture of the farm that was displayed for the jurors and kept out of sight of the child, the defense attorney can educate the jury by cross-examining the child in the following manner:

“Do you remember the horse?” The child nods. The attorney nods, beams and gives the child a sticker. “Do you remember the blue bird on the horse’s head?” (The one that is not there.) If the child hesitates, the attorney can add, “If you remember it, you can have another sticker.” The child remembers. Alternatively, the child can be told, “I played this game with another little girl and *she* remembered the bird. Do you remember it, too?”⁷⁷

As with other forms of impeachment, determining the witness’ reputation for truth is much more difficult with a child than an adult.⁷⁸ However, with older children, it is crucial to learn whether the child has a history of false accusations or of “making up stories.” If so, it is important to let the jury know so that they can use this information in determining credibility. Determining the child’s “community” for purposes of reputation evidence is also a challenge. In a recent New York case, the court held that the child’s family was her community and allowed testimony from adults in the family concerning the child’s propensity for lying.⁷⁹

⁷⁷ If there is an objection, it is important for the defense attorney to explain to the judge that he or she is not attempting to “trick” the child, but is demonstrating to the jurors how it is that the child can be led to say something that is not true because of improper questioning. The defense attorney should further explain to the judge that the jurors should be permitted to observe the child’s demeanor, when, as anticipated, the child testifies that there is in fact a blue bird in the picture the child will evince no indicia of untruthfulness because he or she will have come to believe (based on the questioning) that it is the truth.

⁷⁸ For more information on reputation evidence see e.g., *State v. Tucker*, 968 A.2d 543 (ME 2009) (holding that a trial court order excluding evidence of victim’s reputation for untruthfulness was not an abuse of discretion); NEW MEXICO R. EVID 11-405 (West 2010) (“A. Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct; B. Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person’s conduct.”). See generally Penny J. White, *The Art of Impeachment and Rehabilitation*, 13 PRAC. LITIGATOR 29 (March 2003) (“To prove untruthfulness by reputation evidence, a witness must be produced who can testify to his or her familiarity with the witness’s reputation for truthfulness and untruthfulness in the community in which the witness worked or lived. The reputation witness must be able to establish that he or she is in a position to know the witness’s reputation.”); James W. McElhaney, *Understanding Character Evidence; Four Ideas That Tie It All Together*, 79 ABA J. 76 (March 1996).

⁷⁹ *New York V. Fernandez*, 74 A.D.3d 1379 (3d. Dep’t 2010).

Counsel must also be wary of individuals present in the courtroom seeking to prompt or coach the child during his or her testimony. Often the child is accompanied to court by an advocate, a parent, or a guardian. While this might be comforting to the child, it is critical that the child's testimony not be influenced by the adult. The attorneys should place themselves in the courtroom so that the child cannot see any hand or head movements by the adult who may be trying to "help" the child answer the questions. This is most likely to occur in cases in which the adult has a vested interest in the outcome, for instance, when another parent or intimate is the person charged.

Irrespective of which trial techniques are utilized, the direct and cross-examination should not be conducted in a manner that compounds the stress that is an inherent part of the child's trial experience. Neither the prosecutor nor the defense attorney should ever underestimate the value of a measured tone and simple language when interacting with or questioning a child.

B. THE POLICE OFFICER

The direct examination of the police officer in cases involving allegations of child sexual abuse typically proceeds in the same fashion as it does in any other criminal case. The officer is questioned about his or her background, graduation from the police academy, work assignments, honors or achievements earned and any specialized training he or she has received. The prosecutor should elicit details about how the alleged crime came to the attention of the police agency (e.g. hotline report, child being brought to the station, phone call from an adult), and how the investigation was conducted, including who was interviewed, what physical evidence was collected, how and by whom the child was interviewed, and whether there was an audio or video

recording of the interviews. The officer should also be asked to detail any and all communications he or she had with the accused, whether any statements were made concerning the alleged abuse, and the constitutional protections that were provided to the accused.⁸⁰ If the police made any recordings, then the jury should be permitted to listen to the recordings with any redactions that may have been ordered by the court.

The prosecutor should demonstrate to the jurors the thoroughness of the investigation that was done. The police officer should describe the witnesses that he or she contacted, whether the child was taken for a medical or psychological examination, and what physical evidence was secured. In addition, the police often have video recordings or photographs of the scene that can be shown to the jury.

The cross-examination of the police officer may be used to highlight mistakes that were made in the investigation such as the improper or excessive questioning of the child. Conversely, the cross-examination may be used to bring to the jury's attention examples of *what wasn't done* that should have been done to insure the integrity of the investigation. The following sample questions might be used during cross-examination to elicit testimony about omissions by law enforcement during the investigation of a child sexual abuse case:

You trained in the police academy?

They taught you that sometimes people lie to the police?

⁸⁰ For information concerning authorized communications between police and the accused, specifically with respect to *Miranda* warnings see *Dickerson v. United States*, 530 U.S. 428 (2000); *Miranda v. Arizona*, 384 U.S. 436 (1966) (a suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”). See generally Victoria Newnham Matthews, *Miranda Rule Is A Constitutional Rule: Dickerson v. United States*, 27 AM. J. CRIM. L. 421 (2000); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996).

Sometimes people say things to get other people in trouble?

It is important to investigate to determine the truth?

It is important to see whether the physical evidence supports the witness' account of what happened?

You learned to collect physical evidence?

You learned to have it tested?

You learned to take measurements and photographs?

In this case you didn't go to the trailer?

You didn't take any photographs?

You didn't look under the bathroom door?

You didn't check to see whether the story the boy told you was true?

You could have done that?

It would have only taken a minute or two?

You would have learned that the physical evidence did not support the story that you were told?

The police officer should also be questioned about the number of similar cases he or she has investigated and what type of training he or she has received. If the officer is a member of a "special victims' unit," it is critical to determine whether the office or unit has a policy of "believing" the "victim." While a child who has been sexually abused is certainly a victim, attaching such an appellation prior to the completion of a thorough investigation can cause the investigation to be truncated and lead to a miscarriage of justice.

The police officer can also be questioned about other witnesses and aspects of the case. For example, if the child's mother brought her to the police station, it is important to learn

whether the police questioned the mother to determine if there is a pending divorce or other motive for the mother to encourage the child to fabricate an allegation of abuse. If it is determined that the child has a chaotic home life, with many adults and children living in close quarters, then defense counsel should explore with the police officer the possibility that the child was abused by someone other than the person charged. Similarly, if it is determined that the child had access to pornographic magazines or videos, then defense counsel should highlight this information during cross-examination of the police officer in an effort to provide the jury with an alternate reason why the young child knows about sexual activity. This is particularly important if defense counsel believes that the home life of the typical juror does not include access to similar types of adult material.

C. CHILD PROTECTIVE SERVICES WORKERS

The direct examination of the child advocate or child protective services worker is similar to that of the police officer. The witness should be asked to detail for the jurors how the child came to the attention of the agency and what investigation was done to determine the facts of the case. Sample questions might include the following:

Who made the initial referral?

What questioning was done of the child?

Are there any recordings?

Did the child's recitation change over time?

Were there any witnesses?

Is there a possibility that other victims exist (as in the case of a pre-school, scout leader or priest)?

Was the accused contacted?

Was a medical examination of the child performed?

If so, what are the results?

The cross-examination of the witness should explore the culture and policies of the department and the individual experience of the worker. Does the office keep records as to the number of cases of suspected abuse which are “unfounded” or determined to be untrue? Is there a policy to “believe” any allegation?

One particularly pernicious aspect of an abuse investigation concerns the effect of a denial by the alleged victim that the abuse took place. Again, it is instructive to consider the consequences of a denial or recantation in other types of serious felonies. Imagine if a police officer asked a group of adults whether anyone had been hurt in a car accident or had been the victim of financial fraud. Those who denied being injured would cease to be part of the investigation absent a showing of coercion on the part of the suspect. An adult who accuses another of a misdeed and later recants may himself or herself be prosecuted.⁸¹ At the very least, it is unlikely that a prosecutor would go to trial on a case in which the star witness either changed his or her story dramatically or maintains at the time of trial that no crime was committed.

