BENCH HANDBOOK

The Child Witness

[REVISED 2016]

JUDICIAL COUNCIL
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INTRODUCTION

Society has two compelling interests with regard to child witnesses: an interest in discovering the truth and an interest in safeguarding the child witness's mental and physical well-being. These interests translate into a responsibility (a) to ensure that a child witness has an opportunity to offer complete and truthful testimony and (b) to protect children from severe emotional distress induced by the judicial process. These responsibilities fall, in part, to the court. For example, Evid C §765 requires the court to control examination of witnesses generally, and in particular, to ensure that questions are in a form that is appropriate to the age or cognitive level of child witnesses who are under the age of 14. In prosecutions for child abuse, the court must take all necessary steps to prevent psychological harm to the child victim. Pen C §288(d). In addition, juvenile court judges are required not only to take control of proceedings in their courtrooms, but also to be active in the community in promoting the well-being of children. Standards J Admin 5.40(e). A judge's obligation to provide child witnesses with the maximum opportunity for truth telling and to protect them from psychological harm arises out of the general duty to control attorneys (see Evid C §765), the public (see, *e.g.,* Pen C §868.7), scheduling (Pen C §1048(b); Welf & I C §345), and every aspect of courtroom proceedings.

The goal of combining the greatest opportunity for the truth to emerge with the least stress placed on the child witness consistent with the rights of other parties is not a simple one. Cases involving allegations of child abuse weigh heavily on the hearts and minds of those involved, whether in criminal, juvenile, or family court. You often must avoid ethical and constitutional land mines in order to balance the societal goals of justice, child protection, and due process. One purpose of this bench handbook is to offer solutions to the challenges in managing child witness cases and evaluating the evidence of children in criminal, juvenile, and family court cases.

A second goal of this bench handbook is to offer pertinent principles of child development for judicial consideration and application. A child witness is not a miniature version of an adult witness. Young children think, relate, and communicate in a qualitatively different manner than adults. They have vulnerabilities, needs, and limitations not found among adult witnesses. The management of child witness cases and the evaluation of evidence from children require a knowledge of child development and sensitivity to their unique status.

This text is divided into four chapters. The first provides suggestions for managing the courtroom when there is a child witness; this includes a discussion of principles of child development and stresses that children may experience when they become witnesses. The second chapter focuses on particular kinds of cases in which children are involved as witnesses and parties, such as criminal, juvenile, and family court. The third chapter involves such evidentiary considerations as determining competency, ruling on hearsay, and using experts, and the fourth provides a conceptual framework for facilitating and understanding children's testimony. All these aspects are discussed in the context of cases involving sexual abuse allegations.

In the text, numbers in parentheses indicate references made by the author to publications. These numbers correspond to the complete citation of the publication located in the References, starting on page 123. References are arranged in the order that they occur in the text.

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I. [§1.1] MANAGEMENT OF CASES RELATING TO CHILDREN

You can do a great deal to protect child witnesses from psychological distress and to enhance the truth-telling process. Many of the principles are the same for all types of cases in which children who are victims must testify. See, *e.g.*, §§1.10–1.15, 4.6–4.7. Other measures are specific to criminal court (§§2.1–2.9), juvenile court (§§2.10–2.20), or family court (§§2.21–2.27).

A. Pretrial Preparation

1. [§1.2] Setting Ground Rules for Attorneys

At the outset of a trial involving a child witness, you should institute ground rules for attorneys. These ground rules establish the court's control and serve as an educational vehicle for attorneys who may be unfamiliar with these cases. Some of these ground rules should include:

- **Children must be asked questions that are developmentally appropriate to their ages.** See Evid C §765(b) (developmentally inappropriate questions may be objected to), and discussion in §§4.6–4.7. You should ask attorneys what steps they are taking to ensure that questions are developmentally appropriate (1, 22). Attorneys should be warned that if they fail to do so, you will interrupt and take control of the questioning. Miscommunication and misinterpretation are frequent occurrences during courtroom examination of children (*e.g.*, 1–3). They occur when children are asked questions in sophisticated vocabulary and complex grammar that exceeds their level of language comprehension and children try to answer questions they do not fully understand (2, 4–5). Developmentally insensitive questions can significantly impair children's accuracy, underestimate their abilities, and undermine their credibility (*e.g.*, 6–7). Moreover, certain characteristics of cross-examination are confusing, stressful, and can undermine children's accuracy and self-

image (*e.g.*, leading/suggestive questions, implications of dishonesty or incompetence, ambiguity, use of jargon; 8–9).

- **Attorneys may not raise their voices when questioning the child witness and should argue objections out of the child's hearing**. Young children view the world from an egocentric and over-personalized perspective, and are likely to assume that arguments occur because they have done or said something wrong. Such beliefs may impede further testimony. This can frighten or confuse children, especially since some believe that if they do something wrong on the stand, they themselves will go to jail (*e.g.*, 10). They do not understand the adversary system and its need for objections. In no case should shouting and arguing occur in front of children.
- **Attorneys should stand or sit in one place during examination and cross-examination, preferably in front of the jury and not the defendant (see** §2.8**).** You should ensure that all attorneys question the child from the same neutral location. Attorneys who walk around the room while asking questions create a changing visual backdrop that distracts young children. If an attorney stands in front of the defendant, emotional factors are called into play that could hamper the child's capability of testifying to the best of his or her ability. For example, a child who is frightened at looking directly at the defendant and who was threatened not to tell what happened may regress to the use of less mature language, memory, and cognitive skills. Child witnesses rate facing the defendant and cross examination as the most stressful aspects of testifying (11–13).
- **Questioning of children should be done during their best times of day, which are usually school hours (see, *e.g.*,** Pen C §868.8(d) **criminal proceedings when victims are under the age of 11), with no continuances and delays unless an emergency arises.** Children understand that during these hours they do serious work, not play. Also, their routines (bedtime, naptime) are centered on this schedule. Disrupting children's schedules results in fatigued, cranky, and often regressed children who cannot testify to the best of their abilities.
- **When young children are testifying, breaks should be frequent (*e.g.*, every 20 minutes, depending on the child's coping style and attention span) and strictly adhered to (see** §2.8**).** It is unrealistic to rely on children to notify the court when they need a break. Children younger than 9 or 10 have a limited ability to monitor their own behavior; consequently, they are impulsive and require adults to monitor and set limits on their behavior. One cannot expect a young child to raise his or her hand in front of a group of adults who are intensely involved in their discussion, to ask to go to the bathroom. Also, young children have difficulty focusing attention on verbal questions and answers. A child who can sit and play with something tangible and visual for hours may have an attention span of only 15 minutes for verbal material. Regularly scheduled breaks allow children to concentrate on the questions at hand with the knowledge that a break is not far away. They are also less likely to occur at a time that could favor one side over the other.
- **Continuances, if granted, should be as brief as possible (see** §§2.8**,** 2.20**).**

2. [§1.3] Ensuring That Child Is Prepared for Court

Responsible persons should provide potential child witnesses with *age-appropriate* preparation before the child testifies. Children's knowledge of and experience with the legal system is limited; replete with misconceptions or unrealistic fears (10, 13–18). Coping with the

demands of the system is challenging for adults, but even more so for children who are still developing the necessary cognitive, communicative, and emotional abilities to cope with confusion and distress, at the same time as they are called upon to provide reliable information under formidable circumstances. Children's lack of understanding of the system is a potential source of court-related stress (11, 16, 19–21). Child witnesses express unrealistic fears of being punished, put in jail, or being on trial themselves that might be allayed by preparation (*e.g.*, 14). More knowledgeable child witnesses are less distressed about attending hearings (17) and may provide better testimony (19, 22–24).

Many jurisdictions have formal "Kids in Court" programs established to prepare children to testify in court proceedings. Where such programs exist, judicial officers should require that children attend these programs before testifying (13, 25–28). Where such programs do not exist, courts should consider taking the lead to start them. Programs can be conducted under the auspices of courts, child advocacy centers, or independent community groups. Typically, the facts of the child's case are never discussed with the child to avoid contamination. Instead, interventions focus on demystifying the legal process and the roles of the various participants, anxiety reduction strategies, a tour of a courtroom, and general instructions about answering questions (*e.g.*, giving children permission to say "I don't know" when children lack knowledge).

Many judges prepare for the child witness by arranging for periodic meetings with key people in the legal system to let them know that the judge expects them to brief child witnesses before they come to court. For example, a judge who is handling the criminal calendar would meet with the prosecutor, a key person in the victim witness program, and those who work with the child's support people. For the juvenile dependency calendar, the judge might wish to meet with attorneys who appear in dependency court, an official of the social welfare agency, and the person in charge of children's advocates. At these meetings, judges find that it is most effective to state that the court expects that all children who participate in courtroom proceedings will be prepared to testify, and then to assign this responsibility to one of the people in the group.

A designated person should first explain to children the jobs of the various professionals in court. This is critical because many times children have misconceptions about the functions of legal professionals. Second, children need to understand why they are in court and how the proceeding relates to the previous investigation. They may believe that a courtroom is merely a room you pass through on the way to jail. Third, children need to know what will happen in the courtroom. Advance education makes the unfamiliar more familiar and less threatening. It keeps children from operating under misplaced perceptions. Children whose misperceptions have been corrected will grow up to be adults who feel they were treated fairly by the system instead of betrayed by it and may adjust better to case outcomes, as predicted by the procedural justice literature (*e.g.*, 29–30).

It is surprising to note how little children seem to understand about what happens during the trials and hearings they attend. One researcher found that upon leaving their dependency court hearing, 54 percent of children 7 to 10 years old did not understand the courts' decisions (*i.e.*, whether or not the child would return home or stay in placement; 15). In another study, researchers reported that after attending their hearing, one third of 4- to 15-year-olds failed to report any correct information about what happened in the hearing at all (17). Studies of cases in family law courts suggest similar levels of misinformation, confusion, and fear among children involved in divorce proceedings who are preoccupied with issues of personal safety, both physical and emotional, that go unaddressed (*e.g.*, 20). Such research underscores the need for age-appropriate explanations of psychological and legal aspects of the process that are likely to promote children competence as

witnesses, lower system-induced stress, and support children's positive adjustment and mental health.

At the very least, children should be given a brief outline of what will happen in the courtroom:

- Who are the people in the courtroom (introductions)?
- What are their jobs in court (functions)?
- How long will testifying last (duration)?
- When will children be given a break (recesses)?
- What will children do during the break (reunite with parents)?
- Where will parents be waiting (in hallway, with spectators)?
- What should children do if they have a problem (raise their hand to tell the judge)?
- Why is someone writing down everything they say (for later reference)?

Children should be told that it is the judge who is in charge of the courtroom. A child needs to hear that the adults (the jurors and/or the judge), and not the child, have the responsibility and authority to make decisions. In family law cases, children need to be told that if their parents cannot agree, the judge will decide by considering a number of factors in addition to the child's preferences. In juvenile delinquency or criminal cases, the child should be told that the judge will ensure that no one gets hurt—that the judge's job is to ensure safety and fairness and that the bailiff will keep order.

It is also important that the person responsible for advising the child instruct the child, in language he or she can understand, regarding the obligation to testify truthfully. The specific explanation will differ depending on the type of case.

- In a family law proceeding, a child might be told, "Everyone will listen carefully to what you have to say. The judge is going to make a plan that is the best plan for the whole family. It is very important to tell the truth because if the judge does not understand the whole truth, he or she may not be able to make the plan that is the best for everyone."
- In a dependency matter, the child can be told, "It is important to tell the truth because if we do not know the truth we cannot make the best decision about how to keep children safe."
- In a criminal matter, a child might be cautioned, "It is important to tell the truth because we need to find out the truth about what happened to decide if someone broke the law." In any event, the child should be told that the adults, and not the child, are responsible for decisions made in the case.

In addition, children should be given any necessary instructions about the mechanics of testifying (*e.g.,* "Talk into the microphone. You cannot nod your head; you must say yes or no out loud," etc.). Even so, they may need reminders throughout their testimony if it extends over hours and days rather than minutes.

Finally, as a last resort, you should personally prepare the child for testifying if it is apparent that a child has not been adequately prepared for court. To do so, you may wish to say something to the effect of:

> I am Judge X. I am in charge of the courtroom. My job is to make sure that everything is fair and that everyone else here does his or her job correctly. This is Bailiff Y. He/She is here to make sure that no one gets hurt. Mr./Ms. Z is the court reporter. He/She will write down everything people say so if anyone forgets later what was said, we can look it up. It is important

to speak loudly and clearly so that Mr./Ms. Z can hear you. Mr. and Ms. L are the lawyers. They will be asking you some questions. Their job is to help you tell what you saw and heard so that we can find out the truth.

You will be answering questions this afternoon. We will stop often so that everyone may have a rest. At the break you will see _____(support person) who is now waiting in the hall for you. If you have any problems before the next break, let [*support person, attorney, judge*] know. Also, you may not understand all the questions. We are used to talking to other adults, not to kids. When you don't understand a question, raise your hand and tell me you don't understand. You may not know the answers to all of the questions. If you don't know the answer, just say, "I don't know" or "I don't remember."

[*In family or juvenile court cases, add*]

It is very important to tell the truth because if I do not understand the whole truth, I may not be able to make the plan that is the best for everyone.

[*In criminal court cases, add*]

It is very important to tell the truth because we must find out the truth about what happened to decide if someone broke the law.

3. [§1.4] Children's Expectations of Court

Children's knowledge of the legal system is limited and replete with misconceptions (10, 13, 15–17). They do not have a context for understanding the purpose of the various people, their functions, or the rules by which people interact in the legal setting. Their misunderstandings can result in heightened and unrealistic fears, failure to recognize the significance or consequences of their testimony, and failure to use the "big picture" to put their feelings in perspective and cope with the stress of testifying. Several studies have investigated children's knowledge of the investigative and legal process. The following sections provide a general guide to children's abilities at various stages of development. However, keep in mind that mental retardation, learning disabilities, emotional disorders, and other factors may impact a child's development in ways to be discussed in §1.9.

a. [§1.5] 4 to 7 Years Old

In general, 4- to 7-year-olds know many aspects of the legal system exist, but may treat them as rituals without understanding their purpose. Children's early conceptions of judges reflect observations of their behaviors in the courtroom (*e.g.,* "The judge is there to talk and listen, nothing else, he sits in a high desk and bangs a hammer, I don't know why"). They may not know that you are in charge of the courtroom. Children tend to assume jurors are merely spectators.

Some 4- to 7-year-olds may believe that police are responsible for arresting, condemning, and punishing the accused. They often believe that police officers make all decisions. The court may be viewed as a room you pass through on your way to jail. Legal personnel may be viewed as benign and helpful, in contrast to the court process, which can be seen as treacherous and potentially leading to jail (*e.g.,* if you make a mistake). Their reasoning is driven by a fear of punishment. They may begin to think they did something wrong and that, as a result of the court process, they themselves will somehow end up in jail. This assumption may hamper their testimony.

b. [§1.6] 8 to 11 Years Old

Children 8- to 11 years old begin to understand that arrest leads to an intermediary stage in which the judge, rather than the police, makes a decision about guilt and punishment. Many 8- to 11-year-olds will say that court reminds them of "church, because you have to be quiet and it's serious." Generally speaking, children in this age group no longer confuse the role of the judiciary with the role of the police, and they are aware that the court is a fact-finding process that seeks to uncover the truth.

These children may still assume that witnesses always tell the truth and are always believed. They can be taken by surprise by the tone of cross-examination. They often believe that judges are omniscient and know when witnesses are telling the truth and when they are not. Eight- to 11-year-olds demonstrate an emergent understanding of the adversarial nature of the process (*e.g.,* "The lawyer is on your side") and the representational aspect of the lawyer-client relationship (*e.g.,* "The lawyer stands up for you in court"). Witnesses are viewed as people who help the judge and lawyer by telling what happened. "They answer a lot of questions and tell the truth." Children within this age group realize the judge's role in making a determination of guilt or innocence and in deciding the punishment.

Children under 10 years of age may still be confused because they assume that a legal term is synonymous with a similar-sounding nonlegal familiar term (*e.g.,* jury-journey), and vice versa (a minor is someone who digs coal). Many 8- to 11-year-olds believe that jurors are indistinguishable from other spectators (*e.g.,* "They sit there and watch, I don't know why"). They may not realize that the jury is an impartial group, but think that victims, witnesses, and defendants ask their friends to come be on the jury. Unfamiliar faces are assumed to be friends of the defendant. For the most part, these children believe that you are the only one who decides the case and are unaware of the jury's role in determining the verdict.

c. [§1.7] 12 to 14 Years Old

Children 12 to 14 years old come to understand that the judgment is made through the process of a trial with roles for attorneys, witnesses, and laws, rather than at the whim of the judge. The possibility of an appeal process is conceptualized. They begin to develop a sense of a societal role for the legal system beyond the one-to-one relationships of courtroom personnel. For example, they can perceive the court as one aspect of a democratic government. They learn that although the process seeks to uncover the truth, justice does not necessarily always result, and decisions are made that may in fact be based on inaccurate information (*i.e.*, winning the case is not synonymous with finding truth).

These older children understand that the jury has a role in deciding the verdict. However, they can still be confused, as are some adults. Some children believe that you and the jury go off during recess into a room together to discuss the case or that the purpose of the jury is "so the judge does not get blamed for the decisions."

An incomplete understanding of the purpose of judicial proceedings and the people involved may heighten a child's fears unnecessarily, interfere with the child's ability to cope, and potentially compromise certain aspects of the child's testimony.

4. Special Court Procedures

a. [§1.8] Why Special Procedures Are Needed

Adult rape victims, police officers, and even expert witnesses report that testifying is distressing. So naturally, child witnesses also express a variety of fears and anxieties about

testifying in court. But studies suggest that testifying in court is not harmful to all children, although there are subsets of child witnesses who are particularly vulnerable to the stresses inherent in the legal process, and the stress can last for years after the case is closed (11, 13–14, 19, 21, 27, 31–40). Studies also suggest that for vulnerable children, highly distressing experiences can interfere with recovery from psychiatric symptoms like depression and/or exacerbate other serious symptoms like panic attacks or suicidal thoughts. These vulnerable children who have failed to cope well with stress in the past (*e.g.,* children who have made previous gestures/attempts at suicide, self-mutilation, running away, violent behavior, or substance abuse) may resort to similar coping patterns when stressed again, especially if they have received no treatment in the interim.

It is not uncommon for child witnesses to express fears of real and imagined negative consequences that may hamper motivation and cooperation, increase anxiety or mistrust (41–46), and lead to delays, recantations, and nondisclosure (11, 13, 44–45, 47–51).

Facing the accused and cross-examination are well-documented aspects of testifying that children rate as stressful (11–13). Other aspects of court child witnesses rated as distressing are (a) not being believed, (b) not knowing what to do in court, (c) not understanding the proceedings, and (d) not knowing the answers to questions asked on the stand (4, 19, 52). Moreover, children identify fears of angering or disappointing adults, especially in cases of intra-familial abuse where children express fears related to family pressures and the potential negative impact on the family of testimony (11, 13, 53–54).

Studies suggest that attorneys exhibit little sensitivity to the age of a child in selecting their questions and that children are confronted with developmentally inappropriate questions that exceed their language comprehension abilities from both defense and prosecution attorneys (3, 9, 55). Studies of court transcripts and interviews with defense attorneys have raised concern that cross examination in particular, especially when lengthy and harsh, is not merely unpleasant for children but can have more enduring adverse effects. There is concern it may undermine children's identity development, weaken their resilience, and exacerbate traumagenic symptoms (3, 52, 55). Cross examination on delayed disclosures or failures to disclose often involves accusations of lying, overt attempts to confuse children or undermine their self-worth, or to portray them as possessing a bad character and being a bad witness (55–56). When children's character, honesty, competency, and innocence are impugned by authority figures, children may take these denunciations to heart and incorporate them into their developing self-image.