Unlike other types of serious felonies, the denial or recantation by a child of allegations of sexual abuse seldom presents a roadblock to prosecution of the case. One reason for this is that “Child Abuse Accommodation Syndrome” or “Post Traumatic Stress Syndrome” may be used by the Child Protective Services worker or psychologist to argue that the child’s delay in

⁸¹ See e.g., Jamie Schram & Leonard Greene, *WABC Weather Gal in 'Rape' Lie: Cops Heidi Jones Charged with Making up Assault Tale*, N.Y. POST, December 15, 2010, available at http://www.nypost.com/p/news/local/wabc_weather_gal_in_rape_lie_cops_Dt6rDzCTktzVPJ049g2Y10#ixzz19Pvdws00 (highlighting a recent case where a local newscaster was charged with making a false statement after claiming she was raped); Sean Webby, *DA Won't Charge San Jose Sub Teacher Accused of Sex Assaults in Classroom*, SAN JOSE MERCURY NEWS, December 23, 2010, available at http://www.mercurynews.com/crime-courts/ci_16931774?nclick_check=1; Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2009) (citing the example of the Duke lacrosse case).

reporting, modification of his or her story, or recantation of the allegations constitutes evidence that the abuse occurred.⁸² The jury must be made aware of the limitations of this “up is down” and “down is up” testimony if it is not supported by independent witnesses or physical evidence. Cross-examination can be used to point out the inherent deficiencies of these explanations. An example of such a cross-examination might include the following sequence of questions:

So, if the child tells right away that she was abused, that is a credible sign of abuse?

Yes.

And, if she doesn't tell right away, if she delays, that is a credible sign of abuse?

Yes.

And, if she maintains the story of abuse over time, that is a credible sign of abuse?

Yes.

And, if she adds information over time, that is a credible sign of abuse?

Yes.

And, if she recants completely, and says she made it all up, that, in your mind, is further evidence that the abuse actually occurred?

Yes.

So, if she says it happened, you still believe it happened?

Yes.

⁸² See generally Rosemary L. Flint, *Child Sexual Abuse Accommodation Syndrome: Admissibility Requirements*, 23 AM. J. CRIM. L. 171 (1995); Cara Gitlin, *Expert Testimony on Child Sexual Abuse Accommodation Syndrome: How Proper Screening Should Severely Limit Its Admission*, 26 QUINNIPIAC L. REV. 497 (2008); Dara Loren Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 932, 939 (1999).

And if she says it *didn't* happen, you still believe it happened?

So, in other words, once you make up *your mind*, there is nothing that will change it?

(This last question may be best left for closing argument.)

D. Medical Personnel

The simplest cases of child sexual abuse are those in which there is clear medical evidence of abuse - a young child has contracted a sexually transmitted disease or there is significant vaginal or rectal tearing. In that type of case, the only issue may be who committed the abuse, not whether there was abuse. Most cases, however, are not so easily categorized. The medical evidence may be non-existent, as in cases where it is alleged that fondling occurred or that the child was forced to perform oral sex, or the evidence may simply be ambiguous.

The prosecutor should obtain all of the medical records of the child to determine whether abuse can be demonstrated by the medical witness. It is important that the witness know the physical condition of the child both before and after the alleged abuse, whether the child receives regular and appropriate medical care and whether there have been previous allegations of abuse.

If there is no unambiguous evidence of abuse, the medical witness may still be able to testify to findings that are "consistent with" abuse, such as redness or the absence of a hymen in a young girl. The witness should be prepared to explain the finding in clear terms for the jurors and to use charts or photographs to illustrate the testimony.

During cross-examination of the medical witness, the defense attorney must be prepared to explore other explanations for the witness' findings. This is particularly important in cases in which the medical findings are ambiguous. The jurors need to know what other events or

conditions are also “consistent with” the medical findings, such as masturbation, lack of frequent bathing, or ill-fitting clothing.⁸³

The prosecutor and defense attorney should also scrutinize any other symptoms of trauma that the child has allegedly displayed. Some useful questions might include the following:

Is the child having nightmares?

Wetting the bed?

Doing badly in school?

Acting inappropriately?

If testimony is elicited which establishes that the child suffered symptoms of trauma, then it is necessary to identify the timing of the symptoms. Did the symptoms appear during the time frame of the alleged abuse or after the child was questioned about the abuse? Is the child reacting to the stress of the situation or the distress of the adults surrounding him or her? Is the child experiencing nightmares because of the abuse or are the nightmares normal occurrences for a child of that age?

XIV. Defense Witnesses

A. The Accused

There is perhaps no person in the world more terrified of testifying than an innocent person accused of sexually abusing a child. He or she has lived through the trauma that the accusation itself brings. Many accused individuals have spent months incarcerated. Even those out on bail may have lost their jobs or may have been prevented from seeing their children.⁸⁴

⁸³ See *supra* note 32.

⁸⁴ As an example of statutory conditions of bail when charged with sexual abuse of a child see N.C. GEN. STAT. ANN. § 15A-534.4 (West 2010)

(a) In all cases in which the defendant is charged with felonious or misdemeanor child abuse, with taking indecent liberties with a minor in violation of G.S. 14-202.1, with rape or any other sex offense in violation of Article 7A, Chapter 14 of the General Statutes, against a minor victim, with incest with a minor in violation of G.S. 14-178, with kidnapping, abduction, or felonious restraint involving a minor victim, with

Just as traditional cross-examination techniques are often ineffective in this type of case, standard defenses are also problematic. An obvious example is the alibi defense. In most criminal cases, the prosecutor is required to allege that a criminal act took place at a specified time and in a specified place. Thus, if the person accused can demonstrate to the satisfaction of the jury that he or she was in another place at the time the offense is alleged to have been committed, the case falls and the jury must acquit.

In cases involving child sexual abuse, wide latitude is permitted in the crafting of charging documents. Courts have come to recognize that children often possess a limited ability to understand dates and times, and have thus held that an indictment will not be dismissed as defective when it contains a description of the dates and times of the alleged offense that is “reasonably precise under the circumstances” to provide defendant with “adequate notice of the charges against him.”⁸⁵ A typical description of the time of an alleged offense in an indictment

a violation of G.S. 14-320.1, with assault or any other crime of violence against a minor victim, or with communicating a threat against a minor victim, in addition to the provisions of G.S. 15A-534 a judicial official shall impose the following conditions on pretrial release:

- (1) That the defendant stay away from the home, temporary residence, school, business, or place of employment of the alleged victim.
- (2) That the defendant refrain from communicating or attempting to communicate, directly or indirectly, with the victim, except under circumstances specified in an order entered by a judge with knowledge of the pending charges.
- (3) That the defendant refrain from assaulting, beating, intimidating, stalking, threatening, or harming the alleged victim.

⁸⁵ See *People v. Morris*, 61 N.Y.2d 290 (1984). In *Morris*, the Court explained that “although an indictment that specifies the date and time when an offense occurred would be preferred, such precision is not always necessary. An indictment will not be dismissed as defective under CPL 200.50 with respect to the time period alleged for the commission of a crime, if it or, in some instances, the bill of particulars provides a reasonable approximation, under the circumstances of the individual case, of the date or dates involved. Here, the indictment charging that defendant sexually abused two young girls was reasonably precise under the circumstances, notwithstanding that the crimes were alleged to have been committed within a 24-day period.” *Id.* at 292. See also *People v. Franks*, 35 A.D.3d 1286 (2006) (“In view of the age of the victim and the date on which she reported the crimes, we conclude that the one-month and two-month periods specified in the indictment provided defendant with adequate notice of the charges against him to enable him to prepare a defense.”).

might read, “the summer of 2009” or “during the month of December, 2010.” As a consequence, it is extremely difficult for the accused to account for his or her time during these broad and often vague periods of time specified in the charging document as to when and where the offense is alleged to have occurred.

The accused must be prepared to answer when the prosecutor asks whether he or she believes the child is lying. The accused may be put in the position of calling an adorable little child a liar and alienating the jury. If the child is a teen, the jury may be more inclined to believe the accused. With a younger child, the accused may have to explain why he or she believes the child is saying something that is untrue but that the child has come to believe.

B. Expert Witnesses

Although the defense is not obligated to testify or produce witnesses, as a practical matter, it may be essential in cases involving allegations of child sexual abuse.⁸⁶ If the defense wants the jury to understand the concepts of contamination, suggestive questioning or how a child can come to believe that he or she has been abused when the alleged abuse did not in fact occur, expert testimony as to these concepts will be indispensable. Of course, if defense experts testify, the prosecutor should have his or her own expert to counter that testimony or to buttress the testimony of the prosecution witnesses.

CONCLUSION

As participants in the criminal justice system, we must learn to approach cases involving allegations of child sexual abuse in a rational and balanced fashion. Neither an unquestioning

⁸⁶U.S. Const. 5th Amend. (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

belief of every accusation nor a rejection of each claim is the appropriate approach, and each fails to fulfill our obligation to our professions and our community. A rational and balanced approach must be adopted by each group charged with upholding the Constitution – the police, prosecutors, criminal defense attorneys and the judiciary. It is the hope of this author that if each group does its part, those who are guilty of these crimes will be punished while innocents, whether children, the accused, or both, are protected.