In addition to the child's emotional vulnerability, factors such as lack of maternal support, the need to testify multiple times, harsh cross-examination, victim age, and fear of the defendant should be considered in predicting whether children may suffer significant distress from the legal process (11, 22, 37, 57). The California Legislature has required courts to consider the needs of the child victim and to do whatever is necessary to prevent psychological harm to the child. Pen C §288(d) (criminal cases). See also Welf & I C §350(a)(1); Cal Rules of Ct 5.534, 5.550(a)(1) (juvenile dependency cases). Children frequently express fears involving personal safety in the courtroom (someone screaming at them or physically hurting them) and fears for personal safety of self or loved ones outside the courtroom, especially if they fear reprisal from the accused and believe that he or she will not be convicted (11, 13, 22, 34–35, 56).

Children may also express fear of being sent to jail if they make even a minor mistake or do not understand questions. They fear peer rejection, humiliation, and the anger of parents or siblings, especially if media exposure is anticipated. Children also fear loss of control on the stand, such as crying or becoming ill. Judges can alleviate many fears by ensuring that child witnesses

are prepared to testify and that unrealistic fears are minimized (see §1.4). Juvenile court judges can assure the child who is afraid that his or her statements will be the cause of a parent being jailed that that outcome is not the purpose of the juvenile court proceeding, nor will anyone be imprisoned as a result of the proceeding.

Legal and mental health professionals have noted a number of factors thought to cause children to experience psychological distress in the courtroom. Studies tend to confirm that although individual children respond differently to their involvement in the investigative-judicial process, the following factors related to the trial process are potentially stressful for some children (1, 4, 11, 13, 21–22, 27, 31–35, 37, 49, 57–58):

- long delays;
- child's lack of legal knowledge and preparation resulting in misunderstandings and fears;
- rescheduling of cases;
- child's fear of retribution for testifying;
- fear of public speaking and revealing intimate personal information in front of strangers;
- attempts at character defamation;
- intimidating layout of the courtroom;
- lack of child-friendly waiting areas that ensure no contact with the accused;
- confronting the accused, especially if the child had been warned not to tell;
- insensitive questioning techniques;
- lack of protection during cross-examination;
- use of age-inappropriate language and
- lack of social support from professionals and family.

System-induced stress not only causes immediate discomfort, but also can compromise children's testimony and interfere with recovery and emotional development. The anxiety of the moment can lead to a temporary loss of working memory and interference with the attentional resources needed to deploy retrieval strategies (59). Intimidation and unrealistic fears may cause a child to withhold information reported previously in less stressful situations, to put little effort into remembering in order to end the ordeal quickly, or to refuse to testify at all, creating inconsistencies with out-of-court statements.

Young children have difficulty using the "big picture" to put their feelings into perspective. Adult victims who anticipate that testifying will be difficult tell themselves that it is for the good of others that they endure a threatening and frightening experience. However, children have a limited view of society's need to adjudicate an issue and of abstract notions such as law and order. Thus, a child may have less motivation to testify in the face of emotional distress, have difficulty rationalizing the pain, and is likely to be overwhelmed by the emotion of the moment, potentially interfering with remembering and communicating.

It is also important to note that some children fare better if they do have their day in court, especially dependency court (11, 37, 39). In fact, some children report feeling empowered, reversing their feelings of helplessness, and appreciating the public affirmation that they were not responsible for what happened and that abuse is unacceptable to society (13). Still, even these children report that often court proceedings do not result in their feeling that they are being "heard" by adults (15, 17, 60). Although testifying is not necessarily harmful for all children, some victims

of traumatic events are particularly vulnerable, especially during the period immediately following the trauma. These children may require protective measures to enable them to testify truthfully or at all and to avert significant short and long-term detriment. See §§2.8, 2.20 on requirements for scheduling.

Researchers have begun to study the effects of reforms intended to make courtrooms more child-friendly (21, 31). Studies suggest that when children testified in criminal court, they were better able to answer questions and looked less frightened when a parent or loved one was permitted to stay in the courtroom with them (4, 11, 22). Surveys suggest that identities of support persons vary, with prosecutor-based victim/witness assistants serving most frequently, followed by parents as support persons. Most support persons provide informational support (referrals to community resources, courtroom orientations) with fewer providing emotional support (accompanying child to trial, sitting next to child during testimony (11, 61). Thus far, researchers have failed to find evidence that support person presence increases prejudice towards defendants in mock jury studies (62).

However, there may be a potential disadvantage to support persons in the courtroom in criminal cases. Researchers find that mock jurors view child victim/witnesses to be less accurate and less trustworthy (and defendants less guilty) when support persons were sitting next to the child as compared to when they were absent (63–64). Mock jurors were more likely to assume that when present, the support person had probably coached the child and spend a lot of time together with the child prior to trial, although these beliefs contradict descriptive data from surveys (61). The unintended effect of decreasing a child witness's perceived credibility may suggest consideration of alternative seating arrangements or instructions when support persons are deployed. Some states restrict communication between the two parties and do not allow the support person to obscure the view of the child from the defendant or fact finders. Overall, these findings are consistent with other studies that find mock jurors rate children more negatively when alternative testimony procedures are used (*e.g.*, CCTV; 22, 65–66).

Closing the courtroom to spectators has also resulted in positive effects. Children cried less often on the stand when the courtroom was closed to spectators. In contrast, children who were more frightened of the defendant had more difficulty answering the prosecutor's questions. In England, where closed-circuit television is used more frequently to separate children and defendants, studies suggest a number of positive results including the fact that children appear to be more fluent, confident, relaxed, and consistent witnesses.

The judge should consider the child's emotional adjustment in deciding whether to take protective measures, including:

- The need for support persons during testimony (see §§2.2, 2.11);
- The need for breaks when fatigued or upset (see §§2.8, 2.20);
- The need to control the language used when questioning the child (see §1.2);
- The use of closed-circuit television or alternatives to the traditional courtroom configuration (see §§2.6, 3.57);
- The admission of prior video-recorded testimony or other out-of-court statements by the child (see §§2.7, 3.17–3.28);
- The extent to which a child's character, motives, and honesty may be attacked during cross-examination (see §1.2); and
- The need to clear the courtroom of spectators (see §§2.4–2.5, 2.16, 2.17).

b. [§1.9] Identifying Children in Need of Special Court Procedures

Many times, judges find themselves evaluating a child's vulnerability to determine if the child is unavailable to testify or if there is a need for protective measures, such as the use of support persons or closed-circuit television in appropriate situations. A child's vulnerability depends on a number of factors. Some children's physical or mental abilities have been compromised at birth, *e.g.,* by maternal drug or alcohol abuse during pregnancy. This might include children with mental retardation, attention and memory disorders, learning disabilities, or other cognitive impairments due to head injuries at later ages (67–68). Other children may have experienced repeated traumas and difficulties during childhood, such as separations from primary caretakers, multiple foster placements, and exposure to violence. Neuroimaging and behavioral studies have documented how early exposure to toxic stress associated with these adverse childhood experiences (*e.g.*, abuse, neglect, exposure to domestic violence, parent with mental illness or substance abuse, or parental incarceration) can impair development of the brain's circuitry, impairing cognitive, language, and social-emotional development (68). These adverse childhood experiences can lead to serious life-long negative consequences for physical and mental health (69).

One of the best predictors of vulnerability to stress is a history of exposure to stressful adverse events in the past. Some children may have been diagnosed previously with psychiatric disturbance. These types of children are more vulnerable to the stress of testifying and may require more judicial attention or modification of the process than others. In general, children who find themselves embroiled in the legal system are a high-risk population. The aforementioned adverse childhood experiences leave children at risk for developing post-traumatic stress disorder, depression, anxiety disorders, and potentially self-injurious behaviors, such as running away, suicide attempt, school failure, and high-risk behaviors that include drug abuse, alcoholism, and teen pregnancy (69–75). These symptoms may be used to identify vulnerable children.

Examples of vulnerable children are those with histories of coping with stress in self-destructive ways, such as suicidal thoughts or behaviors, substance abuse, and running away. Children with histories of seizures, panic attacks, or thought disorder (*e.g.,* psychosis), where stress can exacerbate symptoms, may have difficulty testifying under standard conditions. Other types of children who may be vulnerable are those with difficulties in establishing sexual identities due to premature sexual contact with same-sex adults. For these children, concerns about peer rejection and public humiliation can be particularly acute, especially among boys, and public testimony may compound the humiliation. Children on medications that make them drowsy, aggressive, inattentive, or hyperactive (*e.g.,* antihistamines for allergies) can also require attention. Children with phobias regarding public speaking or those with a history of severe anxiety reactions may also need special procedures.

Depressive and anxiety disorders are two categories of psychiatric disorders that make children particularly vulnerable to the effects of stress and are not uncommon among child victims of sexual abuse. Depressed children may be withdrawn; they may lack motivation, concentration, and confidence; answer in one-word responses; and fail to make eye contact. These symptoms affect their presentation and therefore may be mistaken for lack of credibility, but have no real value in predicting truthfulness or accuracy. A severely depressed youngster is likely to have feelings of worthlessness and hopelessness, possibly accompanied by suicidal thoughts. The extent of attack on character and credibility that such a youngster can withstand during cross-examination would be minimal.

In addition to depression, a number of abused children suffer from post-traumatic stress disorder. Some of these children may experience flashbacks of the traumatic event while testifying

on the stand. For these children, it may feel as if they are reliving, not merely retelling, the traumatic event that brought them to the attention of the court. Another symptom found in some traumatized children, including some of those who suffer post-traumatic stress disorder, is dissociation. When children dissociate, they may appear emotionally unaffected by the traumatic experiences. They cope with their anxiety by psychologically distancing themselves from the immediate situation, an activity that is sometimes referred to as psychic numbing. They may appear to stare off into space as if they are daydreaming. This seeming lack of emotion is often mistaken for evidence that the child is inventing the testimony, especially in cases of abuse because it is a common assumption that abused children will act upset when they testify.

Information about the child's emotional state should be brought to the court's attention by counsel. However, attorneys may not realize that such information is relevant or they may be hesitant to reveal evidence of emotional disturbance, lest it damage the child's credibility. If the judge suspects that a child needs special procedures, the judge may appoint an expert to provide advice on this issue. See Evid C §730 (court may appoint an expert on its own motion or the motion of any party whenever it appears that expert evidence may be required). Evidence Code §730 has been used as a basis for appointment of an expert in criminal cases, juvenile dependency cases (see, *e.g., In re Daniel C. H.* (1990) 220 CA3d 814, 829, 269 CR 624), and family law cases (see *In re Marriage of Kim* (1989) 208 CA3d 364, 372, 256 CR 217). In most family law cases, a mental health evaluation regarding the family should provide this information.

B. Alleviating Children's Stress

1. [§1.10] In the Courtroom

Sometimes a child's way of coping with overwhelming emotion is to shut down during testimony, to fall into silence or into a series of "I don't know" and "I don't remember" responses. Attorneys, judges, and jurors may interpret these responses as evidence of denial or recantation. Although this is a possible explanation, judges should consider other explanations as well. It is equally likely that children are overwhelmed with the stress and emotion of the moment at hand (*e.g.,* fear of loss of a father's love, fear of reprisal from a stranger). Moreover, avoidance is a common childhood strategy for coping with anxiety and fear. In fact, avoidance of topics that remind an individual of a past traumatic event is a hallmark of post-traumatic stress disorder, a diagnosis found among approximately one third of sexually abused children. More obvious indications of stress are tears, but complaints of fatigue, nausea, headaches, or stomach aches also can indicate that a child is unable to cope with the needs of the court at the moment.

When a child displays signs of stress, you should not pressure the child to continue. You should also consider intervening if attorneys attempt to pressure a child into continuing. Calling a brief recess would be more productive. A child who has been able to talk about the event previously is likely to be able to do so again. During the recess, it is important to try to find out the source of the child's difficulty. If the reason relates to the courtroom context, you may be able to intervene to make the witness feel free to give testimony.

2. [§1.11] In Chambers

When permissible, you may alleviate a child witness's stress by taking the child into chambers or directing the attorney calling the child to talk to the child privately. See §§2.19 (juvenile cases), 2.25 (family law cases), and 3.57 (not permissible for criminal cases due to Sixth Amendment Confrontation Clause). When taking the child into chambers the court must consider whether all attorneys need to be present to avoid the possibility of improper ex parte communications with the

child. The discussion should focus on the reason the child is having difficulty on the stand. Attorneys should be directed to report the reasons back to you. Support persons, mental health professionals, and advocates could be enlisted for this purpose at your discretion.

> TIP: Often it is necessary to go beyond innocuous comments to address the anxiety the child inevitably feels when being questioned by a judge. This can be done with a few comments designed to let the child know that it is normal to feel anxious in court and that others are aware of these feelings. A comment such as, "I suppose it is hard to talk about something so important with a stranger" may convey to the child that you are trying to understand the child's feelings. Judges need not feel that they have to make the child's feelings go away. Telling anxious children not to feel nervous denies their feelings, but acknowledging their fear is often enough to reduce it. You should follow the guidelines set out in §§4.13–4.32 regarding phrasing of questions to children.

After putting the child at ease, you might say, "I know you have been able to talk about this before, but you seem to be having trouble today. Tell me what is making it hard to talk right now." It could be the case that previous statements had been fabricated. On the other hand, there could be something about the context of the courtroom that is impeding testimony. A child may have an overwhelming fear of public speaking or be so embarrassed as to be unable to cope. The child may simply need a break or to go to the bathroom. The child may be afraid of the way the jury or the accused is staring at him or her. If the child does reveal that the problem is one of a genuine recantation, you should consider calling both attorneys into chambers.

If the child expresses fear of the defendant, then before resuming the trial, you should reassure the child that you are in charge of the courtroom and will ensure that no one gets hurt and that all is fair. You could also review the role of the bailiff to keep order and maintain safety. You can inquire about the specific fears a child harbors regarding what will happen if the child tells the truth. Many children report that they are afraid that the accused will yell at them or hurt them during the trial, and these fears should be addressed before resuming. Children often express fears of retaliation. You can ask them if there is anything you can do to make them feel safe, comfortable, and free to tell the truth.

When terminating the questioning, you should consider thanking the child for "doing something that was hard for you to do." This helps the child reframe the experience in more positive terms. If doing a good job can be seen as being brave by doing something that was hard to do, rather than "winning" the case, then children will be more likely to feel that they were treated fairly in their interaction with the legal system. When children feel their testimony has been valued and respected and they are viewed as competent sources of important information, they are more likely to have a better attitude towards, and make a better adjustment to, case outcomes (*e.g.*, custody plans, foster placements, verdicts) as predicted by the procedural justice literature (30).

In communicating with children, it is important that their unrealistic fears are addressed (see §1.4) and that they are never made to feel responsible for the outcome of the case. Child witnesses should be told that the adults, not the children, have the responsibility and authority to make decisions.

3. [§1.12] Special Objects

Judges should allow children to bring a favorite toy or object to the stand. These comforting objects are more than mere toys. They symbolically represent a little bit of the caregiver's ability

to soothe the child when frightened or nervous. Their presence helps children calm themselves when parents are not immediately on hand.

4. [§1.13] Nonverbal Communications

Questioning young children with limited verbal abilities is a challenge. Research on the use of dolls, drawings, and props to aid memory and to augment children's statements is ongoing; however, at present there is insufficient scientific evidence to demonstrate that dolls provide more information than verbal questions alone. Moreover, there is evidence to suggest that doll use can increase the risk of erroneous reports of touch, especially in preschoolers (*e.g.*, 76–79). In fact, 3- and 4-year-olds are not proficient at using dolls and models to accurately represent the self or others (*e.g.,* 80). And, even older children up to 6 years old may produce more errors with dolls than they do in strictly verbal interviews, depending on the circumstances (81). Props (other than dolls) can lead young children to make errors they would not otherwise have made when used to elicit new information, especially if leading questions are used (78). Most best-practice guidelines in the field do not include the use of dolls or props (*e.g.*, 47, 82–86). Caution is advised before relying on young children's demonstrations when clear verbal statements are not available. In any event, the reporter must accurately record the gesture.

5. [§1.14] Judicial Demeanor

It is appropriate for you to be personable with children, to talk in a soft voice, to ask if they are comfortable, or whether there is anything that could be done to make them feel free to testify or to tell the truth. Judges may also remove their robes. Pen C §868.8(b). However, it may not be appropriate for you to escort a child to the stand as this may be perceived as endorsing a witness's credibility.

6. [§1.15] Reducing Children's Suggestibility

A good way to minimize suggestibility effects is to ask children to tell you what happened in their own words and to avoid questions that state what might have happened and merely ask children to verify or disconfirm. To curtail suggestibility effects, avoid the types of suggestive questions discussed in §§4.19–4.22. This can usually be accomplished without much loss of valuable information. For example, yes/no questions can often be reworded into less leading forms (*e.g.,* "Did John hit you?" can be reworded into "What did John do with his hands?" "How did it feel?") as discussed in §4.17.

Suggestibility effects also are diminished by respecting children's denials (87) and avoiding the following suggestive techniques: peer pressure (*e.g.,* "other people told me it happened"), permission to pretend what might have happened, and accusatory language that refers to suspects as "bad people who did bad things." In addition, suggestibility effects can be lowered by supplying children with neutral, unbiased memory jogging strategies so they provide more information in their own words in response to simple direct unbiased prompts, reducing the need for potentially misleading questions (88–89) as suggested below and in §§2.26, 3.41, and 4.8–4.23.

To maximize children's accuracy and minimize suggestion, best practice guidelines recommend the use of open-ended questions requesting multi-word responses that allow children to provide the most information in their own words (*e.g.*, 47, 82–86). Examples include questions beginning with who, what, where, how, how come, or why (*e.g.*, "What happened?" "Who was there?"). Follow-up questions ask children what they saw and heard and to elaborate on previously mentioned information (*e.g.*, "You said Joe was there, tell me more about what he did or said?"; "You said he hit you with the belt. Tell me more about what happened."). In contrast, closed-ended

questions that can be answered with a single word or phrase (*e.g.*, yes or no) should be curtailed and used sparingly and cautiously. With closed-ended questions the adults are generating most of the information and the children are providing simple unelaborated responses, increasing children's exposure to adult preconceptions embedded into potentially misleading questions.

Also helpful is providing children with instructions to be complete, try hard, listen carefully, tell the questioner when a question is not understood, tell the truth, don't make up anything, and don't guess (47, 83, 88–89). Comments implying the questioner already knows what happened should be avoided because these comments may imply that the child need only convey partial information in his or her own words, thus increasing the need for leading, follow-up questions. Instead, children can be told that they are the experts on what happened, not the adult. There is also some evidence to suggest that warning children that questions might mislead or reflect the adult's guess can increase resistance to suggestion (88–89). For additional suggestive techniques to avoid, see discussion in §§4.19–4.23 and 4.43.

Chapter 2
CRIMINAL, JUVENILE, AND FAMILY COURT CASES

I. CRIMINAL COURT CASES

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I. CRIMINAL COURT CASES

A. [§2.1] Checklist: Modifying the Setting and Process

You are authorized to facilitate the questioning of the child witness at the preliminary examination and trial of a sexual abuse prosecution. To accommodate the child witness, you may:

- Order proceedings closed to the public. Pen C §868.7 (preliminary hearing); Pen C §859.1 (any aspect of the criminal proceeding). See §§2.4, 2.5.
- Permit a continuance of the preliminary hearing to allow for the special needs of the young child. Pen C §861.5; see §2.8.
- Permit a support person to accompany the child. Pen C §868.5; see §2.2.