WHOSE STORY IS IT, ANYWAY? – GUIDING STUDENTS TO CLIENT- CENTERED INTERVIEWING THROUGH STORYTELLING

LAURIE SHANKS*

Persuasively telling a client's story is vital to meaningful and successful representation. This article explores both the challenges facing students as they try to master this skill as well as the challenges of teaching this skill through the lens of one simple exercise. This exercise has proven extremely effective in teaching law students critical lessons about client-centered interviewing. Conducted effectively, and coupled with directed discussion, the exercise has also been invaluable for teaching client-centered representation, interviewing techniques, attorney-client confidentiality and the impact of demographics on the attorney-client relationship. Through their experience with the exercise, each of these concepts acutely resonates with the students. By completing the exercise, law students come away with a commitment to telling their clients' stories, and the skills needed to do it well.

“My job is to tell my client's story, and to do that I really have to get to know him.”¹

I. INTRODUCTION

“How to hear” is what I teach. It isn't easy. Law students don't know how to listen to a client's pain, fear, anger or despair. Such a connection isn't lawyer-like, they feel, or goes against the “issue, rule, analysis, conclusion” format drilled into them in their first year courses. Early in their law school experience, many students are consumed by the competitive academic environment—concerned exclusively with their grades, their future careers, and their present life

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¹ Lieutenant Commander Charles Swift, Attorney for Salim Hamdan, a Yemeni citizen declared an “enemy combatant” and incarcerated at Guantanamo. Swift successfully argued that Hamdan should have access to the court system in the U.S. Supreme Court, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES, June 13, 2004 (Magazine), available at <http://www.nytimes.com/2004/06/13/magazine/13MILITARY.html?ex=1402545600&en=506e105e040960d9&ei=5007&partner=USERLAND>.

choices and challenges. For almost twenty years, I have sought to overcome these barriers. My goal is to change the students' focus to the client, to hear what the person across the desk, in the chair, or behind the lock-up bars is saying – what her story is, and what that story says about her and the law.

The need to listen empathically can be difficult even when the client is similar to the student. The problem is even more challenging if the client is “different” as defined by race, ethnicity, gender, age, economic background, or sexual orientation. It is also daunting if the client is accused of doing something “bad” such as committing a crime, particularly if the crime is considered especially reprehensible, such as assaulting or sexually molesting a child. Add to that issues of mental illness, drug addiction or mental retardation, and the project is harder still. It is often in the context of the initial client interview that these issues first manifest themselves.

Many practitioners, even experienced ones, are unable to meet their clients' needs. While more confident than law students, experienced lawyers often have a limited view of what is required for comprehensive representation. Practitioners commonly concentrate primarily on attempting to obtain the type of information they will need to draft legal pleadings or prepare for trial, while ignoring the skills necessary to establish a relationship with the client, even when they acknowledge and can articulate the importance of such a connection.

In teaching my law students, I want to produce lawyers who do better than this. I draw on my experience and have developed techniques to train law students to become client-centered attorneys from the start of their careers. This article describes one example I have used to teach the skill of client-centered interviewing. I have developed an exercise that I call “Whose Story Is It?” which requires students to learn for themselves what it means to be both a lawyer and a client. At the beginning of a trial practice course, students learn that the essence of the trial is the lawyer telling the story of another (the client) to the judge or jury. The exercise makes the concepts of confidentiality, self-disclosure, diversity, and theory and theme at trial come alive.

There are many barriers preventing attorneys from approaching their practice in a client-centered way, but there are techniques which are successful in teaching students and practitioners alike to confront these barriers. The exercise described in this article was developed as a tool to bring law students out of the competitive academic world and instill in them the value of truly listening to their clients. It is also useful to practitioners who must remember the importance of client-

centered interviewing, a skill which can get lost in a busy practice.

II. RAPPORT BUILDING HURDLES: “THE DEPARTMENT OF MOTOR VEHICLES (DMV) INTERVIEW”

In addition to law school teaching, I teach nationally at Trial Practice Institutes² and CLE seminars. Some of these programs are broad-based state bar sponsored events, attracting civil and criminal defense practitioners in public and private practice; several are limited to criminal defense attorneys. Many of the attendees at these training programs are attorneys in Public Defender offices or those who handle a significant number of court-appointed cases in which they represent indigent persons facing criminal charges.

Client interviewing is a standard skill taught at Trial Practice Institutes. Generally, each lawyer/participant is asked to do a mock interview of an actor who is playing a client charged with a criminal offense. The actors are experienced professionals who are briefed on a simulated case and who stay in character throughout the exercise. The actors are given specific direction concerning the reactions and emotions they should express about various topics that are likely to come up during the interview.

The actors hired are various ages, races and ethnicities and play clients from different economic and educational backgrounds. Some are told to express pre-conceived notions about an attorney’s abilities based upon age, experience, or whether the attorney is court appointed or privately retained. Some actors are instructed to exhibit signs of depression or other mental illness or to be fixated on one issue confronting them, such as potential job loss, what happened to their car when they were arrested, or whether their attorney believes in their innocence.

Participants at the Trial Practice Institutes are asked to assume that they are meeting their client for the first time and are told to start the exercise by explaining what it is they wish to accomplish during the interview. Experienced lawyers tend to state their goal as “establishing rapport” by “gaining the trust” of the client. They understand that making a personal connection with the client is essential if they are to be successful in the subsequent representation.

Once they state their objectives, each attorney is given ten or fifteen minutes to meet with the “client” while the other members of the

² I have taught each summer for the past 19 years at the National Criminal Defense College (NCDC). The College attracts criminal defense practitioners from across the nation for intensive hands-on instruction and practice. The College is housed at Mercer Law School, Macon, Georgia under Professor Deryl Dantzer, Distinguished Professor of Trial Advocacy, Dean of NCDC, and Director of Trial Practice.

trial practice group and the faculty members observe the interaction. The actor/client responds to the attorney according to the instructions he or she has been given and stays in character throughout the exchange.

Of course, having and stating a particular goal does not mean it is attainable. Often an attorney's desire to establish rapport or gain trust does not translate into making such a connection. At the conclusion of the exercise, when the actors are asked, in character, how they feel about their attorney, the majority of them respond, "He doesn't care about me," "She doesn't believe me," or "If I had money, I could hire a good lawyer."

Why the disconnect? The lawyer wanted to connect. The client wanted to connect. Yet, there was no bridge. The explanation, quite often, is the common experience of something I call "The Department of Motor Vehicles Interview" ("DMV Interview"). In attempting to analyze the problem of lawyers who want to establish rapport and trust in the attorney-client relationship but nonetheless fail to do so, I have been struck by one consistent observation. Virtually every attorney I have observed, from brand new lawyers to those with twenty years experience, initiates the attorney-client relationship with the "DMV Interview."

The "DMV Interview" has defining props: a legal pad or folder and a pen. The attorney sits down, pen in hand, almost always across the table from the client, and places the pad on the table. Some attorneys put the pen down in order to shake the client's hand, but a very high percentage cling to the pen from the moment they walk through the door to the moment the two part company.³

This interview generally starts in one of two ways. A substantial number of attorneys do not even tell the client their name or office affiliation before launching a pre-set series of questions. Another group of lawyers gives a "speech" at the beginning of each interview, explaining confidentiality in the attorney-client relationship and the nature of the charges or the legal difficulty they believe the client is confronting. These lawyers then proceed to the same set of questions that the first group asks.

The questioning by the lawyers is primarily aimed at gathering the client's personal identifying information. The questions generally follow this pattern: "What is your name?" "Address?" "Date of birth?" "Social security number?" "Are you married?" "What is your spouse's name?" "How many children do you have?" "What

³ I hope in the new technological age that the DMV Interview is not newly defined by the use of a laptop computer or a "BlackBerry," either of which will create equal or more distance between the attorney and client than the pen and paper.

are their names and ages?” “Are you employed?” “Where?”

Rarely does the lawyer explain to the bewildered or apprehensive client why the questions are important or how the answer will be used. Typically, the lawyer’s eyes are focused on the legal pad as he or she writes down the responses, with darting glances toward the client’s face only as the next question is being asked. The lawyer is oblivious to a client’s rolling of the eyes, slouching in the chair, and stiffening of the jaw and arm muscles. Downcast eyes, tearing, and hand wringing are easily missed.⁴

More significantly, the script rarely changes even when the client changes. The client’s essential identity seems to have no impact on the questions asked or the “speech” delivered. Whether the actor playing the client is the same or a different race than the attorney, older or younger, exhibiting signs of mental illness, or has been told that, for the purposes of the exercise that he/she is illiterate or has a college education, the type and manner of the attorney’s questioning remains virtually the same.