- Order the preliminary hearing testimony of child under 15 to be video recorded so that it may be preserved for trial if necessary. Pen C §1346; see §2.7.
- Maintain a separate room for children within a reasonable distance from the courthouse to enable them to speak freely of experiences that are the subject of judicial proceedings when they do testify. Pen C §868.6; see §2.8.
- Order use of two-way, closed-circuit television to communicate the testimony of a child victim of sexual abuse who is 13 years old or younger. Pen C §1347; see §2.6.
- Appoint separate counsel for the child witness in certain situations. See Pen C §288(d); see §2.3.
- Do whatever is necessary to prevent psychological harm to the child in a child sexual abuse prosecution. Pen C §288(d).
- Accommodate the child by giving frequent breaks and limiting taking of testimony to normal school hours. Pen C §868.8; see §2.8.
- Grant protective orders under Pen C §136.2 if there is good cause to believe that a child victim or witness is likely to be harmed, intimidated, or dissuaded. You may also prohibit any party enjoined under Pen C §136.2 from taking any action to obtain the address or location of a protected party or a protected party's family or caretakers. Pen C §136.3.
- Keep the victim or witness's address or telephone number from the defendant or his or her family members. See Pen C §1054.2.

B. [§2.2] Support Persons and Others Entitled To Be Present

A child victim of sexual abuse who is a prosecuting witness is entitled to the attendance of up to two persons of the child's own choosing or support during the child's testimony. Pen C §868.5(a). Children are often frightened when parents are excluded (11, 13, 21, 35, 61). One of these support persons may be a witness at the preliminary hearing, trial, or juvenile court proceeding. Pen C §868.5(a). The support persons may not be members of the press as described in Evid C §1070 unless they are related to the child as a parent, guardian, or sibling, and are not permitted to make notes during the proceeding. Pen C §868.5(a). If a requested support person is also a witness, the prosecution must show that that person's attendance is both required by the child for support and will be helpful to the child. Pen C §868.5(b). The presence of a support person does not impair the defendant's right to confrontation. *People v Johns* (1997) 56 CA4th 550, 553, 65 CR2d 434.

You must admonish the support persons not to influence or prompt the witness in any way. Pen C §868.5(b). You may order a support person removed from the courtroom if you believe that person is influencing or prompting the child witness. Pen C §868.5(b).

There is a split of opinion as to whether a prosecuting witness who seeks to be accompanied by a support person under Pen C § 868.5(a) must make a showing of need. See *People v Adams* (1993) 19 CA4th 412, 444, 23 CR2d 512 (the prosecution must make such a showing as required by *Coy v Iowa* (1988) 487 US 1012, 1021, 108 S Ct 2798, 101 L Ed 2d 857). But see *People v Lord* (1994) 30 CA4th 1718, 1722–1723, 36 CR2d 453 (questioning the validity of this requirement). In any event, the presence of a support person does not automatically rob a defendant of dignity, bolster the child witness's testimony, or deprive the defendant of a fair trial. *People v Adams, supra,* 19 CA4th at 436–437.

The judge must grant the request unless the defense shows, or the court notices on its own, that the support person's attendance during the child's testimony would pose a substantial risk of influencing the content of that testimony. Pen C §868.5(b). In order to challenge the use of a support person, the defendant must show how the use of a support person at trial under Pen C §868.5 has a damaging effect on the defendant's presumption of innocence. *People v Adams, supra,* 19 CA4th at 437.

In cases in which the use of support persons might unfairly influence the jury's determination of the prosecuting witness's credibility, you should explore on the record the need for the procedure and the viability of other alternatives. *People v Patten* (1992) 9 CA4th 1718, 1733, 12 CR2d 284 (support person was also a prosecuting witness). Some actions that the court might take are to admonish the jury to disregard the presence of the support person or to curtail any unnecessary actions by the support person that might influence the witness or the jury. *People v Patten, supra,* 19 CA4th at 1732.

When support persons are involved, the order of testimony is very important. The testimony of a witness who is also a support person must be presented before that of the child, and the child must be excluded from the courtroom during that testimony. Pen C §868.5(c). However, one court has held that a support person who is a witness may be recalled after the testimony of the child witness has begun when the prosecution, acting in good faith, had failed to discover evidence until after the child had begun to testify and the recall is based on that new evidence. *People v Redondo* (1988) 203 CA3d 647, 654, 250 CR 46. If the support person's testimony is given before the establishment of the corpus delicti, and if the corpus delicti is not later established by the child's testimony, the court may strike the evidence from the record either on its own or on a defense motion to strike. Pen C §868.5(c).

If there are two support persons, only one may accompany the child to the witness stand, although the other may remain in the courtroom during the child's testimony. Pen C §868.5(a). The statute does not specify where the support person may sit during the child's testimony, but in *People v Kabonic* (1986) 177 CA3d 487, 497, 223 CR 41, the court approved the trial judge's decision to permit the young witness to sit on her mother's lap while testifying.

C. [§2.3] APPOINTMENT OF ATTORNEY FOR CHILD

Ordinarily in criminal prosecutions the court does not appoint an attorney for the child witness. Penal Code §288(d), which requires the court to consider the needs of the child victim in a prosecution based on Pen C §288 (lewd and lascivious act with child) or Pen C §288.5 (engaging in three or more acts of substantial sexual conduct) and to do whatever is necessary to prevent psychological harm to the child, was used by the court in *People v Pitts* (1990) 223 CA3d 606, 869, 273 CR 757, to permit appointment of counsel for child witnesses. The *Pitts* court held that the attorney's role must be carefully delineated following a full hearing in which the prosecution, defense, and proposed counsel participate.

D. [§2.4] CLOSING THE COURTROOM

During the preliminary examination in a prosecution for sexual abuse of a child, you may, on the prosecutor's motion, close the examination to the public. Pen C §868.7. The public may be excluded when testimony before the general public would be likely to cause serious psychological harm to the child witness and there are no viable alternatives available for preventing the harm, such as video recording the child's deposition or communicating the child's testimony to the courtroom by means of closed-circuit television. Pen C §868.7(a)(1).

You may not close the courtroom during the trial merely because the child victim in a sexual abuse case would not feel comfortable testifying in front of many people unless the following requirements are satisfied (*People v Baldwin* (2006) 142 CA4th 1416, 1421–1422, 48 CR3d 792, citing *Waller v Georgia* (1984) 467 US 39, 45, 104 S Ct 210, 81 L Ed 2d 31):

- There is an overriding interest (that you must specify) that would be prejudiced if the courtroom were not closed;
- The closure must be no broader than necessary to protect that interest; and
- You have considered reasonable alternatives to closure.

There are two reasons why some child victims of sexual abuse may be at risk of serious psychological harm if required to testify at an open preliminary examination: (1) stress of describing intimate details in front of strangers, as well as defendant's family and friends, and (2) stress resulting from the knowledge that intimate details will be disseminated to the public. *Eversole v Superior Court* (1983) 148 CA3d 188, 200, 195 CR 816. This procedure would only prevent psychological harm from the *former* reason because, under Pen C §868.7, a transcript of the testimony of the minor witness must be made available to the public soon after the hearing. Therefore, closure would not prevent intimate details from reaching the public. *Eversole v Superior Court, supra.*

You may grant a motion under Pen C §868.7 to close the courtroom only on a finding that serious psychological harm would be caused by testifying in the presence of the public and that there is no available alternative, such as video recording or use of closed-circuit television. 148 CA3d at 200. However, it has been suggested that, even if you find closure to be desirable and no alternatives to be available, the order for closure should be as narrowly drawn as possible. 148 CA3d 201 n11 (noting that, when it is shown that the child would suffer psychological distress because of the presence of defendant's family, the order should be drawn to exclude only the members of defendant's family). See §§1.8 and 1.9 on alleviating stress and identifying vulnerable children.

In ruling on motions to close hearings, courts must balance the constitutional rights of defendants, the public, and the press to open hearings against the needs of child witnesses. See US Const amend VI (accused has right to public trial); *Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 573, 100 S Ct 2814, 65 L Ed 2d 973 (public and press have constitutional right of access to criminal trials). While the protection of victims of sex crimes from trauma and embarrassment may justify barring the media from certain aspects of criminal proceedings (see *Globe Newspaper Co. v Superior Court* (1982) 457 US 596, 607, 102 S Ct 2613, 73 L Ed 2d 248), generally "a presumption of openness inheres in the very nature of a criminal trial" (*Richmond Newspapers, Inc., supra).* This qualified right of access of the public and press extends to preliminary hearings. *Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13, 106 S Ct 2735, 92 L Ed 2d 1.

Because of these constitutional considerations, many judges proceed with caution before granting a motion under Pen C §868.7. Moreover, assuming that the media and the public have the same interests to protect in opposing the closure of preliminary hearings at the prosecutor's request as they do in opposing requests to close the hearing for protection of the defendant, courts presumably must provide notice to the media of the request for closure and must hold a bifurcated hearing (the second part in camera) when a motion is made under Pen C §868.7. See *Telegram Tribune, Inc. v Municipal Court* (1985) 166 CA3d 1072, 1077, 213 CR 7 (procedures to follow in notifying media when closure motion is made).

Although an evidentiary hearing is not required by Pen C §868.7, the better practice is to hold such a hearing before making a decision to close the courtroom. See *People v Baldwin*, *supra*, 142 CA4th at 1422.

On either party's motion, the preliminary hearing judge must exclude actual or potential witnesses from the preliminary hearing (Pen C §867) and may exclude the public at the request of the defendant if certain conditions have been met (Pen C §868). Under Pen C §868, family members of the victim may be present unless the defendant can show that their attendance may jeopardize the defendant's right to a fair and impartial trial or will pose a risk of affecting the victim's testimony or that of other witnesses.

Penal Code §859.1 provides for closure of the courtroom in any criminal proceeding, not just a preliminary hearing when the defendant has been charged with any of the sex offenses listed in Pen C §868.8 on a child under the age of 16 years. The court may close the courtroom on the motion of the prosecuting attorney when closure has been sought during the child's testimony or during the course of testimony relating to the child in order to protect the child's reputation. In determining whether the hearing should be closed, the judge should consider, among other factors, the age of the child, the nature and seriousness of the offense, the likelihood of opprobrium because of the status of the victim, and whether there is an overriding public interest in having an open hearing. Pen C §859.1(b). You should also consider the child's history of past psychiatric disorder (*e.g.,* anxiety disorder, depression), examples of the child's inability to cope in the past (*e.g.,* suicide attempts, running away, self-injurious behavior), the likelihood that current psychiatric symptoms will be exacerbated (*e.g.,* flashbacks, anxiety reactions, suicidal thoughts), and availability of parental support. However, in closing *any* criminal proceeding, constitutional considerations apply. See *Globe Newspaper Co. v Superior Court, supra,* 457 US at 607 (because of first amendment right of public and press to open trial, closure must be shown to be as narrowly tailored as is necessary to needs of minor victim); *Eversole* v *Superior Court, supra,* 148 CA3d at 200 (requiring that closure order be drawn as narrowly as possible). For discussion of closure of preliminary hearings, see California Judges Benchguide 92: *Preliminary Hearings* §§92.53–92.59 (Cal CJER).

The partial closure of a trial by excluding two of defendant's supporters during the testimony of a child witness does not automatically deprive defendant of the right to a public trial. *People v Esquibel* (2008) 166 CA4th 539, 554, 82 CR3d 803.

E. [§2.5] REMOVAL OF SPECTATORS

Under Pen C §686.2, the court may order the removal of a spectator who is intimidating a witness. The court may take this step only if it finds all of the following by clear and convincing evidence that:

- The spectator is actually engaged in intimidation,
- The presence of the spectator is preventing the witness from giving full and complete testimony, and
- Removal of the spectator is the only reasonable means of ensuring that the witness can testify fully and completely.

F. [§2.6] USE OF CLOSED-CIRCUIT TELEVISION

On either its own motion or the motion of the prosecutor, the judge may order that the testimony of a child victim of sexual abuse, 13 years old or younger, be taken in another location out of the presence of the judge, jury, defendant, and attorneys. See Pen C §1347(b). This is an

unusual procedure to be used selectively when the facts and circumstances indicate its appropriateness. Pen C §1347(a). In fact, this procedure has rarely been used in California courts.

The testimony would be communicated to the courtroom by means of closed-circuit television that would accurately communicate the image of the child to the judge, jury, defendant, and attorneys. Pen C §1347(b)(3). To use this procedure, the child's testimony must involve a recitation of the facts of an alleged sexual offense. Pen C §1347(b)(1)(A). In addition, the court must find that the child is unavailable as a witness because of clear and convincing evidence of threats, the use of a firearm or infliction of great bodily injury during the crime, or conduct of the defendant or attorney during the procedure that prevents the child witness from continuing. Pen C §1347(b)(2). Refusal to testify by itself does not provide grounds for a finding of unavailability. Pen C §1347(b).

To permit the use of this procedure, you must consider the child's age, the child's relationship with the defendant, any disability the child may have, and the nature of the charged acts. Pen C §1347(b).

When the court grants such a motion, the examination must be under oath and the defendant must be able to see and hear the child witness. Pen C §1347(i). The cost of examination by closed-circuit television is borne by the court. Pen C §1347(k).

The United States Supreme Court has upheld testimony by closed-circuit television in *Maryland v Craig* (1990) 497 US 836, 110 S Ct 3157, 111 L Ed 2d 66. In that case, the Maryland statute permitted testimony by a child witness by one-way, closed-circuit television (the defendant could see the child witness but the child could not see the defendant). The court held that the state was able to show that its interest in protecting the child witness from the trauma of testifying in front of the defendant was a compelling one, particularly when the trauma would have impaired the child's ability to communicate. 497 US at 857.

The court held, moreover, that because the child witness testified under oath, was subject to full cross-examination, and was able to be observed by the defendant, the jury, and the judge, the essence of effective confrontation was preserved. 497 US at 857. However, the court held that, before such a procedure may be used, the trial court must find that the emotional distress that the child would suffer by having to testify without the closed-circuit television would be more than mere reluctance to testify, nervousness, or excitement. 497 US at 856. Although the Supreme Court did not specify what level of emotional distress was necessary, it did state that the Maryland statute (specifying "serious emotional distress such that the child cannot reasonably communicate") met constitutional standards. 497 US at 856. In a case involving an adult witness, the court erred in failing to hold an evidentiary hearing on the need for this special protection before using a one-way glass during testimony. *People v Murphy* (2003) 107 CA4th 1150, 1157–1158, 132 CR2d 688.

As mentioned previously, judges should consider the vulnerability of the individual child by taking into consideration

- current or past emotional disturbance and the possibility that testifying will exacerbate or hasten the return of serious symptoms, such as suicidal thoughts/behavior, disordered thinking, anxiety attacks, flashbacks, etc.;
- past history of self-destructive and maladaptive patterns of coping with stress, such as running away, self-mutilation, substance abuse, violent behavior;
- the likelihood that testifying will thwart recovery from psychiatric disorder, such as post-traumatic stress disorder;

- the child's fear of defendant;
- maternal support of child testifying; and
- the need to testify multiple times.

There is some research to indicate that for children who are at risk for stress from legal involvement, protective measures like closed-circuit testimony may be especially important (11, 22, 31–33, 90). However, there is also evidence that this technique may reduce children's credibility in the juror's eyes. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §3.05[H] (2005). Despite this, it may be the only reasonable and fair way of obtaining the testimony of a frightened and vulnerable child.

G. [§2.7] Use of Video recording

In addition to testimony by closed-circuit television, the prosecution may apply for an order to video record the preliminary hearing testimony of a child victim of sexual abuse who is 15 years of age or less or is developmentally disabled. Pen C §1346(a). Stenographic preservation of the testimony must be made in addition to the video recording. Pen C §1346(a).

The application for the order must be in writing and made 3 days before the preliminary hearing. Pen C §1346(b). If the application is made properly and is received in a timely manner, the magistrate must order that the child's preliminary hearing testimony be taken and preserved as a video recording. Pen C §1346(c). The video recording must be transmitted to the clerk of the court in which the case is pending. Pen C §1346(c).

The video recording may then be used as preserved former testimony under Evid C §1291 if, at the time of trial, the trial court judge finds that the victim is unavailable because further testimony would cause the victim emotional trauma. Pen C §1346(d); see Evid C §240 and discussion of prior recorded testimony in §3.18. The video recording must be available to the prosecutor, defense counsel, and defendant for viewing during normal business hours, but subject to a protective order to safeguard the victim's privacy. Pen C §1346(f). The video recording must be destroyed 5 years after entry of judgment, but not until final entry of any judgment on appeal. Pen C §1346(g).

Although any video recording made under these provisions will be subject to a protective order issued to protect the victim, the transcript of the preliminary examination must nevertheless be issued to the public under Pen C §868.7(b), requiring that in any case where public access to the courtroom has been restricted, a transcript must be made available to the public as soon as possible. Pen C §1346(e). Judges should warn attorneys to ensure that experts or others do not use copies of video recordings of child witnesses for other purposes.

H. [§2.8] Scheduling and Courtroom Configuration Changes

Judges should facilitate timely and speedy management of cases. For example, when a child is the victim of a crime or is a material witness, the trial must be commenced within 30 days after arraignment unless the case is continued on a finding of good cause. See Pen C §1048(b). Empirical studies show that protracted cases have adverse effects on young children, impairing their ability to recover from the trauma of the situation or the courtroom aftermath (11, 31, 35, 37, 39, 58, 90). In evaluating requests for continuances and delays from either prosecutor or defense counsel, you should ensure that time from arraignment or disposition is minimized.

A judge may lessen the trauma to a child witness or a dependent person by careful scheduling. Although ordinarily a defendant is entitled to have the preliminary examination completed in one session (Pen C §861), you may postpone the preliminary examination for one court day so that the

special physical, mental, or emotional needs of the dependent person or the child witness who is 10 years old or younger may be accommodated. Pen C §861.5. In granting such a continuance, you must admonish both the prosecution and defense against coaching the witness before the next appearance in the preliminary hearing. Pen C §861.5.

When the prosecuting attorney has another trial, preliminary hearing, or motion to suppress and the case involves Pen C §11165.1 (reporting requirements for sexual abuse or assault) or Pen C §11165.6 (child abuse or neglect), this may constitute good cause to continue a preliminary hearing for up to 3 court days. Pen C §859b. Similarly, a trial may be continued for up to 10 court days when the prosecutor has the same conflicts listed above in a situation also involving Pen C §11165.1 or §11165.6. Pen C §1050(g)(2).

Other ways in which you may accommodate the child witness in a criminal prosecution for specified sexual offenses against a child under the age of 11 are:

- Permit the child witness reasonable periods of relief from examination and cross-examination. Pen C §868.8(a).
- Limit the taking of the child's testimony to normal school hours unless there is good cause to take the testimony during non-school hours. Pen C §868.8(d).
- Remove the judicial robe if you feel that formal attire is intimidating. Pen C §868.8(b).
- Relocate parties, witnesses, support people, and court personnel within the courtroom for a more comfortable environment for the child witness. Pen C §868.8(c).

However, in relocating people within the courtroom, you should be careful to avoid a violation of the defendant's right to confrontation. An arrangement in which the 5-year-old witness in the preliminary hearing of a sexual abuse case sat in the witness chair, the defendant was seated in front of and to the side of the bench, the judge was seated in the jury box, and the courtroom was cleared was held to violate the defendant's right to confrontation. *Herbert v Superior Court* (1981) 117 CA3d 661, 671, 172 CR 850. The judge made these changes because the child was initially reluctant to testify and was thought to be disturbed by the presence of the defendant and the large number of people in the courtroom. 117 CA3d at 664. To ease the situation, the judge had placed the child witness in a location where she and the defendant would not be able to see each other, but where the defendant could hear the witness's testimony. See §§3.56–3.59, generally, on defendant's right to confrontation vis-à-vis the child witness.

In addition to possible changes in the courtroom configuration for the benefit of the child witness, counties are encouraged to provide multipurpose rooms for the use of children under the age of 16. Pen C §868.6.

Finally, as an additional tool for judges in dealing with the child witness, Pen C §288(d) requires you to consider the needs of the child victim in a prosecution based on Pen C §288 (lewd and lascivious act with child) or Pen C §288.5 (engaging in three or more acts of substantial sexual conduct) and to do whatever is necessary to prevent psychological harm to the child.