Complex legal terms, such as indictment, bail, information, discovery, and predicate offenses are used without explanation or an attempt to determine the client’s level of understanding.⁵ Persistent questions by the “client” about eviction, job loss, or other matters not considered relevant by the lawyer are generally ignored or met with irritation or explanations that those matters will be addressed at a “later” unspecified time.

When they listen to the actors being questioned afterward, the attorneys are dismayed to learn that their “clients” have a negative view of the initial interview. They are also defensive about the need

⁴ I teach each summer at the New York State Defenders Basic Trial Skills Program, a program developed specifically for public defenders in their first years of practice. It is a very innovative program, in which each group of participants is “coached” by a team of instructors which includes both an experienced attorney and an actor or communication expert. These non-lawyer team members provide invaluable feedback to the participants about the “clients” in terms of their non-verbal communication and reactions to their attorneys. They point out the missed cues and discuss their significance, for example the downcast eyes may be the result of embarrassment or may signal the need to explore more serious considerations such as depression. Sensitivity to cross-cultural and economic disparity issues is stressed throughout the week-long program.

⁵ See generally STEFAN H. KRIEGER & RICHARD K. NEUMAN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, AND PERSUASIVE FACT ANALYSIS* 262 (Aspen 3rd ed. 2007) (providing examples of how lawyers frequently miss verbal cues and body language from clients and how that can work against the development of a trusting attorney-client relationship); see also Gay Gellhorn, Lynne Robins & Pat Roth, *Law and Language: An Interdisciplinary Study of Client Interviews*, 1 *CLINICAL L. REV.* 245 (1994) (emphasizing the role of language and clear communication in establishing a trusting attorney-client relationship). The actors at the Trial Practice Institutes provide strikingly similar feedback when asked about the interview. They note that some attorneys never made eye contact, didn’t explain legal terms, or failed to listen to their concerns.

to quickly obtain demographic information.

I can't help him unless I know something about him.

I only have ten minutes to see him in lockup.

If she wants to get out on bail, I need to know whether she has a job or not.

How will I know how strong the case is if I don't ask any questions?

The attorneys are also quick to place any blame for lack of rapport on the client or “the system,” and express such sentiments as:

I work my butt off for these guys and all I hear is that they want a 'real lawyer.'

I feel sorry for her, but the only way she is going to see her kids is if she cooperates with me.

I'm an attorney, not a social worker.

Our office isn't allowed to go to Family Court and that's all he wanted to talk about.

How am I supposed to know if someone is mentally ill?

The Judge is going to be on the bench in twenty minutes; if I'm not ready, I'm in big trouble.

When I go to the jail I have ten guys to see; I don't have time to hear a sob story from every one of them!

These are typical reactions of experienced attorneys when presented with the dilemma of the need to quickly obtain information and establish rapport with their clients. The “DMV Interview” helps to explain this dichotomy between the lawyer wanting and needing to obtain information from a client and that client’s negative perception of the attorney as a result of the interview process. I use the DMV concept to help train attorneys to fulfill their goals of establishing rapport and trust with the client, while still eliciting the information they require.⁶

After the actors have left the room, I ask the lawyers to reflect for a few moments on who they are and where they stand in society. Although many of the lawyers I teach are young public defenders, and are therefore poorly paid in comparison to successful corporate attorneys and other attorneys in private practice, in a more global context they are all quite privileged. By definition, they have succeeded in undergraduate and law school, have passed the Bar exam, and have jobs. In addition, although some come from impoverished backgrounds, many acknowledge they are privileged in a more absolute

⁶ See generally Linda F. Smith, *Client-Lawyer Talk: Lessons From Other Disciplines*, 13 CLINICAL L. REV. 505 (2006) (illustrating the importance of establishing trust with clients throughout the interview as a cooperative conversation).

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Whose Story Is It, Anyway?

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sense, having grown up in a middle or upper class family, having acquired a graduate degree, being a member of a profession, having a support network, and the like.

After discussing their relative prosperity and professional status, I ask the attorneys, “When was the last time that someone asked you the types of questions you asked your client in the exercise? When was the last time you were asked a series of pedigree questions like the ones you just asked?” The answers vary, “When I applied for a passport.” “When I filled out the application to come to the Trial Practice Institute.” “When I was getting a loan for my house.” “I just moved and had to re-register to vote.” “I bought my first car.”

I ask the attorneys what all of the answers have in common. Rarely do any of the lawyers see any connections. I point out that when privileged people are asked such questions, they consider them routine, even boring, and answering the questions typically results in something positive, e.g. obtaining a passport, renewing a driver’s license, approval of a home loan, registering to vote in the next election.

Our discussion moves to the other set of interactions where this questioning is common, which happen to be more often the experience of poor people: when probation is revoked, food stamps are denied, children are removed from their home, warrants are executed, family members are arrested, evictions occur, deportations are initiated. And who asks these types of questions? Federal, state, county or city employees with forms to fill out. These are officials who may be viewed by the clients as bureaucrats, at best, and bullies, at worst. They are police officers, probation officers, immigration officers, and social services workers. They are certainly not individuals whom the clients trust as their advocates.

How are these questions that result in terrible things happening to future clients of the students and practitioners asked? Generally, in the same rapid-fire manner, with little or no intonation, little or no reaction regardless of the answer, and with little or no eye contact, smiling or other non-verbal acknowledgment. And always, bingo, with a pen and paper on a desk in between the questioner and the client.

I then ask the attorneys to view their behavior from the client’s point of view. Why would their client have reason to believe that the attorney was any different from the police officer or probation officer? In fact, how would the client even know who the attorney was or why he or she was asking the questions? Was an introduction made? Was an explanation given? Why were the questions asked? Who would see the answers that were written on the pad of paper?

The lawyer knew what was necessary to open the file or to prepare the bail application, but how could he assume that the client would understand that?⁷

For those lawyers who begin the interview with a prepared speech about confidentiality and the nature of the proceedings, I ask how they can gauge their client's level of understanding. Do they know if English is their client's first language? If their client is literate? What their client's level of education is? Do downcast eyes signify understanding, mere acquiescence, or acute embarrassment? Are twitching limbs a sign of nervousness, mental illness or drug withdrawal?

If experienced practitioners, attempting to establish rapport with their clients, consistently use a technique that does exactly the opposite of what they intend, there is a need to teach them a more effective method. As a law school professor, however, I want to do more. I do not want to wait until I observe practitioners doing it "wrong" to help them learn a better way.

Law students require effective client interviewing skills *before* they become practitioners.⁸ If lawyers are to be client-centered from the moment they begin their careers, both in their clinical work and when they graduate, the law schools must provide this training.⁹ The storytelling exercise I have developed, "Whose Story Is It?" guides students from the DMV Interview to Client-Centered representation.

III. TEACHING RAPPORT BUILDING: THE STORYTELLING EXERCISE

Twenty-four students enroll in my trial advocacy course each year. Each week, all students in the course attend a one hour lecture. In addition, each student is assigned to one of two afternoon lab sections of twelve students which meet for a two-hour period each week.

The first class of the semester is a lecture in which I explain the

⁷ In preparing a bail application in New York state, for example, an attorney must include the following information: "(a) . . . the court must, on the basis of available information, consider and take into account: (i) The principal's character, reputation, habits and mental condition; (ii) His employment and financial resources; and (iii) His family ties and the length of his residence if any in the community; and (iv) His criminal record if any. . ." N.Y. Criminal Procedure Law § 510.30 (McKinney 1970).

⁸ See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006). See also DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH (West 1977) (discussing the value of client centered representation).

⁹ See generally JAMES W. McELHANEY, McELHANEY'S TRAIL NOTEBOOK (American Bar Association 4th ed. 2005) (1981) (providing a comprehensive tool for students and trial attorneys alike). See also THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION (Aspen 2004).

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class requirements and describe how the course will be structured throughout the semester. I then introduce the concepts of “Theory and Theme” in trial advocacy and briefly discuss the various aspects of trial work (*voir dire*, opening statements and closing arguments, direct and cross-examination) that will be covered in the course. Other than a few questions (usually regarding grading) the students tend to listen attentively, assiduously taking notes, and focusing almost exclusively on me.

I then tell the students that I would like them to separate into two groups on different sides of the room based upon their afternoon lab group assignment. Once they are in their groups, I ask them to pair off with another student. I tell them to choose someone that they did not know previously. Once the students have paired up, I give them these directions:

I would like all of you to take a few moments to think of something that has happened to you that changed your life. It must be something that does not relate to law school or why you came to law school. When I am finished speaking, I want each pair of you to find a quiet space in this room, away from the other students.