I. [§2.9] DISCOVERY

Because a videotape made by a Sexual Assault Response Team (SART) can be said to have been produced by members of the "prosecution team," failure to turn it over to the defense may violate *Brady v Maryland* (1963) 373 US 83, 83 S Ct 1194, 10 L Ed 2d 215, when it contains evidence that may be favorable to the defense. *People v Uribe* (2008) 162 CA4th 1457, 1479–1482, 76 CR3d 829.

II. JUVENILE COURT CASES

A. [§2.10] CHECKLIST: MODIFYING THE SETTING AND PROCESS

To accommodate the child witness, the court may:

- Order proceedings closed to the public. Welf & I C §§346, 676(b); see §2.16.
- Permit a court-appointed special advocate (CASA) to accompany the child as a guardian ad litem under the Child Abuse Prevention and Treatment Act (CAPTA). See Welf & I C §§326.5, 675; Cal Rules of Ct 5.660(b)(3). See also Cal Rules of Ct 5.655 (recruitment, duties, etc. of CASAs). The court may also appoint a CASA for a child who has an attorney. Cal Rules of Ct 5.660(f)(4); see §§2.11, 2.15.
- Permit the child to testify in chambers out of the parents' presence in juvenile court dependency hearing. Welf & I C §§350(b), 366.26(h)(3)(A); see §2.19.
- Maintain a separate room for children within a reasonable distance from the courthouse to enable them to speak freely of experiences that are the subject of judicial proceedings when they do testify. Pen C §868.6.
- Appoint separate counsel for the child. Welf & I C §317 (dependency cases); see §§2.12–2.15.

In addition, from the time a Welf & I C §300 petition is filed until juvenile court jurisdiction is terminated, any interested person may advise the court of information relevant to the child's interests or rights. Cal Rules of Ct 5.660(g). If the child's attorney or a CASA acting as a CAPTA guardian ad litem learns of any such interest or right, he or she must notify the court immediately and seek directions on appropriate procedures. Cal Rules of Ct 5.660(g)(2).

If the court determines that further action is necessary to protect the child's rights or interests, it can (Cal Rules of Ct 5.660(g)(3)):

- Refer the matter for investigation and require a follow-up report,
- Authorize and/or direct the child's counsel to take a particular action,
- Appoint a guardian ad litem for the child (this person may be a CASA, appointed as a CAPTA guardian ad litem, or a person who will act only if it is appropriate to initiate action), or
- Take any other action to protect the child or protect or pursue the child's interests.

A court may refuse to permit a child to testify if it determines that such testimony would cause psychological injury and the potential detriment from testifying would outweigh the benefit. *In re Jennifer J.* (1992) 8 CA4th 1080, 1086, 10 CR2d 813, distinguishing *In re Amy M.* (1991) 232 CA3d 849, 283 CR 788, in which the child's testimony could have assisted in resolving a disputed issue. Although no statute or case specifically authorizes a court to exclude a child's testimony in order to avoid psychological harm, the court nevertheless has such power based on the overriding objective of the dependency hearing—to preserve and promote the best interests of the child. *In re Jennifer J., supra,* 8 CA4th at 1089. In addition, the court has the inherent authority to take steps necessary to facilitate the child's testimony. *In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404 (court had inherent authority to use both in-chambers testimony and closed-circuit television).

Generally, in juvenile dependency cases, Welf & I C §350 provides that uncontested (proceedings must be conducted in an informal, nonadversarial manner (Welf & I C §350(a)), that

all proceedings be handled with a view to expeditious and effective determination of the present condition and future welfare of the child, and that the testimony of the child may be taken in chambers outside the presence of the parents (Welf & I C §350(b)). In juvenile delinquency cases, Welf & I C §680 also provides that proceedings will be conducted in an informal, nonadversarial manner. See §2.19 for a discussion of conducting the examination of the child witness in chambers.

B. [§2.11] Support Persons and Others Entitled To Be Present

Dependency. In juvenile dependency proceedings a child may be supported by a guardian ad litem (Welf & I C §326.5) who may be a court-appointed special advocate (CASA) as defined by Welf & I C §§100–109. In addition to support persons, juvenile court judges may admit the child's present or previous custodians as de facto parents and give them standing to participate in disposition and subsequent dependency hearings. Cal Rules of Ct 5.534(e) (sufficient showing required). The de facto parents may (1) be present at the hearing, (2) be represented by retained or appointed counsel, and (3) present evidence. Cal Rules of Ct 5.534(e). In addition, on a sufficient showing, the child's relatives may be present at the hearing and address the court. Cal Rules of Ct 5.534(f). See §2.2 for discussion of the advantages and disadvantages of allowing support persons to accompany a child witness in the courtroom.

Delinquency. In juvenile delinquency proceedings, a prosecuting witness may be accompanied by up to two family members as support persons. Welf & I C §676(a). Also, you must inform the support persons that the proceedings are confidential. Pen C §868.5(b).

C. Appointment of Representative for Child

1. [§2.12] Appointment of Counsel

Dependency. You must appoint counsel for the child unless you find that the child would not benefit from the appointment. Welf & I C §317(c); Cal Rules of Ct 5.660(b). To find that the child would not benefit from counsel, you must find all of the following (Cal Rules of Ct 5.660(b)(1)):

- The child understands the nature of the proceedings;
- The child can communicate with the court, other counsel, other parties, and the social workers and other professionals involved in the case, and can advocate effectively for him or herself; and
- Under the circumstances, there would be no benefit to the child from having counsel appointed.

If you find that the child would not benefit from counsel, you must state reasons on the record for that finding on each criterion (Welf & I C §317(c); Cal Rules of Ct 5.660(b)(2)), and you must appoint a CASA to serve as the CAPTA guardian ad litem. Cal Rules of Ct 5.660(b)(3).

You may appoint a single attorney to represent a group of siblings involved in the same dependency proceeding, unless an actual conflict of interest exists or is reasonably likely to arise. Cal Rules of Ct 5.660(c). Conflicting preferences among siblings does not necessarily mean that there is a conflict of interest. *In re Zamer G.* (2007) 153 CA4th 1253, 1266, 63 CR3d 769.

When appointing counsel, you must determine whether to appoint independent counsel. You may appoint the district attorney, public defender, or other member of the bar, as long as that attorney does not represent a party or an agency whose interests conflict with those of the child. Welf & I C §317(c). A prosecutor who represented the child in a dependency case, however, may not appear on behalf of the state in a juvenile court hearing based on a petition that alleges that the same child comes within Welf & I C §602. Welf & I C §318.

Delinquency. In delinquency cases under Welf & I C §601 or §602, you must appoint counsel for any child who appears without counsel, unless the child knowingly and intelligently waives the right to counsel. Welf & I C §§634, 317(c); Cal Rules of Ct 5.534(h)(2)(A).

2. [§2.13] Duties of Attorney

Dependency. The duties of the child's attorney are to represent the child's legal interests at all dependency hearings. Welf & I C §317(d)–(e). The attorney must advocate for the protection, safety, and physical and emotional well-being of the child. Welf & I C §317(c). The role of the child's counsel is not merely to express the wishes of the child if orders consistent with those wishes would endanger the child. *In re Alexis W.* (1999) 71 CA4th 28, 36, 83 CR2d 488. Because the child's attorney has an obligation to represent the child's interests, the attorney may have to present a position to the court that runs counter to both the parents' and the petitioning agency's position. See *Allen M. v Superior Court* (1992) 6 CA4th 1069, 1075, 8 CR2d 259 (child's counsel may properly request that petition not be dismissed despite agreement between DSS and parents regarding dismissal).

The attorney must meet regularly with his or her client regardless of the child's age and ability to communicate and be able to establish a valid attorney-client relationship: he or she must work with the other attorneys and the court to resolve disputed aspects of the case. Cal Rules of Ct 5.660(d)(4). Because counsel for children must interview their clients to ascertain their wishes, the judge may generally assume that the attorney who advocates for a certain disposition had previously consulted the child regarding that disposition. See *In re Jesse B.* (1992) 8 CA4th 845, 853, 10 CR2d 516.

Counsel cannot be faulted for asking a question of a child who has recanted previous testimony in a way that seems argumentative when counsel is attempting to assist the court in ascertaining the truth. *In re Kristen B.* (2008) 163 CA4th 1535, 1543, 78 CR3d 495 (case dealing with effective assistance of counsel).

The attorney represents the child's legal interests and is not required to assume the responsibilities of a social worker. Welf & I C §317(e); Cal Rules of Ct 5.660(d)(4); see also Welf & I C §280 (duties of social worker). However, in assessing how to handle the litigation, the child's attorney, as well as the social worker, CASA, or guardian ad litem, must be notified of changes in the child's life, including changes in placement. See *In re Robert A.* (1992) 4 CA4th 174, 192, 5 CR2d 438.

Delinquency. The duties of the child's attorney are (1) to defend the child against the allegations in all petitions filed in delinquency proceedings and (2) to advocate, within the framework of the delinquency proceedings, that the child receive care, treatment, and guidance consistent with his or her best interest. Cal Rules of Ct 5.663(b). But the attorney is not required to assume the responsibilities of a probation officer, social worker, parent, or guardian, nor to provide nonlegal services or to represent the child in any nondelinquency proceedings. Cal Rules of Ct 5.663(d).

3. [§2.14] Invoking Privileges

Dependency. Either the child or the child's counsel may invoke a privilege, such as the psychotherapist-patient privilege, and if the child invokes it, counsel may not waive it; but if counsel invokes it, the child may waive it. Welf & I C §317(f). If the child is neither old nor mature enough, counsel is the holder of the privileges. Welf & I C §317(f).

Notwithstanding Welf & I C §317(f), the juvenile court may order a child's therapist to disclose limited information regarding the issues being addressed by the child in therapy and the general progress being made. In this way, the court can ensure the dual purpose of therapy in dependency cases—to treat the child and to provide the court and the Department of Social Services with information necessary to make reasoned recommendations and decisions regarding the child's welfare—is satisfied. See *In re Kristine W.* (2001) 94 CA4th 521, 527–528, 114 CR2d 369 and *In re Mark L.* (2001) 94 CA4th 573, 584, 114 CR2d 499.

4. [§2.15] Appointment of Guardian ad Litem

Dependency. You must appoint a guardian ad litem (GAL) for the child in all cases in which a dependency petition is filed based on abuse or neglect of the child. See Welf & I C §326.5; see also *In re Josiah Z.* (2005) 36 C4th 664, 679–680, 31 CR3d 472. However, appointment of a guardian ad litem for a minor parent in a dependency proceeding is not required unless the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case. Welf & I C §326.7. See also CCP §372(c)(2).

If the court does not appoint the child's counsel to serve in the additional role of the GAL counsel, it must appoint a court-appointed special advocate (CASA) to serve as the CAPTA guardian ad litem. Welf & I C §326.5; Cal Rules of Ct 5.660(b)(3), (f). See also Cal Rules of Ct 5.655 (recruitment, duties, etc., of CASAs). The court may also appoint a CASA for a child who has an attorney. Cal Rules of Ct 5.660(f)(4).

D. [§2.16] Closing the Courtroom and Restricting Access

Dependency. Juvenile court dependency hearings are closed to the public unless a parent or guardian requests otherwise and the child concerning whom a petition has been filed has also requested otherwise or has consented to the parent's or guardian's request. Welf & I C §346. You may also admit any person who has a direct and legitimate interest in the case or the court's work. Welf & I C §346. See also Welf & I C §345 (juvenile cases are confidential and no person on trial, awaiting trial, or accused of a crime may attend except as a witness unless that person is the child's parent, guardian, or relative). The court may not condition press attendance on restricting the press from investigating and publishing information that it lawfully obtained. *San Bernardino County Dep't of Pub. Social Servs. v Superior Court* (1991) 232 CA3d 188, 206–207, 283 CR 332.

Delinquency. Except when a Welf & I C §602 petition is filed because of an alleged serious or violent offense listed in Welf & I C §676(a), juvenile court delinquency hearings are closed to the public unless the child concerning whom a petition has been filed or a parent or guardian requests otherwise. Welf & I C §676(a). You may also admit any persons who have a direct and legitimate interest in the case or the court's work. Welf & I C §676(a). See also Welf & I C §675 (no person on trial, awaiting trial, or accused of crime may attend except as a witness unless that person is a parent, guardian, or relative of the child).

However, in certain situations, juvenile delinquency hearings are required to be open to the public. For example, the parent, guardian, or other person having control of the child has a right to an open hearing if the complaint charges a violation of Ed C §48293 (penalties against parents for child's truancy). Welf & I C §700.2. More importantly, when certain violent or serious crimes are involved, the public must be admitted to the delinquency hearing. Welf & I C §676(a); *Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 451, 218 CR 505 (unless child can show likelihood of substantial prejudice to the right to receive fair and impartial trial, fitness hearings should be open). See also *Cheyenne K. v Superior Court* (1989) 208 CA3d 331, 336, 256

CR 68 (public may attend hearing concerning child's competency to stand trial when child has committed one of the serious offenses listed in Welf & I C §676). The press is entitled to print the name and a likeness of the juvenile offender. *KGTV Channel 10 v Superior Court* (1994) 26 CA4th 1673, 1683–1685, 32 CR2d 181.

There is an exception to open hearings for serious offenses when the petition alleges that the child committed certain crimes such as rape or sodomy with force or violence, or when the victim is prevented from resisting by any intoxicating, anesthetizing, or controlled substance, or incapable of giving consent due to mental disorder or developmental or physical disability, and this is known or reasonably should be known to the person committing the offense. Welf & I C §676(b). In such an instance, the entire hearing may be closed on the victim's motion. Welf & I C §676(b)(1). The hearing must also be closed during the testimony of a child victim witness who is under 16 years of age. Welf & I C §676(b)(2).

1. [§2.17] Excluding Spectators

Dependency. When a child witness expresses fear of a parent or guardian, that person may be excluded while the witness is testifying if that person's attorney is present during the child's testimony and has a chance to cross-examine the child. See *In re Tanya P.* (1981) 120 CA3d 66, 69, 174 CR 533. See also *In re Mary S.* (1986) 186 CA3d 414, 417, 230 CR 726, in which the court held that the children's testimony outside both parents' presence was proper when the children had expressed that they would be afraid and unable to testify fully in their parents' presence and when the father's right of confrontation was protected by his attorney's cross-examination of the children. See §§3.56–3.59 for discussion of right of confrontation. The *Mary S.* court also held that expert testimony is unnecessary to establish the children's need to testify outside of their parents' presence; the young witnesses' fear could be established by their own testimony. 186 CA3d at 422.

2. [§2.18] Public Access to Records

Under Welf & I C §827(a), the juvenile court has discretion to determine which members of the public may have access to juvenile court records. See *In re Keisha T.* (1995) 38 CA4th 220, 238–239, 44 CR2d 220. The court controls these records regardless of whether the minor had previously been declared a dependent or ward of the juvenile court. *In re Elijah S.* (2005) 125 CA4th 1532, 1546–1547, 24 CR3d 16. The court may also restrain parties to the proceedings from disseminating confidential juvenile court information. *In re Tiffany G.* (1994) 29 CA4th 443, 452, 35 CR2d 8.

In balancing the best interests of the children against the interests of the public, the court must conduct an in camera hearing to determine which material should be disclosed. *In re Keisha T., supra*, 38 CA4th at 239. When determining the extent of disclosure, the court should consider the factors set out in Cal Rules of Ct 5.552(e)(4)–(6). 38 CA4th at 240. The procedure for determining access to juvenile court records is as follows:

(1) The petitioner applies for disclosure using Judicial Council form JV-570 and showing good cause. See *In re Keisha T., supra,* 38 CA4th at 240; Cal Rules of Ct 5.552(c)–(e).

(2) The court may grant or deny the petition with no hearing if it determines no further action is required. See Cal Rules of Ct 5.552(e)(1).

(3) If the court needs more information, the petitioner must provide reasons for disclosure and describe the records and their relevance.

(4) Copies of the petition are given to children and other interested parties. See Cal Rules of Ct 5.552(d).

(5) If the court sets a hearing, it must provide notice and opportunity to be heard to all interested parties. *In re Keisha T., supra.*

(6) At the hearing, the court must review the records. See Cal Rules of Ct 5.552(e).

(7) The court makes appropriate orders concerning which part of the records are to be disclosed; it identifies information to be disclosed (partial disclosure may be appropriate), protective orders, and the procedure for access. Cal Rules of Ct 5.552(e)(7), (8); *In re Keisha T., supra,* 38 CA4th at 240–241.

The parties must stipulate to a judge pro tem if the in-camera hearing is conducted by such a person. 38 CA4th at 241.

E. [§2.19] CONDUCTING EXAMINATION IN CHAMBERS

Dependency. In dependency proceedings, Welf & I C §350(b) and Cal Rules of Ct 5.534(c) permit examination in chambers outside the presence of the parents or guardians, but in the presence of parents' attorneys, if any one of the following conditions exists:

- The court determines that testimony in chambers is necessary to ensure truthful testimony. Welf & I C §350(b)(1); Cal Rules of Ct 5.534(c)(1).
- The child is likely to be intimidated in the more formal courtroom setting. Welf & I C §350(b)(2); Cal Rules of Ct 5.534(c)(2).
- The child is frightened to testify in front of the parent or parents. Welf & I C §350(b)(3); Cal Rules of Ct 5.534(c)(3).

The same factors apply in determining whether to take the child's testimony in chambers outside the presence of the parents or guardians in a selection and implementation hearing. Welf & I C §366.26(h)(3). In such proceedings the court must also consider the child's wishes and act in the child's best interests. Welf & I C §366.26(h)(1). The court need not take evidence concerning the child's wishes, however, if the child is too young to understand the situation or express him or herself. *In re Juan H.* (1992) 11 CA4th 169, 172–173, 13 CR2d 716. In determining whether there is a basis for the child's in-chambers testimony, the court may consider the petitioner's report or the offers of proof. Cal Rules of Ct 5.534(c). Also see §§1.8 and 1.9 on alleviating stress and identifying vulnerable children in need of modification and extra support. After testimony in chambers, the parents or guardians may choose to have the court reporter read back the child's testimony or have the testimony summarized by their own counsel. Welf & I C §350(b); Welf & I C §366.26(h)(3)(B); see Cal Rules of Ct 5.534(c).

In *In re Katrina L.* (1988) 200 CA3d 1288, 1298, 247 CR 754, the court of appeal held that it was proper for the child to testify in chambers outside of her father's presence at a jurisdiction hearing even though the request for examination in chambers did not come from the child herself but from the Department of Social Services, which stated that the child would likely be intimidated in a courtroom setting. Because counsel for all parties were present, the child's testimony was transcribed, and the father had an opportunity to discuss the testimony with his counsel, the requirements of Welf & I C §350 were met.

A court may permit the child to testify in chambers even when the child does not expressly state a fear of testifying in open court. *In re Katrina L.*, *supra,* 200 CA3d at 1297–1298 (requirements of Welf & I C §350 were otherwise met).

Counsel for the parent or guardian must be present during in-chambers testimony. It may be prejudicial error for the court to question the child in chambers with only a reporter present even when the parent appears to have acquiesced to the procedure. See *In re Laura H.* (1992) 8 CA4th

1689, 1697, 11 CR2d 285. Disagreeing with *In re Laura H.* is *In re Jamie R.* (2001) 90 CA4th 766, 771, 109 CR2d 123, which held that a parent who keeps silent and otherwise acquiesces to the questioning of the child in chambers without counsel waives the statutory right to have counsel at the in-chambers proceeding (Welf & I C §366.26 hearing). In *In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404, the court upheld the procedure by which even the judge viewed the in-chambers testimony via closed-circuit television.

When a child testifies in chambers, the court must first administer an oath to the child or obtain a satisfactory promise from the child to tell the truth. See *In re Heather H.* (1988) 200 CA3d 91, 95–97, 246 CR 38 (failure to administer oath rendered testimony inadmissible). See discussion in §3.11.

> TIP: Because chambers may feel extremely crowded for a child, some judges conduct "in-chambers" proceedings in the courtroom without the parents. In this situation, you may come down from the bench to listen to the child's testimony. Before doing so, however, it may be advisable to check with the case worker, child's attorney, and/or CASA representative. The child may have been previously introduced to the standard courtroom setting and may feel uncomfortable or threatened with the less formal approach. Different approaches work in different situations.

F. [§2.20] SCHEDULING CHANGES

Dependency. Dependency cases must be granted precedence on the court's calendar (Welf & I C §345) and no continuance shall be granted that is contrary to the interest of the child (Welf & I C §352(a)). No continuance may be granted without a showing of good cause. A stipulation between counsel, convenience of the parties, a pending family law proceeding or criminal prosecution do not constitute good cause. Welf & I C §352(a). For requirements for detention or initial hearings, see Welf & I C §352(b) (dispositional hearing must be completed within 60 days after order of removal without exceptional circumstances) and Cal Rules of Ct 5.670(f) (hearings must be held within 30 days for nondetained cases and 15 days for detained cases).

In *In re Katrina L.* (1988) 200 CA3d 1288, 1295, 247 CR 754, the court held that a parent accused of abuse should not be granted a continuance in a dependency proceeding pending the outcome of his criminal trial because Welf & I C §352(a) does not consider such a situation to constitute good cause and because Welf & I C §355.1(f) provides that a parent's testimony in a dependency proceeding is not admissible in any other proceeding. Chronic court congestion also does not constitute good cause for continuing a hearing.

Dependency cases demand priority. See, *e.g., Jeff M. v Superior Court* (1997) 56 CA4th 1238, 1242–1243, 66 CR2d 343 (after more than a year from the filing of the petition, jurisdiction hearing had still not been completed). The priority of dependency cases must be stressed to your Presiding Judge, and there may be inordinate delays unless a civil or criminal department can be used.

Delinquency. Delinquency jurisdictional hearings are also to be held expeditiously. Welf & I C §657 (within 15 days if the child is detained in custody; otherwise 30 days). A continuance shall be granted only upon a showing of good cause and only for that period of time shown to be necessary. Welf & I C §682(b).

III. [§2.21] FAMILY LAW CASES

In a family law case, you may order proceedings closed to the public and press when you consider closure necessary in the interests of justice. Fam C §214. You may also appoint separate counsel for the child (Fam C §§3114, 3150–3153; see §2.24) and should also consider using some of the measures outlined in §§1.11–1.15.

In child custody cases, children may need to be questioned either as a percipient witness of fact or to determine the child's needs for custody planning. California Rules of Ct 5.250 sets forth the procedures for the examination of child witnesses in family court proceedings. The court must determine the children's participation on a case-by-case basis. No statutory mandate, rule or practice either requires children to participate in court, nor prohibits them from doing so. Cal Rules of Ct 5.250(a). For further discussion of these procedures see §200.52 of CJER Benchguide 200: *Custody and Visitation* (2014).

If the child is old enough to have formed an intelligent preference as to custody, the court must consider the child's wishes. Fam C §3042(a). If the court does consider the child's wishes, it must control the questioning of the child so as to protect the child's best interests. (91). Fam C §3042(b). If a child 14 years of age or older wishes to address the court about custody or visitation, the child must be permitted to do so, unless the court determines that doing so is not in the child's best interests. Fam C §3042(c). The court may hear from a child who is under 14 if it determines it is in the child's best interests. Fam C §3042(d).

If the court precludes calling the child as a witness it must provide an alternative means for learning the child's wishes. Fam C §3042(e).The child's counsel, evaluator, investigator, or child custody recommending counselor is required to indicate to the judge if he or she knows the child would like to address the court. Fam C §3042(f). The child is not required to state a preference or to provide other input regarding custody or visitation. Fam C §3042(g). See also *Niko v Foreman* (2006) 144 CA4th 344, 366–367, 50 CR3d 398.When the child is questioned as a percipient witness of fact, his or her comments might be sought to prove fitness of a parent. When questioning the child about his or her needs for custody planning, the purpose of questioning is to determine the child's needs in the context of reorganizing family functioning. In either case, judges are often hesitant to involve a child in this type of courtroom proceeding, and recommend proceeding cautiously. For example, a court of appeal has found that it is well within a family court's discretion to decline to personally interview a 5-year-old under Fam C §3042 because it is doubtful that such a young child could realistically determine his or her own best interest. See *Marriage of Slayton & Biggums-Slayton* (2001) 86 CA4th 653, 659, 103 CR2d 545. However, there may be occasions on which a child could provide helpful information related to custody planning (*e.g.*, ways to maintain important relationships or activities). Even very young children (ages 3 to 6) express a desire to be heard during the process, although they also express wanting the adults to make the ultimate decisions (20).

A. [§2.22] TESTIMONY IN CHAMBERS

In family law proceedings, you may hear the testimony of children in closed proceedings in chambers. See, *e.g., Marriage of Okum* (1987) 195 CA3d 176, 180, 240 CR 258 (court used Evid C §765 to justify questioning outside parent's presence in acrimonious proceedings; court reporter was instructed not to transcribe notes of chambers proceedings); *In re Marriage of Rosson* (1986) 178 CA3d 1094, 1100, 224 CR 250, disapproved on other grounds in 13 C4th 25, 38 n10. In *Rosson,* Justice King stated (178 CA3d at 1100 n5):

We approve of the in chambers procedure to minimize the exposure of the children to the adversary process and to avoid to the greatest extent possible placing the children in a position of having to choose between their parents.

In fact, many judges will not permit the child witness in a custody proceeding to be examined in open court on the witness stand. See Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases*, 27 Santa Clara L Rev 220 (1987).

Before terminating parental rights in family court, the court must hold a hearing in chambers to determine the child's wishes if the child is 10 or older. Fam C §7891. Failure to hold such a hearing is cause for reversal. See *Adoption of Jacob C.* (1994) 25 CA4th 617, 626, 30 CR2d 591. An in chambers hearing may be used to take the testimony of a child of any age outside the presence of the parent or guardian if the following conditions are met (Fam C §7892(a)).

- The parents are represented by counsel and counsel is present, and
- The court determines that testimony in chambers is necessary to ensure truthful testimony, or
- The child is likely to be intimidated by a formal courtroom setting, or
- The child is afraid to testify in front of the parents.

The presence of these conditions must be established by clear and convincing evidence. Fam C §7892(c).

TIP: Some judges believe it is advisable to create a record on the issue of whether and where a child should testify by asking a family law evaluator to testify concerning the following issues:
- Whether it would benefit the court to question the child.
- Whether it would benefit the child to be questioned by the judge.
- Whether there are drawbacks to questioning the child.
- Whether a given child should testify at all and, if so, whether testifying is best done in chambers or in open court.
- Whether a child should be allowed to watch the trial.

This type of questioning builds a record to assist you in making the best decision regarding handling of the case. Also, you may want to consider questions that help you understand the reasons underlying a child's preference–-reasons which might be based on inaccurate assumptions that are a function of developmental immaturity (*e.g.*, wishes or fears rather than reality).

B. [§2.23] Conducting Interviews With Children

In some cases, the attorneys will permit you to speak to the child in their absence and without a reporter. You should proceed with extreme caution before accepting such an offer and should do so only if you are certain that there is a great deal to be gained by taking such a step. In doing so, it must be remembered that unsworn statements of children are not evidence and cannot be the basis for the court's determination on an ultimate issue or fact. See *In re Heather H.* (1988) 200 CA3d 91, 95–96, 246 CR 38. Unsworn statements of children may be used, however, as a basis for ordering the Department of Social Services to investigate an issue. See *In re Sergio C.* (1999) 70 CA4th 957, 960, 83 CR2d 51. Decisions regarding whether the judge should personally interview a child depends on what can be accomplished in a brief interview, above and beyond the extensive evaluations conducted by experts.

TIP: In questioning children, it is most important to remember that a child should never be made to feel responsible for the outcome of the case. Children should be made to feel they have provided important information that will help the judge make the best decision for the entire family. As previously mentioned, there are benefits to children believing they have been 'heard' rather than dismissed or devalued, even when their preferences are not followed.

You should tell the child that you will determine what is best for the whole family and that this means that a plan will be worked out that allows for new ways for family members to relate to one another. Children need to hear that the adults, not the children, have the responsibility and authority to make the decisions about the plan. They should be told that if their parents are unable to agree, the judge will decide by considering many factors in addition to the child's preferences. This avoids making the child feel responsible for choosing between parents.

At the outset, the child's unrealistic fears must be dealt with (see §1.3). You should explain to the child the representative nature of the attorney's role and the decision-making aspect and impartiality of your role. Once this is accomplished, the child may be better able to accept custody plans, even if his or her preferences are disregarded. Children going through family law court express confusion about whether judges really seek the truth and listen to both sides (20). Perceptions of judges are often more negative than positive. Some children conclude that judges and lawyers interfere with their parents' ability to remain civil. Legal professionals can be easy targets for displacement of children's anger and blame for the divorce (20).

For some children, any questioning at all in dissolution proceedings would be detrimental. Certain children may be particularly vulnerable to fears of losing parental love or support, hurting a parent's feelings, and talking about private matters in public. It may be best to ask for the recommendation of an expert or to consult evaluations and reports available in the file that address the child's vulnerabilities. To determine a child's vulnerability, you may wish to consider the extent of problems in the child's functioning before the separation, whether the child has ever been treated for a psychiatric disorder, and the degree of support by family members (siblings, grandparents). See §1.10 for a discussion of the vulnerable child.

C. [§2.24] Appointment of Attorney for Child

The court may appoint counsel for a child who is the subject of a custody or visitation proceeding if it would be in the child's best interests to do so, provided that the court and counsel comply with the requirements set forth in Cal Rules of Ct 5.240, 5.241, and 5.242. Fam C §3150(a). The court-appointed investigator may recommend that an attorney be appointed. Fam C §3114. The court should follow the nondiscrimination guidelines of Cal Rules of Ct, Standards of J Admin 10.21 in recruiting and maintaining lists of court-appointed attorneys. Cal Rules of Ct, Standards of J Admin 5.30(g).

The attorney's role is to gather information regarding the child's best interests and present this information to the court. Fam C §3151(a). Once child's counsel has entered an appearance on behalf of the child, he or she must continue representing the child until relieved by the court. Fam C §3150(b).

In proceedings for termination of parental rights in family court, counsel must be appointed for the child if the court finds that the child's interests require representation by counsel. Fam C §§7860, 7861. You may also appoint a suitable party to act on behalf of the child. Fam C §7804.

There is no authority for a family law court to appoint a guardian ad litem to represent children in a custody dispute. *Marriage of Lloyd* (1997) 55 CA4th 216, 224, 64 CR2d 37.

D. [§2.25] WHERE TO QUESTION CHILDREN

After deciding to question a child, you may find yourself trying to balance the necessity of taking a child's testimony in the courtroom with parents and attorneys present with the need to create an environment in which a child can be open and honest. You should consider a variety of possible settings for taking children's testimony, including an open courtroom, a closed hearing with only attorneys present, in camera questioning with or without attorneys and parents present, in camera questioning with attorneys present but with the judge questioning the child, using questions submitted in advance by the attorneys, in camera questioning with only the judge and court reporter present, and a private encounter between child and judge that is not recorded. Such settings can be ordered on stipulation of the parties.

Sometimes children may not be able to be honest about their preferences and needs in front of their parents or in the formal courtroom setting under the conditions of the adversarial process. As a general guide, it is probably best for the child to be questioned in chambers in as private a setting as possible.

E. [§2.26] HOW TO QUESTION CHILDREN

When judges decide to question children themselves, they should consider taking time to establish rapport and a supportive psycho-social atmosphere. This can be accomplished in a nonsuggestive manner with a warm, friendly, attentive approach using positive comments, cautiously and not contingent on the content of children's statements (92, 93). Judges might begin by asking children to describe a typical day at home—from getting up to going to bed. This provides valuable information about the child's perceptions of parenting styles, the quality of parental nurturing, parent-child attachments, the degree of organization or chaos in the home, and the important events in the child's world that should be preserved by the custodian.

If a child's initial narrative is too skeletal, you could help a younger child elaborate on details with open-ended questions that ask them to tell more about previously mentioned events (*e.g.*, "You said you had breakfast first. Tell me more about that." "What happened next?"), participants (*e.g.*, "You said you had dinner, who was there with you?" "You said you were home, how did you get home?" "Who picked you up after school?"; You said you did your homework, who was there when you did your homework?"), participant actions (*e.g.*, "What did your mom do?"), conversations (*e.g.*, "What did your sister say?"), underlying reasons (*e.g.*, "Why [or how come] did he do that/say that?"), locations (*e.g.*, "You said you got hurt, where did it happen?"), and episodes ("You said you had a fight with your brother, what made it start? What made it stop?"), and children's subjective experience ("How did you feel?" "What made you think so?").

You should consider asking about the positive qualities of each parent, his or her strengths and favorite activities, and aspects of family functioning that are only indirectly related to parent conflict. This helps children avoid the feeling that they are tattling on their parents, and it enhances rapport and trust. See §2.23 generally on questioning children in chambers.

The discussion with the child can include considerations of alternative distributions of parental responsibility, keeping in mind that children typically resist changes in family circumstances. They often need to vent their feelings to an accepting adult before they can discuss the feasibility of different options. During such exchanges, children's wishes, fears, and ambivalence usually emerge. The tone of the questioning should convey that the plan is not a decision about "which" parent will have custody, but a decision about "how" parental

responsibility will be divided between parents. It is also helpful to normalize children's ambivalence by telling them that many children feel confused, like a part of them wants to do one thing and another part of them wants to do something else.

You can facilitate children's eventual acceptance of their decisions by allowing children to air their feelings, without trying to talk them out of their feelings or convince them of the soundness of the decision. Letting children express their concerns in a nonjudgmental environment, even if you have already decided to disregard children's preferences, allows children to adjust to the final decision because they feel their voices were heard. If you feel that a child will have difficulty adjusting to a plan that is determined to be in the child's best interests, you may wish to suggest an evaluation by a mental health professional for future treatment.

While a conversation with a judge may be perceived by the adults to be a decisive moment in a custody determination, the child may not be aware of its significance. Because children have a limited understanding of the legal process, their role, and the role of the judge, you should inform the child in simple terms (before the interview) about the nature of the process by which custody determinations are made and the roles of the child, attorneys, and judge. Throughout the interview also use language that will not confuse the child, as children rarely ask adults for clarification and the child may be too shy to ask what you mean.

F. [§2.27] CONFIDENTIALITY

Children often worry about the limits on confidentiality, especially if their parents are not present during questioning. Until this issue is addressed, children may not be able to talk openly with an unfamiliar adult. You should consider various protections of confidentiality depending on the facts of the case and the vulnerability of the child. The only way to ensure absolute confidentiality is to avoid making a record of the interaction between you and the child. You may also have the interview recorded but should obtain a stipulation that the attorneys who are present will not discuss the information with the parents.

It is never advisable to promise complete confidentiality if there is any chance of the parents learning what the child has said. Even when the attorneys have stipulated that they will not disclose what the child has said, if there is an appeal, appellate courts may write opinions including the confidential information to which parents could gain access. False promises of confidentiality can backfire. If the child feels betrayed, these feelings may compromise future interactions with the court. Unless no record of the interview with the child is made, children should be told only that great efforts will be made to keep the information confidential.

Chapter 3
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I. [§3.1] SUFFICIENCY OF CHILDREN'S EVIDENCE

In a prosecution for child sexual abuse, a young child's testimony can be sufficient, by itself, as a basis for conviction. *People v Jones* (1990) 51 C3d 294, 305, 270 CR 611. California courts have recognized that "child molestation cases frequently involve difficult, even paradoxical, proof problems." 51 C3d at 305. The Supreme Court in *Jones* noted that a young witness may have difficulty remembering or even distinguishing specific incidents or dates when there has been repeated, continuous molestation. 51 C3d at 305. Balancing the defendant's due process rights with society's need to ensure that the resident child molester is not immunized from criminal liability, the court held that a child's testimony that lacks specificity as to time, place, or circumstance may nevertheless constitute substantial evidence of molestation occurring within the limitation period. 51 C3d at 305, 316.

If there is no alibi defense, a child's "generic testimony" may be sufficiently substantial to support a conviction without impairing the defendant's due process rights when the victim describes the kind of acts committed with enough specificity to ensure that unlawful conduct has occurred and to distinguish among the various types of proscribed conduct. 51 C3d at 316. Although *Jones* applies to children under age 14, it has also been applied to 15- and 16-year-olds. *People v Matute* (2002) 103 CA4th 1437, 1447, 127 CR3d 472.

Similarly, in *People v Harlan* (1990) 222 CA3d 439, 451, 454, 271 CR 653, the court of appeal has held that even the testimony of a very young witness (under 5 years old) does not require corroboration, and that inability to remember or relate details of the abuse goes to credibility and not to sufficiency of the evidence.

II. DETERMINING COMPETENCY

A. [§3.2] IN GENERAL

In general, every person is qualified to be a witness, regardless of age. Evid C §700; *People v Thomas* (1978) 20 C3d 457, 471, 143 CR 215; *Adamson v Department of Social Servs.* (1988) 207 CA3d 14, 20, 254 CR 667. A witness is presumed to be competent unless there is a showing to the contrary. *People v Willard* (1983) 155 CA3d 237, 239, 202 CR 100. The burden of proof on the issue of competency is on the objecting party (*People v Farley* (1979) 90 CA3d 851, 868, 15 CR 695) by a preponderance of the evidence (see comments of Assembly Committee on Judiciary to Evid C §405; *People v Liddicoat* (1981) 120 CA3d 512, 515, 174 CR 649; Jefferson, California Evidence Benchbook §27.5 (4th ed CEB 2009)).

A person who is incapable of expressing himself or herself so as to be understood, or incapable of understanding the duty of a witness to tell the truth, however, must be disqualified as a witness. Evid C §701(a). Once you have made a determination concerning a potential witness's competency, that determination will not be reversed on appeal unless there has been an abuse of discretion. *In re Crystal J.* (1990) 218 CA3d 596, 601, 267 CR 105.

There is no minimum age for competency (see Jefferson §27.2), and no distinction should be made between the competence of young children and that of other witnesses *(People v Jones* (1990) 51 C3d 294, 315, 270 CR 611). While some 4-year-olds might have trouble qualifying as witnesses, testimonial competence varies greatly. *People v Roberto V.* (2001) 93 CA4th 1350, 1369, 113 CR2d 804. Also, competency depends on the nature of the testimony sought; even a very young child may be able to relate uncomplicated facts. *People v Roberto V., supra.*

Even a child who makes some bizarre statements might be competent to testify if he or she is otherwise well-oriented, lucid, and not easily led. *In re Amy M.* (1991) 232 CA3d 849, 858, 283 CR 788. Inconsistencies in a child's testimony generally go to credibility, not competency. *In re Katrina L.* (1988) 200 CA3d 1288, 1299, 247 CR 754. If the evidence establishes that the witness is not disqualified under Evid C §701 (person disqualified if unable to express himself or herself or unable to understand the duty of witness), has personal knowledge as required under Evid C §702, and has the capacity to perceive and recollect, it is up to the trier of fact to determine whether the witness has done so correctly. *People v Anderson* (2001) 25 C4th 543, 573, 106 CR2d 575 (discussing tests for competency).