Once the students have selected a partner and rearranged the chairs to allow space between each pair, I give the following additional directions:

Decide who will go first. That student will tell his or her partner about his or her experience. You will have about ten minutes. When the time is up, I will say ‘switch.’ The other person will then have an opportunity to tell about his or her experience. After another ten minutes, I will say ‘stop.’

After a few blank looks, moans, and some nervous laughter, the students begin to talk with their partners. Within a moment or two, they are all quite engrossed in the exercise. Some students are wildly gesticulating with their hands, appearing to act out events, others are obviously telling humorous stories replete with laughter and groans, and still others have leaned in close to one another and appear almost grim.

I can observe some students listening intently, without interruption, as their partner tells a story. Other students appear to be asking questions or commenting on what they are hearing. I have never seen a student take out a pen and paper and take notes on the story that they are hearing. The students all choose to sit side by side or on chairs facing one another with nothing between them. Some of the

students touch one another during the course of the exercise.

During the exercise, I either stay in a part of the room away from any of the student pairs or leave the room, returning to give the “switch” and “stop” directions. At the conclusion of the allotted time, I dismiss the students.

I next see the students when they meet for their afternoon lab section. Once they have taken seats, I greet them and then call on one student. “Joe, who was your partner during the lecture class? Kathy? OK, please go to the front of the room and tell us Kathy’s story.”¹⁰ I then take a seat with the students, and participate only to call on each student in turn. I give no further direction to the students until all of the stories have been told.

A. *The Stories*

The stories run the gamut from childhood misadventures, to “how I met my husband,” to brushes with death. Some are mundane, some inspiring, some excruciating. Students discuss childbirth, sexual abuse, and acts of heroism performed or witnessed. There are stories about parents, spouses, children, “coming out” sexually, religion, travel to foreign countries and trips to an amusement park. There are stories that take only a few minutes to tell and stories that take much longer than the students spent in their pairings. Most of the students are surprised that the exercise is something more than a “get to know you” party game. When called on, a few say, “I’m afraid I’ll forget something,” or “Can I tell about my own experience instead?” Some appear to be embarrassed or concerned at sharing another’s story, but no student has ever refused the direction to tell the story. Nor has any student requested that his or her story not be told. A few students have said, “Why didn’t you tell us that we would have to do this?”

Although all of the students comply with the direction to tell their partner’s story, some are obviously uncomfortable in the front of the room, others at ease. Most of the stories are told in the third person, but occasionally a student will use the first person. Often a student will “check facts” with his or her partner, e.g., “your sister’s name is Susan, right?” Sometimes the student whose story is being told will interrupt the “teller” to correct facts or add details.

Often the teller will add his or her own interpretation of the event, even going so far as to directly contradict how the participant in the story related it. For example, one student’s story was a poignant one of rejection experienced during his childhood. The teller expressed it this way,

¹⁰ All of the students’ names have been changed for use in this article.

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Robert told me that it didn't bother him that these boys weren't his friends anymore, but I don't think that is true. I think the fact that he told me about it so many years later means that it affected him deeply.

Another student said,

I could tell how much Tamara admired her sister and how she wished she could be as brave as Rachel was.

The teller often speaks directly to the person about whom the story is being told. Other students make almost no eye contact with their partner and still others tell the story directly to me, essentially ignoring their partner as well as the other students in the class.

Many of the students add their own experiences and emotional reaction to the story they are telling.

Brian told me that his father was his hero growing up. He told me how much he admired the fact that he fought in Viet Nam. I could understand that because I always thought my father could do anything. He didn't fight in a war, but he taught me to stand up for what I believed.

Some of the students will “act out” the story, pretending to be in the car speeding down the highway or in the hospital room. Others will acknowledge the skill of their partner in describing the experience,

When she told me how she felt when the baby came out, I started crying because it was so real.

A few of the students will explicitly cite a “lesson” from the story, usually at the end of their recitation.

What I learned from John was how important family is to him.

Others will begin with a theme,

Karloff told me about how he learned to swim - the hard way!

One student even intoned,

The moral of this story is: “Be careful who you trust.”¹¹

¹¹ See generally Phillis Gershator, WISE. . . AND NOT SO WISE TEN TALES FROM THE RABBIS (Jewish Publ'n Soc'y 2004) (illustrating the traditional use of storytelling to teach religious and moral lessons). See also Heather Forest, WISDOM TALES FROM AROUND THE WORLD (August House, Inc. 1996) (highlighting the diversity of cultures which historically

The student paused dramatically before pronouncing the moral to insure the class was listening and would absorb the “lesson.”

Many of the students give their impression of the story and/or their partner. Often, these observations contain a comparison with themselves:

I think Nancy is one of the most courageous people I have ever met. I can't believe that she started law school while she was receiving chemotherapy. And she has two kids to take care of. I can barely take care of myself, and I still call my mom almost every day.

Often, the student whose story is being told will look down at his or her desk while the story is being told, but will look up when it is over and thank the teller of the story. If it is a sad or heroic story, others in the class may comment during or immediately after the story is told. It is not unusual during humorous stories for the men in the class to “high five” the subject of the story for a daring or clever act described in the story. Twice, women students have asked their classmate to show a picture of the baby whose birth story was told.

B. *The Aftermath*

Once all of the students have had an opportunity to tell their partner's story, I lead a discussion of the exercise. Although there is no assigned seating in the class and the students are given no direction as to where they should sit, most of the partner pairs are sitting together during the lab. I first simply ask them to notice and to think about why they chose to sit next to their partner in the exercise and whether they had ever before sat next to this person in a class.

I then bring them back to the class during which they shared their stories and ask the following questions:

1. How did you choose your partner?
2. Was it someone you knew before?
3. Was your partner the same gender?
4. Was your partner the same race?
5. Are you and your partner similar in terms of age?

I next ask the students who “went first” in telling their story and how they decided on which of their life stories to share. Did they choose their most important story? The easiest to tell? A funny one? One that showed them in a good light?

I follow up these questions by asking whether they believe that

use of stories to pass on lessons to future generations).

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their choice of stories was in any way influenced by the characteristics of their partner. In other words, would they have picked another story if their “audience” was another woman as opposed to a man, a person of a different race, an older or younger person, or if they knew the entire class would hear the story? Because I discuss issues of race, gender, and age, as well as power and status throughout the semester, this is an opportunity to let the students know that we all make demographic observations and that it is not only appropriate, but necessary, to discuss these factors and their impact on our behavior.

I ask each student to think about how they wanted their partner to feel about them as a result of the story they chose to tell. Did they want the other person to like them? To respect them? To feel sorry for them? To learn about their values? Their background?

I then turn to the students who told their story “second.” I ask them whether they changed the story that they had planned to tell based upon the story that they heard. Did they “mirror” the first story in subject matter or tone? For example, if the first story was “how I met my husband,” did the student then tell how she/he met his/her partner? If the first story was light-hearted or humorous, was the student then hesitant to tell a story of her child’s struggle with drug addiction?

I ask the students to think about how they felt about their partner while the story was being told.¹² Had they formed an opinion of their partner before the story began? Did that opinion change? Did they ask questions during the story? Why or why not? How did they respond during the storytelling to information that was funny, sad, or upsetting? What did they say to their partner about their feelings? Did anyone touch their partner? Why or why not? How are they now feeling about their partner? Closer? More distant? Are they a team in some way?

I ask the students to think about what they did with the stories between the time they heard them and the time they came to class. Did they think about them? Did they share them with anyone? If so, who? Did they think about how they would share them? Did they have further questions they would like to ask their partner about the story or the people or places described? How did they feel about the story that they told? Do they feel they disclosed too much about themselves? Not enough? Were they worried about what would happen to the information?

¹² See Filippa Marullo Anzalone, *It All Begins With You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 *HAMLIN L. REV.* 324 (2001) (emphasizing the importance of the emotional component for creating a successful adult learning environment and engaging adult learners in the learning process).

Interestingly, many of the students say that they would feel very uncomfortable sharing any of the information that they learned in the class, particularly if it was very personal. One student last semester said,

I normally tell my wife everything, but I told her that I didn't think that I should share the stories from this class. I really thought that what happened here should stay here. We didn't agree to that in advance, but I just think that should be the rule.

His classmates all nodded vigorously in agreement and one said, "Let's vote on that." Everyone then raised their hands. This action on the part of the students, with no prompting from me, made for an easy transition to the discussion of Making Confidentiality Real.