A trial court may decide that a child has the ability to remember and recount facts despite the fact that he or she has not been accurate about all facts. *People v Lamb* (1953) 121 CA2d 838, 847, 264 P2d 126 (4-year-old witness was qualified, despite the fact that she insisted she was only 5 months old, since otherwise she gave a coherent and plausible account of the molestation). Other

examples in which judges correctly found young child witnesses to be competent despite some problems with their testimony were:

- *People v Slobodion* (1948) 31 C2d 555, 558, 191 P2d 1 (6-year-old was qualified witness despite his belief that there were 12 days in a week and his inability to describe defendant's size).
- *People v Pike* (1960) 183 CA2d 729, 731, 7 CR 188 (even though 5-year-old did not know her address, how long she had lived at that address, how long since she had gone to school, the name of the church at which she attended Sunday school, and the names of her classmates, the trial judge's determination that she was a competent witness was sustained on appeal because of that judge's ability to observe the witness's demeanor, and because the record reflected that the child gave a credible account of the molestation).
- *People v Dennis* (1998) 17 C4th 468, 525–526, 71 CR2d 680 (death penalty case— despite 4-year-old having discussed the events with the prosecutor and others and had some gaps in her memory, she was not disqualified as a witness, because she was able to express herself in an understandable manner, understand that she was required to tell the truth, and able to perceive and recollect).
- *Adamson v Department of Social Servs.* (1988) 207 CA3d 14, 20, 254 CR 667 (young witness's inconsistent or exaggerated statements may render that child's testimony incredible but do not mean that the child should be found incompetent to testify if the conditions for competency are otherwise met).
- *In re S.C.* (2006) 138 CA4th 396, 421, 41 CR3d 453 (15-year-old with Down syndrome and an IQ of 44 was competent to testify because she knew the difference between the truth and a lie, was generally responsive to questions, and was mostly easy to understand; any confusion she showed would bear on her credibility, not competence).

A ruling on a child's competency by a preliminary hearing judge need not be followed by the trial judge; however, such a ruling may be given deference on the issue of the child's competency at the time of the preliminary hearing if the ruling was supported by sufficient evidence. See, *e.g.*, *People v Liddicoat* (1981) 120 CA3d 512, 515, 174 CR 649. By admitting pretrial statements into evidence, the court has determined by implication that the child witness was competent when making those statements. *In re Nemis M.* (1996) 50 CA4th 1344, 1355, 58 CR2d 324.

On the question of psychological evaluation of competency, see §3.9. For a discussion of whether out-of-court statements of incompetent declarants may be admissible, see §§3.18, 3.20, 3.24.

B. Voir Dire

1. [§3.3] Conduct of Voir Dire

Although there is no sua sponte obligation to voir dire a child witness for competency, you must determine competency once a challenge has been made. See Evid C §405 and Comments of Assembly Committee on Judiciary to Evid C §405. Generally, when competency is challenged at the outset of a jury trial, a judge will hold a voir dire hearing for competency under Evid C §405 outside the presence of the jury. See Evid C §402.

You may occasionally hold competency hearings in a jury's presence. See, *e.g., People v Nugent* (1971) 18 CA3d 911, 916, 96 CR 209 (voir dire for competency held in jury's presence). The jury has no role, however, in assessing a witness's competency. *People v Armbruster* (1985)

163 CA3d 660, 663, 210 CR 11. You alone determine whether a witness can communicate intelligibly and understands the obligation to tell the truth. See *People v Anderson* (2001) 25 C4th 543, 573−574, 106 CR2d 575 (discussing tests for competency).

Typically, most children are competent; it is rare that a child will be found incompetent to testify, just as it is rare that an adult witness will be found incompetent. In nonjury trials, many judges recommend reserving the determination of competency until the conclusion of direct examination as authorized by Evid C §701(b). In a jury trial, or if the judge otherwise determines that a separate competency hearing is necessary, many judges recommend holding a hearing in chambers outside the presence of the jury *and* the defendant as authorized by *Kentucky v Stincer* (1987) 482 US 730, 744, 107 S Ct 2658, 96 L Ed 2d 631 (a competency hearing held in chambers in the presence of the prosecutor and defense attorney but not defendant did not violate defendant's right to confrontation under Sixth Amendment nor his due process rights under Fourteenth Amendment).

Once a challenge to competency has been made, you cannot preclude a child from testifying without holding a voir dire examination for competency. *Bradburn v Peacock* (1955) 135 CA2d 161, 163, 286 P2d 972 (arbitrary refusal to allow boy of 3 years, 3 months to testify without voir dire examination was abuse of discretion).

If the judge has reserved challenges to competency until the conclusion of direct examination under Evid C §701(b), the challenge must be renewed at the conclusion of the child's direct examination, or objections to the child's testimony will be waived. See *In re Katrina L.* (1988) 200 CA3d 1288, 1298, 247 CR 754.

For suggestions of questions to ask during a voir dire for competency, see §§3.5–3.8.

2. [§3.4] Content of Voir Dire

Questions in competency examinations should not range widely across areas that do not bear directly on competency as defined in Evid C §701 but should focus on the witness's ability to express himself or herself (Evid C §701(a)(1)) and his or her understanding of the duty to tell the truth (Evid C §701(a)(2)). To ascertain the former, you should have a conversation with the child using short, simple sentences (see §§4.13–4.37) to determine if the child's speech is intelligible and if the child appears to understand simple questions. Many judges assess the child's ability to communicate by listening to their testimony since no preliminary assessment of communicative competence is required. To ascertain children's understanding of their duty to tell the truth, you should assess children's understanding of what it means to them to lie and tell the truth and the consequences of promising to tell the truth as discussed in §§3.6–3.8. Traditional approaches have been found to markedly underestimate children's competence to testify (94).

In California, the ability to perceive or recollect is not relevant to a determination of competency (see Evid C §701), and the court should not voir dire a child concerning these abilities. Questions regarding children's ability to count, recite the alphabet, tell time, state their addresses, or provide their birth dates should *not* be used to evaluate competence. In fact, such questions could inadvertently result in discrimination against children who come from disadvantaged backgrounds since children from enriched preschool environments who are explicitly taught these skills may master them at earlier ages than children from deprived preschool environments (95). Although children with nursery school experience from higher socioeconomic levels may appear more competent than children with lower skill levels, these skills have no bearing on the ability to communicate or tell the truth.

Similarly, admissions of belief in fantasy figures such as Santa Claus or the Tooth Fairy are not relevant to competency determinations. See §4.39 for discussion of children's logic. Children need not understand philosophical distinctions concerning truth and reality.

Inconsistency does not necessarily disqualify a child witness. Certain types of inconsistencies are to be expected from children of certain developmental stages; see §4.2. Similarly, factual mistakes do not render a child incompetent. Often children cannot state the date on which an event occurred. This failure is not necessarily related to their abilities to report accurately the actions that took place. Although adults may be baffled by a few unbelievable statements, there is no evidence that such statements invalidate the rest of what a child has to offer, which may be accurate and related in a manner that can be understood by the jury (96–97). Inconsistencies, limited knowledge, and inability to fix events in time are not relevant to competency. See, *e.g., Adamson v Department of Social Servs.* (1988) 207 CA3d 14, 20, 254 CR 667 (young witness's inconsistent statements do not necessarily render witness incompetent).

a. [§3.5] Assessing Children's Communication Skill

The speech of most children over the age of 3 or 4 should be intelligible to others. Hesitancy, embarrassment, and apprehension about speaking in front of a room full of adults, especially if revealing a secret that a child was warned not to tell, are to be expected from young children. Such demeanor does not render a witness incompetent.

Preschoolers are still in the process of learning how to communicate. They may not have mastered all of the invisible rules of conversation, grammatical constructions, sounds of proper articulation, future and past tenses, or vocabulary necessary to express their thoughts fully. As a result, their conversation may be somewhat disjointed, with off-topic comments that appear irrelevant. They may demonstrate failures in turn-taking, limited vocabulary, and limited descriptions of past and future. They do, however, have sufficient verbal skills to make themselves understood, albeit differently than adults.

In conducting a voir dire to determine whether a child witness's communications skills are adequate, you could ask some open-ended questions designed to encourage the witness to communicate. Often, however, even an open-ended question will elicit a minimal response. If so, you should prompt, "Tell me more about it" or "What happened next?" The questions that you ask of children to initiate conversation will vary depending on the child's age and sophistication. For a preschool child it is best to start by asking about the here and now to focus the child's attention:

> **"Here you are in the courtroom (office). Tell me what it looks like; tell me what you see." Then you might ask, "What did you do this morning?" eliciting a description of breakfast, dressing, etc.**

For a school-age child you might ask a few of the following open-ended questions:

Tell me about your class at school.

What do you do when you first get to school? What happens next?

What is your favorite part of the day? What do you like best about it?

Tell me more about [*certain activities*]. What do you like most about [*that activity*]?

Tell me about something that is important to you.

What games do you like to play? How is that game played?

What is your favorite television program? Tell me about it. Who is in it? What do they do?

A child whose speech is intelligible and who stays on topic can communicate sufficiently to testify. When questions are phrased in an age-appropriate manner (see §4.8), communication skills should not be a problem for children over 4 years of age. Judges have even found some 3-year-olds to be competent witnesses.

b. [§3.6] Assessing Children's Understanding of Truth and Falsehood

Researchers have compared different methods of determining a child's competence to take an oath (94, 98). The results suggest that even normal 3-year-olds can demonstrate adequate knowledge of the difference between truth and falsehood if tested in an age appropriate manner. Unfortunately, the results also show that some of the traditional ways of testing a child's understanding of truth and falsehood are so developmentally inappropriate that they preclude even 7-year-olds from demonstrating their knowledge. These methods to be avoided include asking young children to define "truth" or "lie" or to explain the "difference" between the terms. See discussion in 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §2.11 (2005). Most children who can identify truthful statements and lies cannot provide minimally sufficient definitions of truth or lie or explain the difference between the terms (94).

Instead, researchers have developed an oath-taking competency picture task that more sensitively assesses children's understanding of the meaning and morality of lying (94). This simple task allows young children to identify which of two characters is lying and to choose between alternative descriptions of what happens when people lie. For example, children are presented with a picture of an apple and two children and told one child says it is a banana and the second child says it is an apple. They are asked to point to the character who is telling the lie or the truth. Usually, four trials are used. In studies, this task allowed the majority of normal 3-year-olds and a majority of maltreated children 5 years and older, to demonstrate their competence despite serious language delays (94). The task appears in Appendix A.

See Lyon and Saywitz, Qualifying Children to Take the Oath: Materials for Interviewing Professionals (2000), Appendix A or go to the website:

http://works.bepress.com/thomaslyon/9/. See also the discussion in 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §2.17[E] (2005).

To demonstrate their understanding of the immorality of lying, children are frequently asked what would happen to them if they lied. The problem is that young children have difficulty in responding to hypotheticals about negative events and they often refuse to answer such questions about themselves because of their fears of the consequences of lying (99). Children find it easier to describe what will happen to two story characters who lie than to imagine themselves lying and muse about it aloud. In a more developmentally sensitive alternative, for example, children are shown a picture of either two boys or two girls talking to an authority figure, such as a police officer or judge. They are told that the adult wants to know what happened. The children are told which character will lie and which one will tell the truth and are then asked to point to which character will get in trouble. An example is found in Appendix A.

With older children, you can ask the child what it means to tell the truth and what it means to tell a lie. Acceptable responses include defining the truth as "telling what really happened," and defining a lie as "telling what didn't really happen" or "making up answers." If the child does not give an adequate definition, you can use the picture task described above.

(1) [§3.7] Evaluating Duty To Be Honest

Competency examinations should not be tests of honesty. Children are no less honest than adults. To a large degree, whether someone is honest or not depends on the situation. In some

situations, even a relatively honest person may tell a lie, and a relatively dishonest person may tell the truth. There is no valid test of whether a witness, child, or adult will lie in court. Of course, children are capable of lying and they do lie when they have a motive to do so (100). Children lie to preserve self-interests as well as for the benefit of others (101). Typically, intentional lying occurs in young children in order to avoid punishment (102). Young children may also lie when they are threatened by someone else not to disclose the truth. Sometimes young children lie to protect loved ones (103) or when an adult tells them to lie (*e.g.*, 102), although young children are less likely to generate these kinds of lies than older children. Although children develop the ability to lie at an early age, they also understand that lie-telling is morally unacceptable and do not condone most types of lies (104). Lies to obtain rewards or protect one's self-esteem begin to appear in older children.

Overall, children tend to become more convincing liars as they get older and become more cognitively sophisticated. School-age children have many of the skills necessary to spontaneously tell elaborate, detailed lies which sound plausible and convincing whereas preschoolers are less likely to be capable of such lies (100, 104). It is more likely they will withhold information or that their lies involve only a few words (100). However, the fact that very young children are capable of telling one word lies means that children should be asked to elaborate and clarify one-word responses (*e.g.*, "What makes you think so? Tell me more about that.").

In addition to age, individual differences play a role in lie-telling. Even within a specific age range, children vary widely. For example, occasionally children generate false, and sometimes incredulous stories about their experiences; however, researchers find that when this occurs it is often the result of neurological immaturity in a small subgroup of children who are deficient in executive functions of cognitive control (*i.e.*, the ability to inhibit a pre-potent response; 105) Typically, these are exuberant, impulsive, 3- to 5-year olds (more often boys) who have not yet developed the neural circuitry to stay on topic, keep rules in mind, or filter out irrelevant thoughts and actions. They may describe bizarre or fantastical tales and adults who do not realize that they are "mental surfing" may ask inappropriate follow-up questions that encourage the children to acquiesce to a process of embellishing and expanding their story further to entertain the adult (105).

Children are also willing to lie to cover for other's transgressions and those in which they are jointly implicated. By 4 years old, they are more likely to lie for a parent than a stranger. By 6 years old, children recognize that parents are less likely to believe their children when they accuse another parent (rather than a stranger) of wrongdoing. By 8 years old, children recognize that parents are less likely to contact authorities when another parent has harmed a child. Children learn early in life that what happens within the family is a private affair (47).

The fact that a child has lied previously does not render the child incompetent. If there is suspicion that a witness of any age is a pathological liar, then a psychological evaluation can be ordered by the court to assess the issue. See §3.10 for a discussion of assessing credibility.

(2) [§3.8] Understanding Consequences of Lying

In determining whether a witness understands the duty to tell the truth, the witness need not profess a religious belief, but may merely understand that "some earthly evil" will happen if the truth is not told. *In re Crystal J.* (1990) 218 CA3d 596, 601, 267 CR 105 (citing with approval *People v Berry* (1968) 260 CA2d 649, 67 CR 312). The court need not threaten punishment for lying as a prerequisite for a determination that a child will be competent as a witness. *People v Mincey* (1992) 2 C4th 408, 444, 6 CR2d 822 (death penalty case in which one of the witnesses was a 4-year-old). It is sufficient that the court impress on the child the importance of telling the

truth and that the child promises to do so. *People v Mincey, supra.* Children understand what it means to make a promise as young as 3 years old (94, 99).

Children need not understand the concept of perjury or be familiar with the term, or understand the full extent of potential consequences of failing to tell the truth in the legal setting. Most children over 3 know that in the familiar home or school setting, it is wrong to tell a lie and that they can be punished for lying (98). In fact, many older children fear that if they just make a mistake on the stand, they will be sent to jail. Up to the age of ten, children may confuse mistakes with intentional lies (106–107). Questions that contrast the two should be avoided. Children will agree that they have "lied" when they hear that they have made an error.

3. [§3.9] Psychological Evaluations of Competency

There is no authority in California permitting a judge to order a psychiatric or psychological examination to aid in a competency determination and it generally would not be necessary. Only if the child appears to have less than normal intellectual ability might such an examination be helpful, although most children of below average intelligence are able to testify truthfully. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §2.19 (2005). Penal Code §1112 prohibits the use of psychiatric or psychological evaluation to assess the *credibility* of a victim witness of sexual assault. In *People v Armbruster* (1985) 163 CA3d 660, 663 n3, 210 CR 11, in dicta, the court held that this section does not apply to competency determinations.

Occasionally, in a criminal case, you will be asked to review a child's medical or psychological records in camera insofar as they bear on the issue of the child's competency and credibility. In such a case, you must review the records in camera and must ascertain to what extent they are privileged and whether the defendant's right to a fair trial may overcome the privilege. See *People v Boyette* (1988) 201 CA3d 1527, 1534, 247 CR 795; see §§3.30–3.38.

III. [§3.10] ASSESSING CREDIBILITY

Factors governing credibility are governed by Evid C §§780–791. The trier of fact has the responsibility for determining a witness's credibility. *People v Jones* (1990) 51 C3d 294, 314, 270 CR 611; *Adamson v Department of Social Servs.* (1988) 207 CA3d 14, 20, 254 CR 667. Therefore, a teenage girl's contradictory statements about the number of times she was molested by the defendant in a certain month present a question of credibility for the jury, rather than rendering her evidence inherently unbelievable, and this determination is not reviewable on appeal. *People v Mejia* (2007) 155 CA4th 86, 99, 65 CR2d 776.

And even a witness who is inherently not credible may still be competent to testify. See, *e.g.*, *Adamson v Department of Social Servs., supra* (court noted that the incredible aspects of young witness's testimony are for trier of fact to weigh; they have no bearing on witness's competency).

Because adults may be skeptical about the reliability of children's testimony (see, *e.g.,* discussion in *People v Harlan* (1990) 222 CA3d 439, 451, 271 CR 653; 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Case*s §3.08[A] (2005)), credibility is often an important factor in a criminal prosecution for sexual abuse. In *People v Jones* (1990) 51 C3d 294, 315, 270 CR 611, the Supreme Court noted that the belief that children are inherently unreliable witnesses has been discredited by numerous modern authorities and that, in enacting Pen C §1127f, the Legislature has adopted the modern view. Penal Code §1127f requires the judge to instruct the trier of fact not to assume that child witnesses are less credible than adult witnesses. Under Pen C §1127f, in a criminal proceeding in which a witness testifies who is 10 years old or younger, upon the request of a party, the court must instruct the jury as follows:

> In evaluating the testimony of a child, you should consider all the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's cognitive development. *Although, because of age and level of cognitive development, a child may perform differently as a witness from an adult, that does not mean that a child is any more or less credible a witness than an adult.* You should not discount or distrust the testimony of a child solely because he or she is a child. (Emphasis added.)

See discussions of developmental influences in §§1.5–1.7, 4.2–4.5.

If requested by a party, you must give the instruction based on Pen C §1127f, which is reproduced in CALCRIM 330 and CALJIC 2.20.1. That instruction need not be given sua sponte. *People v Cudjo* (1993) 6 C4th 585, 25 CR2d 390. Also, when the credibility of a child witness is challenged, CALCRIM 226 (former CALJIC 2.20) is adequate without alteration to inform the jury of how to assess the witness's accuracy and veracity. *People v Chue Vang* (2009) 171 CA4th 1120, 1131, 90 CR3d 328.

This instruction does not give any greater credibility to the testimony of a child; it merely advises the jury that the witness should not give less credibility to a witness because the witness is a child. *People v Harlan* (1990) 222 CA3d 439, 456, 271 CR 653; *People v McCoy* (2005) 133 CA4th 974, 979–980, 35 CR3d 366. Nor does this advice remove the issue of credibility from the jury; the instruction presupposes that the jury must determine credibility, but only after considering all the factors related to a child's testimony, including his or her demeanor. *People v Jones* (1992) 10 CA4th 1566, 1573−1574, 14 CR2d 9 (upholding CALJIC 2.20.1). Several courts have rejected constitutional challenges to the instruction. See, *e.g., People v McCoy, supra*.

In addition to the child's age and cognitive development, which Pen C §1127f requires the trier of fact to consider in evaluating the child's testimony, Evid C §780 provides additional guidelines to assist the trier of fact in assessing credibility, including the witness's demeanor, the character of his or her testimony, his or her character for honesty, and the extent to which the witness had an opportunity to observe the events about which he or she is testifying. For a discussion of children's honesty, see §§3.6−3.7. For discussion of factors affecting children's credibility, see §§4.2–4.5.

The court's ability to provide an optimal environment for truth-telling with minimal stress placed on the child witness will play a marked role in determining whether a child is viewed as credible. For example, child witnesses report that their greatest concern is having to face the accused in court (11, 36). Face-to-face confrontation with someone the child believes to be intending bodily harm because of past threats may increase children's anxiety and limit the amount of detail emotionally fragile children can provide (11, 22, 58). Thus, when vulnerable child witnesses are required to testify under conditions of high emotional arousal, they may give incomplete testimony or refuse to testify at all, which in turn can influence jurors' perceptions of the children's credibility (31). Children provide more accurate and complete testimony in more supportive and less stressful settings (24, 108–109).

Because participants in a child abuse prosecution or a dependency case often seek to impugn or bolster the witness's credibility, expert testimony has occasionally been sought on this issue. But it is never required that an expert be appointed to assist the court in making a factual determination such as a child witness's credibility. *In re Eric A.* (1999) 73 CA4th 1390, 1394 n4, 87 CR2d 401. Moreover, courts "approach unanimity" in rejecting expert testimony that comments directly on the credibility of individual children or the credibility of abused children as a class. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §6.24 (2005); Myers et al, *Expert Testimony in Child Abuse Litigation*, 68 Neb L Rev 121–122 (1989). Indeed authorities

have generally not permitted any victim or witnesses of sexual assault to be impeached by psychiatric testimony. *People v Chatman* (2006) 38 C4th 344, 375, 42 CR3d 621 (adult victim).

Lay opinion on the veracity of particular statements made by a witness is also inadmissible. *People v Melton* (1988) 44 C3d 713, 744, 244 CR 867. Thus, a trial court erred in admitting opinion testimony by two police officers concerning the veracity of a child witness in a sexual abuse prosecution (*People v Sergill* (1982) 138 CA3d 34, 187 CR 497), although the court may permit those who know the child to testify on the issue of the child's general honesty. See, *e.g.*, *People v Espinoza* (2002) 95 CA4th 1287, 1317, 116 CR2d 70 (sister was permitted to testify that the victim "made up a lot of stories"). With a mentally retarded witness, however, it is permissible for a psychologist to testify as to credibility. *People v Herring* (1993) 20 CA4th 1066, 1073, 25 CR2d 213 (borderline retardation does not make a witness any more or less truthful).

Penal Code §1112 prohibits a court from ordering a complaining witness or victim of an alleged sexual assault to submit to a psychiatric or psychological examination for the purpose of assessing credibility. This prohibition also applies to the child victims of sexual abuse. *People v Espinoza, supra,* 95 CA4th at 1311–1312 (pre-Pen C §1112 case law authorizing the admission of expert psychiatric evidence regarding the credibility of a sex crime victim did not survive the enactment of that law); *In re Dolly A.* (1986) 177 CA3d 195, 202, 222 CR 741. The court in *Dolly A.* also held that Pen C §1112, which by its terms applies to sexual assault prosecutions, also applies to dependency proceedings because such proceedings are more nearly criminal than civil in nature since the parent is faced with the loss of custody of the child, an outcome that is essentially punitive in nature.

Penal Code §1112 has been upheld against a number of constitutional challenges, including the claim that it violates the Truth-in-Evidence provisions of Cal Const art I, §28(d) (added by Proposition 8). *People v Armbruster* (1985) 163 CA3d 660, 210 CR 11. In 1984, Pen C §1112 was amended to specifically exempt the statute from the provisions of §28(d); the Legislature stated that it did not intend to imply that Cal Const art I, §28(d) has limited the application of Pen C §1112 in any way.

The question of credibility of the child witness is one for the trier of fact. *People v Jones, supra.* A child's testimony may not be found to be inherently unbelievable as a matter of law even when the alleged victim remembered nothing at the preliminary hearing and then at trial corroborated the testimony of another victim with whom she had spoken in the interim. *People v Nugent* (1971) 18 CA3d 911, 918, 96 CR 209.

For a discussion of in camera review of a child's records on the issue of credibility, see discussion of *People v Boyette* (1988) 201 CA3d 1527, 247 CR 795, in §3.9. For procedures required of a defendant in a civil suit for sexual abuse when that person seeks to attack the credibility of the plaintiff, see Evid C §783; see also *Barrenda L. v Superior Court* (1998) 65 CA4th 794, 802−803, 76 CR2d 727 (defendant may not put child's prior sexual activity or experience into issue).

While expert testimony is not admissible on the issue of whether a child witness is credible, expert testimony may be admitted to rehabilitate a child's testimony. See discussion in §3.45.

IV. [§3.11] ADMINISTRATION OF OATH

Although witnesses are required to take an oath or make an affirmation, child witnesses who are under the age of 10 need only promise to tell the truth. Evid C §710. See CCP §2094 for forms of affirmation. Judges should ask children " Do you *promise* that you *will* tell the truth?" because studies show that this wording is understood best by children (98).

In *People v Berry* (1968) 260 CA2d 649, 652, 67 CR 312, a case predating the current version of Evid C §710, the court held that a judge need not administer the adult oath to a child witness, nor determine that a child witness has either religious motives for telling the truth or an in-depth understanding of the adult oath.

Children are generally not able to accurately define the term oath until about 12 years old (18). Children as young as 4 understand and can define the notion of promise (99). Thus, asking children to promise to tell the truth, that is to tell what really happened, is sufficient to fulfill the oath requirement.

If the adequacy of the oathtaking is not raised at trial, it will be considered to be waived on appeal. *In re Katrina L.* (1988) 200 CA3d 1288, 1299, 247 CR 754. However, if counsel is not present to object, then an oath or equivalent must be given. See *In re Heather H.* (1988) 200 CA3d 91, 96, 246 CR 38. If counsel is not present to object and there is no waiver, the ensuing unsworn testimony will not constitute evidence within the meaning of the Evidence Code. See *People v Lee* (1985) 164 CA3d 830, 841, 210 CR 799; *In re Heather H., supra* (child's unsworn testimony legally inadmissible).

V. DETERMINING ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

A. DETERMINING UNAVAILABILITY

1. [§3.12] In General

Several hearsay exceptions require the proponent of the evidence to demonstrate the witness's unavailability before an out-of-court statement may be admitted. See, *e.g.,* Evid C §1228 (statement of child under 12 establishing corpus delicti of sex crime), Evid C §1230 (declaration against interest), Evid C §1251 (statement of prior mental or physical state), and Evid C §1291 (former testimony). Moreover, depositions (Pen C §§1345, 1362) and videotaped preliminary hearing testimony of a child victim (Pen C §1346) may be admitted if the witness is found to be unavailable.

Under Evid C §240(a), a declarant is unavailable as a witness if he or she is:

- Precluded from testifying on grounds of privilege.
- Disqualified from testifying.
- Dead or unable to testify because of physical or mental illness or infirmity.
- Absent from the hearing and the court is unable to *compel* attendance by process.
- Absent from the hearing and the court is unable to *procure* attendance by process despite the exercise of due diligence by the proponent of the declarant's statements.
- Persistent in refusing to testify despite having been found in contempt for refusal to testify.

The burden of proof of unavailability is on the proponent of the evidence sought to be admitted (usually the prosecution in a sexual abuse prosecution) by a preponderance of the evidence. *People v Turner* (1990) 219 CA3d 1207, 1213, 268 CR 686, disapproved on other grounds in 24 C4th 889, 901 n3. With child witnesses, judges will often hold a hearing in chambers to determine a witness's availability. See, *e.g., In re Christina T.* (1986) 184 CA3d 630, 634, 229 CR 247; *People v Rojas* (1975) 15 C3d 540, 547, 125 CR 357.

For a discussion of a defendant's right to confrontation of witnesses when a witness's out-of-court statements are admitted in evidence because the witness has been found to be unavailable, see §3.17.

2. [§3.13] Incompetency

If a witness is disqualified from testifying because of incompetency, that person is unavailable as a witness. Evid C §240(a)(2). A witness is disqualified from testifying if that witness is incapable of expressing himself or herself so as to be understood or is incapable of understanding the duty of a witness to tell the truth. Evid C §701(a). See, *e.g., People v Orduno* (1978) 80 CA3d 738, 742, 145 CR 806 (3-year-old found incompetent to testify); see §§3.2–3.9 for discussion of determining competency and §§3.18, 3.20, 3.24, on the use of out-of-court statements of "incompetent" witnesses.

3. [§3.14] Trauma

A declarant may be unavailable as a witness if he or she is unable to testify because of physical or mental illness or infirmity (Evid C §240(a)(3)), or if expert testimony establishes that mental or physical trauma arising from the crime would cause harm of sufficient severity that the victim is unable to testify without suffering substantial trauma (Evid C §240(c)). A parent's testimony on the trauma to the victim that would be caused by testifying is insufficient. *People v Stritzinger* (1983) 34 C3d 505, 516, 194 CR 431. Expert testimony by a physician or surgeon, psychiatrist, psychologist, licensed clinical social worker, or person licensed as a marriage and family therapist is necessary to establish this trauma. Evid C §§240(c), 1010 (defining psychotherapist). Without this expert testimony, the child victim is required to testify. *Hochheiser v Superior Court* (1984) 161 CA3d 777, 794, 208 CR 273.

While Evid C §240 provides no guidance concerning the substantiality of the trauma, case law suggests that the illness or infirmity causing the unavailability under Evid C §240(a)(3) be such as to render the witness's testifying relatively impossible and not merely inconvenient. *People v Christensen* (2014) 229 CA 4th 781, 177 CR 3d 712 (expert testimony supported court's finding that it would have been relatively impossible for child victim to testify without suffering substantial trauma); *People v Winslow* (2004) 123 CA4th 464, 473, 19 CR3d 872 (child's flashbacks and posttraumatic stress disorder would result in increased emotional harm if the child were to testify, so court may admit child's preliminary hearing testimony at trial, based on the child's unavailability under Evid C §240(a)(3) and (c); *People v Gomez* (1972) 26 CA3d 225, 230, 103 CR 80 (witness was vulnerable to stress and had psychomotor seizures; treating physician felt there was a strong possibility that testifying would be detrimental to her welfare); *People v Williams* (1983) 93 CA3d 40, 54, 155 CR 414, disapproved on other grounds in 54 C4th 480, 499 (adult rape victim should not have been found to be unavailable because, although she had been under some physical and emotional strain while testifying at defendant's first trial, testifying at subsequent trial was merely inconvenient and not relatively impossible). See §1.10 for discussion of vulnerable children.

In a case decided under Evid C §240(a)(3), the finding of unavailability was upheld when the treating physician testified that there was a 70-percent chance that the adult witness's symptoms (gastritis, hyperventilation, and other symptoms of extreme stress) might be exacerbated if the witness were forced to testify. *People v Macioce* (1987) 197 CA3d 262, 281, 242 CR 771. In *Macioce,* the court called the physician as its own witness and permitted counsel for both sides to cross-examine her. 197 CA3d at 282.

A finding of unavailability was also upheld in *People v Turner* (1990) 219 CA3d 1207, 1210, 1215, 268 CR 686, disapproved on other grounds in 24 C4th 889, 901 n3, which involved an adult victim witness of a sexual assault who had exhibited symptoms of post-traumatic stress disorder that had grown progressively worse over time. The court of appeal held that the expert who testifies

about a potential witness's unavailability due to trauma need not be a physician who is treating the witness at the time of the hearing. 219 CA3d at 1215. In *Turner,* the expert was a clinical social worker who had seen the witness in treatment only once and who responded to evidence of others and to hypothetical questions in assessing the witness's unavailability.

In determining whether the child is unavailable, the court should consider whether testifying might interfere with the child's treatment and recovery, cause an intensification of symptoms, or compromise the child's intellectual growth and educational achievement. See §1.9 on identifying children in need of special court procedures.

4. [§3.15] Fear of Testifying

The definition of "unavailable as a witness" under Evid C §240(a) was expanded in 2011 to include unavailability due to persistent refusal to testify despite having been found in contempt for refusal to testify. Evid C §240(a)(6). Prior to amendment of Evid C §240, California courts had already held that persons who refused to testify out of fear for their own or their family's safety were unavailable by construing the facts under one of the other definitional categories, such as mental infirmity under Evid C §240(a)(3). See *People v Rojas* (1975) 15 C3d 540, 552, 125 CR 357 (child witness of crime refused to testify for fear of his own safety and that of his family suffered from mental "infirmity", despite the fact that he had been found in contempt of court and sent to juvenile hall for this refusal). But see *People v Sul* (1981) 122 CA3d 355, 366, 175 CR 893 (refusal to testify after being found in contempt is insufficient basis for unavailability unless the trial court has taken reasonable steps to induce the witness to testify). See also *People v Walker* (1983) 145 CA3d 886, 193 CR 812 (witness could be found to be unavailable when the court questioned him on motives for refusing to testify, threatened him with contempt, and ordered him to testify, all to no avail).

Sometimes children have been warned not to tell what has happened to them. Threats of bodily harm to self or loved ones can produce intense fears that prevent children from testifying and are much more meaningful to them than a judge's threat to hold them in contempt, a concept that is beyond their level of understanding. From the child's perspective, testifying in front of the accused can be perceived as a life-or-death issue. In some cases, fears can be alleviated by reassuring children of the judge's role in maintaining fairness and safety for all concerned. In other cases, the child may perceive the accused to be far more powerful in the child's own world than the unfamiliar judge who has played so small a part in the child's life, and no amount of reassurance will be helpful.

5. [§3.16] Loss of Memory

A witness's loss of memory may lead to unavailability despite the fact that the witness had testified in full detail at an earlier trial. *People v Alcala* (1992) 4 C4th 742, 778, 15 CR2d 432 (the witness had been diagnosed with "posttraumatic stress disorder chronic delayed," which causes delayed memory impairment). The court may base its finding of unavailability on the witness's own testimony concerning memory loss. 4 C4th at 780.

B. Hearsay Exceptions

1. [§3.17] In General

Hearsay evidence consists of statements made out of court that are offered to prove the truth of the matter asserted. Evid C §1200. Such evidence is inadmissible unless it falls within an established exception. Evid C §1201. Generally, hearsay evidence is inadmissible because it has been considered to be too unreliable for the trier of fact to use as a basis for its findings. See

Jefferson, *California Evidence Benchbook* §1.4 (4th ed CEB 2009). In an adversary system, the declarant's ability to recollect, perceive, and communicate generally needs to be tested before the trier of fact by having the declarant present and under oath and by permitting the defendant to cross-examine the declarant.

The United States Supreme Court has held that if the out-of-court statement was testimonial (*e.g.*, made under circumstances that would lead an objective witness to believe that the statement would be available for use at a later trial), it is inadmissible unless the declarant is unavailable to testify, and the defendant had a previous opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 US 36, 53–54, 124 S Ct 1354, 158 L Ed 2d 177; see *Davis v Washington* (2006) 547 US 813, 126 S Ct 2266, 165 L Ed 2d 224 (court applied *Crawford* and determined 911 call was nontestimonial, but police interrogation at crime scene was testimonial). When nontestimonial hearsay is at issue, however, each state may continue to be flexible in its development of hearsay law. *Crawford v Washington, supra*, 541 US at 68. *Crawford* does not apply when the statement is offered for a nonhearsay purpose. 541 US at 60 n9. The question of whether statements are testimonial is thus critical in determining the use of a statement. See, *e.g., People v Rincon* (2005) 129 CA4th 738, 754–757, 28 CR3d 844. The *Crawford* court did not provide a comprehensive definition of "testimonial," but it did describe various formulations of a core class of "testimonial" statements, including ex parte in-court testimony or its equivalent such as affidavits, custodial examinations, or prior testimony that would reasonably be expected to be used in a prosecution and for which the defendant had no opportunity to cross-examine; it might include ex parte preliminary hearing or grand jury testimony or structured questioning by police officers or other government officials. See *Crawford v Washington, supra,* 541 US at 51–53.

The U.S. Supreme Court has held that *Crawford* need not be applied retroactively in federal habeas corpus proceedings already final on direct review (*Whorton v Bockting* (2007) 549 US 406, 127 S Ct 1173, 167 L Ed 2d 1), although a state *may* apply it retroactively in post conviction proceedings if it chooses to do so. See *Danforth v Minnesota* (2008) 552 US 264, 128 S Ct 1029, 169 L Ed 2d 859 (videotaped interview of the child was used at trial in place of the child's testimony). One appellate court applied *Crawford* retroactively when the appeal was pending at the time that *Crawford* was decided. See *People v Price* (2004) 120 CA4th 224, 238, 15 CR3d 229 (spousal abuse case).

The determination of whether a statement is testimonial is being fleshed out case-by-case in appellate decisions. In *People v Pantoja* (2004) 122 CA4th 1, 9, 18 CR3d 492, the court held that a declaration in support of a restraining order is testimonial and therefore inadmissible (spousal abuse case).

By contrast, examples of nontestimonial statements are:

- Statements to a school friend. *People v Griffin* (2004) 33 C4th 536, 579 n4, 15 CR3d 743 (death penalty case), disapproved on other grounds in 54 C4th 758 n32.
- Statements to a fellow gang member. *People v Rincon* (2005) 129 CA4th 738, 757, 28 CR3d 844.
- Statements to a friend for the purpose of seeking medical advice. *People v Cervantes* (2004) 118 CA4th 162, 174, 12 CR3d 774 (murder case).
- A police dispatch tape, because it was offered to describe the pursuit, and not to establish the truth of the matter asserted. *People v Mitchell* (2005) 131 CA4th 1210, 1224, 32 CR3d 613.

- Statements unwittingly made to government informants. *People v Arauz* (2012) 210 CA4th 1394, 1402, 149 CR3d 211.
- Statements to emergency personnel given in response to questions elicited in course of ongoing emergency. *People v Nelson* (2010) 190 CA4th 1453, 1467–1468, 119 CR 3d 56.

Whether or not statements are testimonial depends on the primary purpose of the interrogation that elicited the statement. The California Supreme Court has determined that formality is an essential element of a testimonial statement and the primary purpose of the statement must pertain in some fashion to a criminal proceeding. See *People v Lopez* (2012) 55 C4th 569, 581–82, 147 CR3d 559. Objective analysis of (1) the formality of the interrogation, (2) the statements and actions of the interrogator and the declarant, and (3) the circumstances of the encounter is required to determine the primary purpose of the interrogation. *Michigan v Bryant* (2011) 562 US 344, 361–366, 131 S Ct 1143, 179 L Ed 2d 93. Thus a teenage victim's statements to a police officer while in the emergency room waiting for treatment about an hour after the assault would be testimonial unless the statements were necessary to facilitate the treatment or to somehow assist with the emergency, rather than to aid in uncovering possible criminal activity. *People v Cage* (2007) 40 C4th 965, 985, 56 CR3d 789. Compare with *People v Vargas* (2009) 178 CA4th 647, 660–662, 100 CR3d 578 (report prepared by forensic nurse examiner working in concert with law enforcement for possible use in prosecution of offender).

In child abuse litigation when there are allegations of abuse, the out-of-court statements of children may constitute the most important evidence in the case because there may not be physical or corroborative evidence, and the children may not be able to testify at all. See 2 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §7.01 (2005). These statements may be inadmissible if the *Crawford* requirements are not satisfied.

Crawford does not appear to change the law regarding "nontestimonial" declarations but may call into question the admission of hearsay when the out-of-court statements of children are made in a testimonial context, such as those made to an investigating police officer or during a multidisciplinary interview (MDIC). See *People v Sisavath* (2004) 118 CA4th 1396, 13 CR3d 753. In *Sisavath*, the child victim was unavailable to testify by virtue of being declared incompetent under both Evid C §701(a) and (b), and the defendant had no pretrial opportunity to question the child. The court held that the MDIC interview was testimonial because it was conducted under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. 118 CA4th at 1402. This may not hold for every MDIC interview, but it does hold when the prosecution has begun and when members of the prosecution team are present. 118 CA4th at 1403.