C. "Beachballing": Leading the Directed Discussion

The discussion portion of the exercise is crucial, and while my role in it is important, I have found that is equally important that I am not the focus. I use a teaching technique during the discussion portion of the exercise that I call "beachballing." I sit with the students rather than standing or sitting at the front of the classroom, thereby creating a more democratic learning environment in which adult-learners take a role in the learning process. By actively participating in the experience, a direct connection is made between the lessons learned and practical problems students will be faced with in practice.¹³ I do not call on students. I ask a question and then remain silent until one of the students makes a comment. I then wait to see the response of the other students. I will make eye contact with particular students to encourage them to respond to their classmates' observations, but will respect their silence if they do not comment. If a student raises his or her hand, I will nod or make eye contact, but try to remain silent.

I conceptualize my role in asking questions as lobbing a beach ball into a group.¹⁴ It is up to the group members to "keep the ball in the air." Once the conversation lags and the ball drifts to the ground, I pose another question. On the other hand, I let the students continue to make comments until it appears that everyone who wishes to contribute has done so.¹⁵ Many of the students are hesitant to con-

¹³ See generally Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995) (explaining the function and value of experiential based learning for adult students).

¹⁴ See generally Anzalone, *supra* note 12 (explaining key components of the learning experience and the role of the professor as modeling self-reflection and facilitating discussion as a member of the group).

¹⁵ See generally Deborah J. Cantrell, *Teaching Practical Wisdom*, 55 S.C. L. REV. 391 (2003) (emphasizing active participation and reflection as an integral part of adult legal

tribute at the beginning of the class but grow increasingly dynamic as the conversation progresses.

I use the beachballing technique because I want the students to understand that they will learn from one another and from their own experiences and interactions, not only from “top down” lecturing from their professor.¹⁶ After the first few questions, the students understand and take on the responsibility for forwarding the discussion.¹⁷ They encourage their partners first, and then their other classmates to share with them their thoughts about telling a personal story to someone they did not know before, someone who perhaps was very different from them in terms of race, gender, age, or previous experience.¹⁸

Once the students are comfortable in sharing feelings with their classmates, we move to the next level of discussion. Again, I lob “beach balls” into the group. I ask the students how they felt when their story was being told. The students are surprisingly forthcoming. Students tend to first disclose feelings of embarrassment and concern for what others will think of them. Next, they say that it “didn’t sound the same” when someone else was telling it. One student, Samantha, expressed it this way,

Listening to someone else tell my story was really weird. The things that Debra emphasized made me re-evaluate the way I told the story and my reasons for telling the story. It showed me how powerful perception can be and how two people can perceive things so differently.”

education.). See also Paula Lustbader, *Seven Principles for Good Practice in Legal Education. Principle 7: Good Practice Respects Diverse Talents and Ways of Learning*, 49 J. LEGAL EDUC. 448 (1999) (discussing techniques for involving all types of adult learners, particularly through participation and reflection). Courses in trial advocacy typically draw students who are outspoken and assertive and may intimidate more passive classmates if the professor does not consciously provide an opportunity for the quieter students to have their say.

¹⁶ Cantrell, *supra* note 15 at 391 (further demonstrating how providing opportunities for reflection on lessons learned is an essential part of experiential learning).

¹⁷ See generally Quigley, *supra* note 13 (discussing the importance of experienced based learning and how active participation in a learning experience provides students with a much more concrete connection to practical problem solving rather than traditional passive learning). Although the students are initially discomfited by the silence and by the fact that I am not lecturing, they quickly rise to the challenge and begin to provide comments. Experiencing this learning technique early in the semester, allows the class to be much more comfortable in providing feedback later in the semester on simulated trial exercises.

¹⁸ See generally Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability Into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996) (identifying the importance of discussing issues of diversity in the law school classroom to develop open minded attorneys who are better listeners and can therefore better represent their clients).

I ask if the person telling the story made any mistakes. Students begin by sharing factual details that were wrongly told, such as names, ages, or events that were out of order. The “teller” of the story often apologizes. I ask how the student felt when the mistake was made. Some students dismiss the inaccuracies as unimportant to the story; others express frustration that their partner was not paying enough attention or that they were not clear in describing the events. Most place the “blame” for inaccuracies on themselves, “*I don’t think I was very clear when I was telling you,*” or on the complexity of the information, “*Nobody could be expected to remember all the names of the people in my family.*”

On the other hand, the tellers of the story apologize for not paying close enough attention and for making mistakes. Tony summed up the feelings of many of the students,

There is a lot of pressure telling someone else’s story. I wanted to make sure I did a good job. I wouldn’t have worried about telling my own story so much, but I wanted to let everyone know how much I thought about Umar and what I learned about his struggles to come to this country.

Interestingly, the most animated conversations about accuracy involve not factual details, but the recitation of the emotional components of the stories. A student will say, “*You said that I admired my sister - but that is not what I told you. I said that she never took me seriously.*” The “teller” may respond, “*I know that is what you told me, but I could tell that you wanted her to take you seriously because you thought so highly of her.*” This type of comment invariably leads other students to express what “they could tell” that was either not “told” or is now being explicitly denied by their partner. Eventually, someone will say, in exasperation, “*So, you think you know better than I do what I was thinking? How do you know what I was feeling? It is my story, not yours!*”

This is a critical juncture in the exercise and leads naturally to a discussion of both interviewing skills and client-centered representation. “Whose story is it?” I ask the students. I inquire of the person who told the story how he or she “could tell” what the emotions were by listening to the story. The students will begin to discuss body language, tone of voice, and choice of words.¹⁹

It is important to give the person whose story was being told an

¹⁹ See generally Jeffrey Kravis, *The Art of Attorney Mediation: 10 Ways to Improve Your Law Practice Using Negotiation Skills*, 62 J. DISP. RESOL. 22 (2007) (highlighting the importance of not only listening but using intuition to gather vital information from body language).

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opportunity to respond to the assertions about what his or her tone, body language and choice of words “told” the listener about his story. The student may accept the “trueness” of the emotions conveyed or may feel that unwarranted assumptions are being made. Occasionally, a student will express surprise at learning that a particular mannerism, gesture, tone, or choice of words conveyed an emotional message to others that the student believes is accurate but was deeply hidden, or continues to feel is inaccurate.

We discuss the stories in which the teller added observations about his or her own family, values, or observations. Did these additions change the original story? Make a new story? Did it become the story of the teller as opposed to the partner? Did the changes affect how the class felt about either partner? Both partners?

I conclude this part of the class discussion by asking the students whether they would have changed the story they picked if they knew it would be told to the entire class. Interestingly, it is generally the students who told the more mundane or amusing stories who now want to tell a more serious or revealing one. One student said,

I am always the class clown and I told a story that I knew would make everyone laugh. But when Christa told my story, I just thought ‘why don’t I just grow up?’ I wish that I had told an important story, so that people would know that I’m not just a joke.”

Another student, a black, single mother, wrote this reflective note to me,

I feel like I should have shared a more personal experience because other people did. Most of my life experiences have been negative, or at least perceived by me to be negative. I wanted to share a positive experience and that’s what I did. But, after hearing the people in the group tell stories I felt bad because their stories were negative, about loss, but were told in a positive manner, about how they learned or bounced back. I wish I had told a story like that about my life.²⁰

I ask the students whether they now feel differently about their classmates and, if so, how? The students are aware that the exercise makes them see their classmates more as individuals. Danielle put it this way,

²⁰ In addition to the class discussion, I tell students that they may come to see me, call me, or send me an e-mail at any time to discuss anything about the exercise or anything else that happens in class. In addition, one of the questions on the end-of-semester evaluation asks the students to reflect on the storytelling exercise. Some of the comments I have quoted in this article come from these evaluations.

*I never really care who is in my classes. There is always the jerk who knows everything, the suck-up, the idiot who never gets anything, and then a whole bunch of people that I can't even remember. This is different. Now when I see these people in class and in the cafeteria, I'll remember their stories"*²¹

Another student commented,

We learned a little bit about each person as an individual and it made strangers into acquaintances immediately. This made it easier to strike up friendships and work with each person later.

D. Teaching Client-Centered Representation

Once the students have had an opportunity to process their classmates' comments, I ask them how they think the exercise relates to what we will be doing in the trial advocacy class.²² Almost always, the students who respond indicate that speaking in front of an "audience" will make them more comfortable or skilled in the courtroom simulations. A few even draw an analogy between the listening group and a jury.

At least one or two students each semester comment that they are "bonded" with classmates as a result of the experience, and that this feeling of closeness will make it easier to perform the lab exercises. "Now that everyone here knows what a fool I made of myself when I asked my wife to marry me, I won't be so embarrassed if I screw up on my opening statement."

By and large, the students see the exercise as an "ice-breaker" or party game designed to give them a "taste" of oral advocacy skills and an opportunity to get to know their classmates a bit better. A couple have even thanked me for allowing them this "gradual" immersion into the class, as opposed to "throwing them right in" by requiring a direct examination or opening statement during the first class periods.

In short, during the reflective discussion period immediately following the exercise, the students are focused exclusively on themselves and their prospective ability to succeed in the class.

On their own, the students do not make the connection between the person whose story they told and the client in a trial. I specifically tell them: "What we do as lawyers, inside a courtroom and out, is

²¹ This point is exemplified by an ancient Chinese proverb, "Tell me, I forget. Show me, I may remember. Involve me, and I understand." Fran Quigley, *supra* note 13, at 50.

²² See generally Linda S. Anderson, *Incorporating Adult Learning Theory Into Law School Classrooms: Small Steps Leading to Large Results*, 5 APP. J. L. 127, 145-46 (2007) ("Adults learn better when they can actively participate in and reflect on the skills they are seeking to gain.").

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function as the “teller” of our client’s story.” When I say those magic words, I can see the “light bulb” go on, and students nod and murmur in agreement.

Drawing on the comments the students made in the earlier discussion, the class is then able to have a more focused conversation about what it means to represent someone and to tell their story.²³ I point out that the students were all able to choose the story about themselves that they wished to tell. Although we only had, in essence, a “snapshot” of their life at a given moment in time, each student was able to go through his or her “photo album” and select an image that showed them in a positive light. In addition, each student could insure that the only details that we had about the event were those they chose to divulge, i.e., they could “crop” the picture before it was shown.

In contrast, I explain to the students, our clients generally come to see us about a particular “story” or legal problem. Often, the client is upset, embarrassed, or devastated by the circumstances. In most cases, there will be an adversary painting the client in an unflattering light and evidence which either corroborates or contradicts the client’s version of the events. The “snapshot” of our client is one over which he or she may have very little control, and which may be out of focus or distorted. Further, the picture may not be at all representative of the rest of the client’s life.

I take this opportunity to go back to the demographic issues we discussed earlier and how similarities and differences can affect the attorney-client relationship. Did they choose which stories they told or change their stories in any way due to their partner’s race, age, gender, or other real or perceived similarity or difference? Were any of them surprised at the story their partner told? Did they change their impression of their partner as a result of the story? Did they worry that their partner might have biases that would affect how they heard the story?

One student in my class a few years ago, Jalessa, was an outgoing, full-bodied black woman with a booming voice. Her partner, Mara, was a willowy, soft-spoken white woman, who sat with her head bent, her long brown hair covering her eyes, while Jalessa empathically told her story. When I asked if anyone changed their impression of their partner during the exercise, Jalessa shared the following:

I picked Mara because you told us to find someone that we didn’t

²³ See Anderson, *supra* note 22, at 127 (illustrating the importance of providing students with immediate feedback and reflection to facilitate understanding of the material in context).

know. I have seen Mara in the halls the last two years, and she was in one or two of my classes, but I never spoke to her before the night of the lab. I figured we had nothing in common. She's white, she's beautiful, and she wears expensive clothes. When she started telling me about her problems with food, I couldn't believe it. We are the same person! It was like, 'I don't believe this. You felt this way, too?' Obviously, she has dealt with it a lot better than I have, but she really encouraged me to keep working at losing weight, not for other people, but for myself. I felt so much better after talking to her. Quite frankly, I never thought a white girl would understand me. I still don't think a white man would.

Age differences and prior work experience are very significant to most law students. One student commented,

Anne is as old as my mother. I kept expecting her to say the things that my mother would have said if I told her about drinking and almost crashing the car.

Another student expressed his feelings about his partner's story in relation to his own lack of experience,

Robert has already had two careers and I haven't even figured out what I want to do when I graduate.²⁴

Although we have a number of "non-traditional" law students in the class every year, a majority of the students are in their twenties. We discuss the fact that, at least for the first decade of their practice, many of the people they come in contact with, including senior partners, jurors, court personnel, and particularly, clients, will all be older than they. What impact will that fact have on their representation? On their clients' trust? On their comfort level? On their ability to relate?

Once the students finish discussing how their feelings about their partners changed as a result of the storytelling exercise, I ask how they would have felt if, instead of saying "switch" at the end of the first ten minutes, I had ended the exercise at that time with only one partner in the pair having told his or her story. How would they then have felt about the exercise, particularly the "sharing" of the story with the rest

²⁴ See generally Anderson, *supra* note 22 (discussing the value of timely peer to peer feedback and how that can deeply resonate with adult learners). Students also begin to recognize that what they learn from the experiences of their classmates can be used by them in the future in working on behalf of their clients. For example, a young student with no previous work experience may develop techniques to discuss business matters and an older student may learn tips on "connecting" with juvenile clients from his much younger classmates.

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of the class?

The students begin to protest.

That wouldn't be fair.

That would be terrible!

I would never have come back to class.

They would have power over us.

That would make the ones who told so much more vulnerable.

I would resent you (referring to me as the professor).

I would resent my partner.

Well, we wouldn't be partners if only one person told!

Once the shouts of indignation subside, I ask, "How do you think our clients feel when they share with us and we do not reciprocate?" Again, light bulbs, and a connection is made about what it is that we do as attorneys, and how what we do can affect our clients. We briefly talk about power considerations in the attorney-client relationship, and what and how much is appropriate to share with clients. I let the students know that the answers to these questions involve issues of confidentiality and professional standards of behavior as well as issues of trust and establishing rapport. I tell them that we will not be able to explore all of these issues within the time constraints of our class, but that they need to be aware of them as they begin their legal careers.

We then continue the discussion with questions about whether the exercise would be different if the two participants spoke different languages and an interpreter was needed to assist in the communication; how the conversation would be different if one of the participants was free to leave at any time but the other was confined to the chair or room; and what impact it would have if the story being told had no meaning to the listener because of cultural or background differences.²⁵

We discuss different client populations that students might encounter in the law school clinics, in their field placements (externships), or when they are in practice. Many of the students will be dealing with immigrants, non-native English speakers, clients with physical and mental disabilities, and clients who are incarcerated. Students will also be dealing with clients who do not share their cultural

²⁵ See generally Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001) (emphasizing the importance of respecting and preparing for cultural differences between attorneys and their clients). It is important in this context not to limit the discussion to racial or ethnic differences, but to make the conversation as broad based as possible, touching on issues such as religious background, developmental or mental disabilities, educational disparity and language barriers.

or class background.

Again, I stress to the students that we are barely scratching the surface of the types of considerations that are crucial to establishing and maintaining a rapport with clients that will allow for meaningful representation. The students must understand that the skills and techniques which they are using for the first time will be modified and refined throughout their professional careers. The ability to be both self-aware and empathic to clients is a life-long endeavor, a skill that the best attorneys are constantly striving to improve.

E. Making Confidentiality Real

The stories shared in class can be very personal and sensitive in nature, and the students are sometimes hesitant to tell them. I ask the students, "Did any of you feel uncomfortable telling the story?" Almost always, a student will say, "*I didn't think I should tell. It was John's story and I didn't know if he would want the whole class to know.*"

When I ask why the student told the story if he or she felt that it shouldn't be shared, the invariable response is, "*Because you told me to.*" I then inquire, "What do you think would have happened if you said, 'no'?" Silence. "Is that the test? If someone tells you to disclose something that is a secret, do you do it?" Silence. "Do you think you could have asked John's permission to tell the story?" Silence. Then, "*If John thought I wouldn't tell, then I shouldn't have told.*"

The students' realization of the disclosure problem effortlessly leads into a discussion of the ethical requirement of attorney-client confidentiality and the importance of the client's subjective expectations.²⁶ We discuss under what circumstances an attorney might be pressured to reveal a confidence and what the ethical response should be. In addition, we talk about how to explain the concept of confidentiality and its waiver to our clients in terms that they can understand.

I also share with the students that I feel ambivalent at times about utilizing the exercise, even though I believe that it has great pedagogic value. Once, a student, John, was glowering at me, arms locked across his chest, slumped in his seat, hat pulled low over his eyes, after the exercise in which he told his partner's story of a painful divorce involving infidelity. "John, would you like to share how you are feeling?"

²⁶ See Model Rules of Prof'l Conduct R. 1.6 (1983); see generally Gregory C. Sisk, *Change and Continuity in Attorney-Client Confidentiality*; *The New Iowa Rules of Professional Conduct*, 55 *DRAKE L. REV.* 347 (2007) (highlighting the importance of confidentiality as the foundation of a trusting attorney-client relationship).

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You tricked us! You should have told us why we were hearing the stories. You knew what was going to happen, but we didn't. It isn't fair!

Fair. Ethical. Professional. Moral. We discuss the difference between these terms, both from a legal and from a practical and ethical standpoint. We discuss the power differential between me as a professor and them as students and compare it to the roles of attorney and client. Usually, at least one of the students shares that he or she was willing to give me the “benefit of the doubt” and trusted that I had a “good reason” for the exercise, and that was justification enough to go along with the instructions. This conversation, their perception that the exercise would lead to a benefit for them, leads naturally to the next topic, specifically instructing the students in interviewing skills and avoiding the pitfalls of the DMV Interview.

F. Teaching Interviewing Skills: The “DMV Interview” Revisited

It is always the case that none of the students take notes during the storytelling exercise. I ask them whether that was a conscious decision on their part. Usually a student will say, “*Well, if I knew that we were going to have to tell the story, I would have, so that I wouldn't make any mistakes or forget anything.*” Most of the students, though, comment that they wanted to pay attention or that it would be distracting to take notes. One student expressed,

I think that would have made the whole thing useless. The important thing was to understand who Jessica was. I got more out of her facial expressions than her words, and I wouldn't have been able to write those down. If I had been writing the words, I would have missed the expressions.

Having already drawn the connection between the storytelling exercise and representing real clients, the students want to know if they “should” take notes when the exchange involves an attorney-client exchange. They understand that they may have to refer back to the information collected, that they may have dozens of clients and that their representation of a client may extend over a long period of time.

Again, I share with my students that the difficulties that they perceive between the desire to make a connection with a client and the need to obtain and retain information is one that is experienced by attorneys on a regular basis.²⁷ I stress that they need to develop the

²⁷ See generally Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, *Teaching Professionalism in Context: Insights From Students, Clients, Adversaries, and Judges*, 55

skills to find a balance between these seemingly competing goals.

Students are generally frustrated by the tension between the lawyer wanting and needing to obtain and preserve detailed information and the client's potential negative reaction to note-taking during the interview process. We brainstorm. We discuss the DMV Interview. "Why aren't you offended when you are asked questions by the bureaucrat at the DMV office?" "*Because I got a driver's license.*" The students appreciate that they are not offended or suspicious when asked for demographic information which might otherwise seem intrusive if they perceive that they are receiving a benefit, e.g. a driver's license.

We discuss again how our clients, because of who they are and what experiences they may have had with the police, immigration, probation, or other agencies, might feel or react differently to the same types of questions.²⁸ "Why might they be afraid?" "Who could get the information?" "What could it be used for?" We then brainstorm. "So, how do you think you could make your client feel better?" "*Explain why I needed to take notes?*" "Yes!"

In fact, when questioned, in character, at the Trial Practice Institutes, the actors all told their lawyers that they wanted them to make eye contact, LISTEN to them, explain why they were asking questions, show them what they were writing down, and explain what was going to happen next. In short, they were seeking a human connection, so that their stories could be told.²⁹

I use beachballing again to let the students discuss what they liked about the exercise. They appreciate how much information they were able to glean in ten minutes. How much they learned from eye contact, body language, facial expressions, and word choice. They comment on how much they would have missed if they were taking notes and how nervous they would have felt if someone were taking notes when they spoke.

S.C. L. REV. 303 (2003) (illustrating the challenges of balancing professionalism with the need to build trust with the client through different interviewing techniques). I also share with my students that I use this same exercise at Trial Practice Institutes attended by very experienced attorneys and that those lawyers exhibit the same difficulties.

²⁸ See generally Susan Bryant, *supra* note 25 (demonstrating the danger in assuming that clients attach the same cultural meaning to legal vocabulary and illustrating how such assumptions must be overcome to develop better client rapport through earnest listening and cultural awareness). Again, the conversation needs to be broad enough to also address client assumptions based on additional factors such as, educational level, language skills, and developmental or mental disability.

²⁹ See generally Linda F. Smith, *Client-Lawyer Talk: Lessons From Other Disciplines*, 13 CLINICAL L. REV. 505 (2006) (emphasizing the importance of deep listening to establish a trusting attorney-client relationship in the context of the client interview as a cooperative conversation).

On the other hand, we talk about how difficult it must be if you have dozens of clients and need to keep all of their files organized and how much information you need to do a proper investigation and meet with witnesses. What type of demographic or factual information is necessary for pleadings such as a bail application or motion to suppress? How is it possible to reconcile these competing demands?

Inevitably, the students come up with almost identical solutions to those suggested by the actors at the Trial Practice Institutes. We identify what would make them feel comfortable and respected.

Here are the rules that my last class developed: First, make eye contact and introduce yourself to the client. Shake hands or touch the client in some way to establish a human connection. Make sure that the client understands that you are his or her attorney and are there to help and be his or her advocate; don't assume that the client knows. Give the client a card with your name and phone number. Then, listen to the client without looking away or taking notes. Pay attention not only to the client's words but to his or her tone, body language and affect.³⁰ Try to determine the client's level of education, sophistication and understanding and whether he or she is suffering from any physical or emotional problems.

Then, explain to the client why it is necessary to take notes and what the notes will be used for, e.g. "to ask the judge to let you go home to your children." Let the client see what is written on the legal pad. Ask permission. Say to the client, "I need to go see the witnesses. Is it O.K. with you if I write their names down so that I can give them to my investigator?" Tell the client who will see the notes, e.g. "only the other attorneys in our firm and our investigator." Read what you have written back to the client and ask if it is correct. Thank the client. Tell the client when you will be back to visit if he or she is in custody or make another appointment if the client will be coming to your office. Ask the client if he or she has any questions or if he or she would like to take any notes or write anything down before you leave. Tell the client how to get in touch with you if he or she has questions or concerns. Let the client know if a family member can call and speak with you and what information you can or cannot share.

G. Student Reflections on the Exercise

At the end of the semester, the students complete an extensive evaluation of the trial advocacy class. One of the questions on the

³⁰ See generally Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321 (1998) (emphasizing how important it is to be aware of non-verbal cues from clients, and how missing such cues can negatively affect the ability to establish a trusting relationship with the client).

evaluation concerns the storytelling exercise. The students are asked to describe what they learned from the exercise and if they felt it was useful to have the experience at the beginning of the semester.

The responses from the students are wide-ranging. We spend a great deal of time during the semester discussing interviewing skills, client-centered representation, issues of diversity, use of theory and theme in trial, and the power of detail and description in conveying emotion in witness examination, opening statements and closing arguments. As these topics are discussed, I relate them back to concepts of telling the client's story to the jury, using verbal and non-verbal communication, and being aware of ethical considerations at all times.

Some students see the direct correlation between these classroom discussions and the initial storytelling exercise. Tony expressed it this way in his evaluation,

I learned to be attentive, as a lawyer should, listening to a client's problem for the first time. I tried to learn to place myself in the role of a lawyer meeting with my client for the first time and tried to hone in on listening skills.

Many of the students value the storytelling exercise because it helps them present more persuasive examinations or arguments.

I knew that I had to make my closing argument into a story so that the jury would remember it. I still remember the stories from the first day of class. I remember you telling us that seeing something from a different perspective is key and I wanted the jury to see it from my client's perspective because it was his story, not mine.

A few students persist in viewing the exercise as a party game for the first day of class.

I like that it was at the beginning of the semester. I think that it made me feel closer with my class. I have never before said hello to everyone in the hallway from a class after such a short amount of time.

Many students value the lessons on confidentiality. Mark wrote,

I learned that if you think something you are being asked to do by the judge is questionable, or may harm your client or relationship with them, don't be afraid to challenge (nicely of course).

The comments on telling the client's story demonstrate that the students are able to learn this critical concept. Sabrina wrote,

I felt it gave me a wonderful perspective on what it would be like to

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be a client. Having my story told and told wrong made me cringe even though it was unimportant in the scheme of things. It will make me more careful with real clients.

John put it this way,

It was an experience where we got to see our story told by another advocate – exactly the same situation our clients will be in.

Curtis specifically addressed interviewing techniques,

Sharing personal information with your client helps facilitate/establish rapport with your client. It establishes a common bond with your client and makes you more approachable. Also, it takes the spotlight off them and turns you from an inquisitor to a conversationalist.

IV. CONCLUSION

Experienced practitioners know that establishing rapport and gaining trust is critical to effective client representation. Unfortunately, even though they are able to articulate these goals, many are unable to effectively achieve them in an initial client interview. Teaching these skills in the law school environment will enhance both clinical representation and future practice. Guiding students away from the pitfalls of the “DMV Interview” to effective Client-Centered Representation through the use of Storytelling is one way to “turn them from an inquisitor to a conversationalist” and move them along the path to effective and successful client-centered representation.