Similarly, statements made to the police officer were testimonial because they were made during a police interrogation and given in response to structured police questioning (mentioned in *Crawford* as testimonial). 118 CA4th at 1402. Both statements were testimonial, and the *Crawford* requirements were not met. Therefore neither statement was admissible. 118 CA4th at 1403.

However, in *Ohio v Clark* (2015) ____US _____, 135 S Ct 2173, the U.S. Supreme Court held that an unavailable 3-year-old child's statements to teachers subject to mandatory reporting requirements did not violate the Confrontation Clause because the primary purpose of the conversation was not to create evidence for future use in a criminal trial. Because neither the child nor his teachers had the primary purpose of establishing evidence for the prosecution, the child's statements did not implicate the Confrontation Clause, and therefore, were admissible at trial. *Ohio v Clark, supra*, 135 S Ct at 2177. The Court concluded that the statements by the child were non-testimonial in that they were made during the course of an ongoing emergency involving suspected

child abuse and the teachers' questions and the child's answers were directed at identifying and ending the threat. *Ohio v Clark, supra*, 135 S Ct at 2181. As a result, statements of children, especially very young children with no understanding of the criminal justice system, will rarely be testimonial. *Ohio v Clark, supra,* at 2182.

Generally, once the witness appears and testifies at trial, however, neither *Crawford* nor the Confrontation Clause bar the admission of out-of-court statements. *People v Martinez* (2005) 125 CA4th 1035, 1049–1050, 23 CR3d 508.

> Note that *Crawford* and the 6th Amendment Confrontation Clause do not apply in preliminary hearings (*People v Gonzales* (2012) 54 C4th 1234, 1267, 144 CR3d 757); the sentencing phase of a criminal trial (*People v Cain* (2000) 82 CA4th 81, 86, 97 CR2d 836); dependency cases (*In re S.C.* (2006) 138 CA4th 396, 424, 426–427, 41 CR3d 453); civil litigation; or civil commitments within the Sexually Violent Predator Act (SVPA) (*People v Fulcher* (2006) 136 CA4th 41, 55, 38 CR3d 702).

2. [§3.18] Prior Recorded Testimony (Evid C §§1290–1291)

The "former testimony" exception is available only when the declarant is unavailable as a witness. Evid C §§1291(a), 240. Under this exception, former testimony may be admitted if it was offered against a party to the action who had the right and opportunity to cross-examine the declarant with the same interest and motive he had at a former hearing or trial. Evid C §§1290(a), 1291(a)(2). The burden of establishing unavailability of the declarant is on the proponent of the evidence, and the showing must be made by competent evidence. *People v Stritzinger* (1983) 34 C3d 505, 516, 194 CR 31; *People v Turner* (1990) 219 CA3d 1207, 1213, 268 CR 686, disapproved on other grounds in 24 C4th 889, 901 n3 (burden of proof is by preponderance of the evidence). See §§3.12–3.16 for discussion of the child as an unavailable witness.

Testimony given by a witness at a preliminary examination may be offered at trial, but only if the defendant had the opportunity for meaningful cross-examination at the preliminary examination. *People v Brock* (1985) 38 C3d 180, 189, 211 C 122; see 1 Witkin, *California Evidence* §261 (5th ed 2012). But the former testimony remains subject to the same objections as though the declarant were testifying at the trial, unless objections are based on the form of the question, competency and privilege that did not exist at the time the former testimony was given. Evid C §1291(b).

In *People v Liddicoat* (1981) 120 CA3d 512, 515, 174 CR 649, the court held that the transcript of the preliminary hearing testimony of a young child who had been adjudged competent at the preliminary hearing 2 months before the trial was admissible at trial under Evid C §1291. The trial judge had found the child to be unavailable to testify at the trial because of incompetency despite the fact that the magistrate had found her to be competent to testify a short time earlier. The court of appeal held that the trial judge was correct both in ruling the child incompetent to testify at trial and in agreeing with the magistrate's earlier determination of competency at the preliminary hearing. Moreover, the court held that the magistrate's ruling had been supported by substantial evidence in that the child's preliminary hearing testimony was coherent, clear, and direct. 120 CA3d at 516.

For a discussion of admissibility of former testimony of child witness in dependency case, see §3.19. See also Pen C §1346 (court may order child's testimony at preliminary hearing to be videotaped so that it may be preserved for trial if necessary) and discussion in §§2.6–2.7.

3. [§3.19] Use of Child's Preliminary Hearing Statement at Dependency Hearing (Evid C §1293)

Evidence Code §1293 provides for a hearsay exception for the preliminary hearing testimony of a child who was a complaining witness if the former testimony is offered in a dependency proceeding. Evid C §1293(a)(1). This code section has been used to admit a child's preliminary hearing transcript in a jurisdiction hearing. See *In re Elizabeth T.* (1992) 9 CA4th 636, 642, 12 CR2d 10. In order for this former testimony to be admissible, the defendant must have had the right and opportunity to cross-examine the child at the preliminary hearing with motives and interests similar to those of the parent or guardian against whom the testimony is offered at the dependency hearing. Evid C §1293(a)(2). The parent or guardian against whom the former testimony is offered may challenge the admissibility of the former testimony by showing that new and substantially different issues are present at the dependency hearing. Evid C §1293(c).

The admissibility of the former testimony is subject to the same limitations and objections as though the child was testifying at the dependency proceeding. Evid C §1293(b).

- For a general discussion of admissibility of prior recorded testimony of a child witness, see §3.17.

4. [§3.20] Spontaneous Declaration (Evid C §1240)

A statement purporting to describe or explain an act, condition, or event perceived by the declarant and made spontaneously while the declarant was under the stress of excitement caused by such perception may be admissible hearsay under the "spontaneous declaration" exception to the hearsay rule. Evid C §1240. Spontaneous declarations of children who are incompetent to testify in criminal court concerning sexual molestation are admissible under Evid C §1240. *People v Daily* (1996) 49 CA4th 543, 552, 56 CR2d 787. This is true also in dependency cases. See *In re Emilye A.* (1992) 9 CA4th 1695, 1713, 12 CR2d 294. And spontaneous statements to a civilian without any expectation that they would be relayed to law enforcement personnel are admissible under Evid C §1240 and are not testimonial under *Crawford. People v Rincon* (2005) 129 CA4th 738, 757, 28 CR3d 844.

The rationale behind this exception is that the statement is likely to be trustworthy because the declarant has had no time or opportunity to contrive a false statement. See 2 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §7.13 (2005). Under this exception, for the statements to be inherently trustworthy, the time lapse between the event and the statements should have been minimal, and the declarant's reflective power must have been sufficiently in abeyance that the statement is completely spontaneous. *In re Damon H.* (1985) 165 CA3d 471, 476, 211 CR 623. In *Damon H.*, the 2-year, 9-month-old declarant told his mother within 10 minutes of returning home from an encounter with the minor offender that "Damon put his weenie in my butt." The court held that, despite this 10-minute lapse, the requirements for spontaneity were still met because the declarant remained in an extremely excited state (crying) for the entire time. Moreover, the spontaneity requirements were not defeated by the fact that the declarant's statement was in response to a simple inquiry. 165 CA3d at 475; *People v Farmer* (1989) 47 C3d 888, 904, 254 CR 508. Similarly, a 2-day time lapse did not defeat the admissibility of statements of a 2-and-a-half-year-old when she had been with the perpetrator for that entire period and his departure provoked an immediate outpouring of previously withheld utterances. *People v Trimble* (1992) 5 CA4th 1225, 1234–1235, 7 CR2d 450.

In addition, the *Damon H.* court held that despite the declarant's testimonial incompetence, which was the subject of a stipulation, the child's statement could nevertheless be admitted as a

spontaneous declaration. 165 CA3d at 475. In other words, the declarant need not have been competent to testify at the time that the out-of-court statement was made. See also *People v Orduno* (1978) 80 CA3d 738, 745, 746, 145 CR 806 (statements of 3-year-old who was too young to testify could be admitted if they were spontaneous declarations) and *People v Trimble, supra* (2-and-1/2-year-old was too traumatized to speak at trial).

A crucial factor in permitting hearsay under the spontaneous declaration exception is that the declarant should not have had time to reflect and invent a story. *People v Orduno*, *supra*, 80 CA3d at 745, 746 (statements of distraught 3-year-old unavailable declarant that defendant had gotten her pants wet and had "stuck his pee pee in her bummy" were spontaneous declarations because they were made immediately after she left defendant's apartment while she was in a state of great excitement). And the statements of 5-year-old unavailable declarant were admissible to show the truth of the matter asserted when the child was in an agitated state when he made the statement and when it was made immediately after the child ran out of defendant's house. *People v Butler* (1967) 249 CA2d 799, 804, 805, 57 CR 798. But the "spontaneous declaration" exception to the hearsay rule does not apply when a 2-month period has elapsed between the crime and the child's statement about the crime and when the child had had ample opportunity to make such a statement outside of the presence of the defendant. *People v Guttierez* (2009) 45 C4th 789, 812, 89 CR3d 225 (capital case).

The issue of whether a statement is made after a lapse of time or in response to questions is relevant but not dispositive on whether the statement is a spontaneous declaration. In *In re Cheryl H.* (1984) 153 CA3d 1098, 1130, 1131, 200 CR 789, disapproved on other grounds in 8 C4th 746, a 3-year-old child's statements made during play therapy indicating molestation by her father were not admissible in a dependency jurisdictional hearing as spontaneous declarations on the issue of whether the father committed the offenses, since they were made some time after the alleged events and were not made while the child was in an excited state. However, the statements were admissible in a dispositional hearing as nonhearsay to show that the child believed that her father had hurt her and that she was afraid of having continuing contact with him.

If the other conditions for admissibility of a spontaneous declaration have been met, the witness need not be vulnerable for it to be admissible. *White v Illinois* (1992) 502 US 346, 357–358, 112 S Ct 736, 116 L Ed 2d 848.

The judge, not the jury, must decide whether the conditions of admissibility have been met. *In re Damon H., supra*, 165 CA3d at 477. Factors to be considered are the length of time between the startling occurrence and the statement, whether the statement was blurted out or made in response to questioning, how detailed the questioning was, whether the declarant appeared excited or frightened, and whether the declarant's physical condition was such as would inhibit deliberation. *People v Lynch* (2010) 50 C4th 693, 752, 114 CR3d 63, abrogated on other grounds in 52 C4th 610.

5. [§3.21] Statements by Children Under 12 Years To Prove Corpus Delicti (Evid C §1228)

Under Evid C §1228, hearsay statements of child victims of sex crimes who are under the age of 12 may be admitted to bolster an existing confession. These hearsay statements may be used to provide the judge with independent evidence of the crime under the corpus delicti rule only when there is an existing complete confession. *Creutz v Superior Court* (1996) 49 CA4th 822, 830, 56 CR2d 870. Without this statutory provision, the prosecution might not be able to proceed even with a confession from the defendant, because the corpus delicti of the crime must be established

by evidence other than the extrajudicial statements of the defendant. *People v McMonigle* (1947) 29 C2d 730, 738, 177 P2d 745; *People v Mattson* (1990) 50 C3d 826, 874, 268 CR 802.

> TIP/CAUTION: Because the statements are admitted for the purpose of determining admissibility of a confession, it is not clear if the Confrontation Clause applies. Therefore, if the *Crawford* requirements must be satisfied, courts have not yet addressed the issue of whether these statements, if they are "testimonial," must satisfy the *Crawford* requirements.

Under this section, a court may admit the out-of-court statement of a child under the age of 12 describing an incident of sexual abuse if the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department. Evid C §1228(a), (b). The statement must have been made before the defendant's confession and must be viewed with caution if there is any evidence of personal bias. Evid C §1228(c). The child must be unavailable as a witness or must refuse to testify (Evid C § 1228(e)), there must not be any significant inconsistencies between the confession and the statement (Evid C § 1228(d)), and the confession must have been memorialized by law enforcement officers in a trustworthy fashion (Evid C §1228(f)).

To introduce this type of hearsay evidence, (1) the prosecution must serve a written notice on the defendant at least 10 days before the trial of the intent to offer such a statement in evidence, and (2) the court's determination of admissibility must be made out of the presence of the jury. Evid C §1228. If the statement is found admissible, it will be admitted outside the presence of the jury for the sole purpose of determining the admissibility of the defendant's confession. Evid C §1228.

6. [§3.22] Statement of State of Mind or Physical Condition or for Medical Diagnosis or Treatment (Evid C §§1250–1253)

Statements of the declarant's state of mind, emotion, or physical sensation may be admissible when they deal with the declarant's then-existing state of mind and are used to explain the declarant's acts or conduct. Evid C §1250. In addition, statements of the declarant's state of mind, emotion, or physical sensation at a time before making the statement may be admissible when they are used to prove or explain the prior state of mind, emotion, or physical sensation when it itself is in issue and when the declarant is unavailable as a witness. Evid C §1251. Such statements of physical or mental condition will be inadmissible if made under circumstances that indicate lack of trustworthiness. Evid C §1252. A declarant's statements about his or her fear of a defendant, no matter how credible, are not admissible unless the declarant's state of mind is at issue. See *People v Bunyard* (1988) 45 C3d 1189, 1204, 249 CR 71. Following *Crawford v Washington* (2004) 541 US 36, 53−54, 124 S Ct 1354, 158 L Ed 2d 177, statements that are testimonial in nature may no longer be admissible under Evid C §§1250−1253 unless the declarant is unavailable and was subject to cross-examination. Nontestimonial statements, however, such as statements to a school friend, would still be admissible under Evid C §1250 because they are outside the scope of *Crawford.* See *People v Griffin* (2004) 33 C4th 536, 579 n4, 15 CR3d 743 (death penalty case), disapproved on other grounds in 54 C4th 758 n32.

Moreover, a nontestimonial statement made by a child victim of abuse or neglect when that child was under 12 years old may be admissible despite the hearsay rule if the statement was made for medical diagnosis or treatment. Evid C §1253. Thus, statements made by a 4-year-old victim to his aunt who was caring for him and to the treating doctor and nurse are reliable when they were made shortly after the incident, and the child had no reason to lie. *In re Daniel W.* (2003) 106

CA4th 159, 165, 130 CR2d 412. Child abuse or neglect mean any act proscribed by Pen C §§273a, 273d, 288.5, 11165.1, and 11165.2. See Evid C §§1253, 1360(c).

In a criminal case, nontestimonial statements describing the nature and circumstances of the abuse are admissible if made in the course of diagnosis or treatment, as is a statement identifying the abuser when the abuser has such an intimate relationship with the child that his or her identity is relevant to the child's treatment. See *People v Brodit* (1998) 61 CA4th 1312, 1331, 72 CR2d 154. The person to whom the child has made the statement need not be licensed as a treatment provider; if the statement is made to an intern or even a hospital attendant or ambulance driver, the statement will be admissible if it was made for the diagnosis or treatment. *People v Brodit, supra,* 61 CA4th at 1332.

Nontestimonial statements may also be admissible on the issue of the victim's state of mind if his or her credibility has been attacked. See, *e.g., People v Mendibles* (1988) 199 CA3d 1277, 1304, 245 CR 553, in which statements of an 8-year-old declarant to an aunt, that she was afraid to wear dresses because defendant touched girls who wore dresses, were admissible under Evid C §1250 on the question of the declarant's then-existing state of mind because the defendant had attacked the victim's credibility and had supplied a motive for later fabrication. Such statements may also be admissible on the issue of the condition of the child's body. See *People v Pike* (1960) 183 CA2d 729, 735, 7 CR 188 (5-year-old girl's statement to her mother at the time of the incident that her rectum hurt was admissible).

In a dependency case, hearsay exceptions under Evid C §§1250–1253 often arise when the child describes the molestation to a doctor or other person who then uses the statements in making a diagnosis or reporting the abuse and who may later testify to them. See, *e.g., In re Tanya P.* (1981) 120 CA3d 66, 70, 174 CR 533, in which the court held that a child's complaint to a police officer of pain in her vaginal area was admissible as a statement of then-existing pain under Evid C §1250.

However, testimony based on these statements as a basis for opinions about matters such as the conduct of third parties is not admissible. See Evid C §1250(a)(2); *In re Cheryl H.* (1984) 153 CA3d 1098, 1119, 200 CR 789, disapproved on other grounds in 8 C4th 746 (psychiatrist's testimony that child's father had sexually abused her was not admissible from child's statements to the psychiatrist to that effect).

7. Probation Reports and Social Studies

a. [§3.23] Criminal Cases

Out-of-court statements of children and other nontestimonial items of hearsay may be admissible in limited situations if they are contained in probation reports. In a criminal felony case, a probation report containing hearsay is admissible for sentencing purposes. See Pen C §1203(b) (report must include circumstances surrounding crime and defendant's prior history and record); Cal Rules of Ct 4.411.5 (prescribing contents of report). See also Pen C §1203h (report on person who is convicted of child abuse or neglect). Facts contained in the report that would be inadmissible hearsay on the question of guilt may nevertheless be received in evidence on the issue of punishment. *People v Peterson* (1973) 9 C3d 717, 725, 108 CR 835. Therefore, for the purposes of making a decision regarding punishment, the court may consider past arrest and conviction records, although such records would be inadmissible on the question of guilt. *Loder v Municipal Court* (1976) 17 C3d 859, 867, 132 CR 464.

b. [§3.24] Juvenile Dependency Cases

The information contained in social studies reports is admissible and competent evidence on which to base jurisdiction findings if the preparer of the report is present for cross-examination and the parent or guardian has the opportunity to subpoena and cross-examine the witnesses mentioned in the report. Welf & I C §§355(b), (d), 341; Cal Rules of Ct 5.684(c), 5.526(d), 5.682(b). In general, the court is authorized to receive and consider probation department reports on issues involving custody, status, or welfare of children. Welf & I C §281.

A "social study" is a written report furnished by the county probation or welfare department to the court, the parties, and counsel. Welf & I C §355(b)(1). The preparer of the report must be made available for cross-examination on a timely request of a party; availability includes being on telephone standby, if the person can be present in court within a reasonable time. Welf & I C §355(b)(2); Cal Rules of Ct 5.684(c)(2).

If a party raises a timely objection to the admission of specific hearsay in the report, that particular evidence may not by itself support a jurisdictional finding or any ultimate fact on which a jurisdictional finding is based *unless* the petitioner establishes one or more of the following exceptions:

- The hearsay evidence would be admissible in any criminal or civil proceeding as a statutory or case law hearsay exception. Welf & I C §355(c)(1)(A); Cal Rules of Ct 5.684(d)(1).
- The hearsay declarant is the child who is the subject of the proceeding and is under 12 years old. This exception may be defeated if the objecting party establishes that the statement is unreliable in that it is the product of fraud, deceit, or undue influence. Welf & I C §355(c)(1)(B); Cal Rules of Ct 5.684(d)(2).
- The hearsay declarant holds a certain position such as peace officer, health practitioner, social worker, or teacher and the statement would be admissible if the declarant were testifying. See Welf & I C §355(c)(1)(C); Cal Rules of Ct 5.684(d)(3).
- The hearsay declarant is available for cross-examination. Welf & I C §355(c)(1)(D); Cal Rules of Ct 5.684(d)(4).

The admissibility of hearsay statements contained in a social study report under Welf & I C §355 was upheld in *In re Lucero L.* (2000) 22 C4th 1227, 96 CR2d 56, which held that a petition may be sustained based solely on the social worker's report containing statements of a child, even one who is incompetent to testify. If these statements bear indicia of reliability corroboration of the child's statements is not required under the social study exception. *In re Lucero L., supra*, 22 C4th at 1247–1249. If the court does not find such indicia, there needs to be additional evidence to support the finding of jurisdiction. *In re Lucero L., supra.*

There is also a judicially created child dependency hearsay exception created in *In re Cindy* L. (1997) 17 C4th 15, 69 CR2d 803. Before permitting a statement to be admitted under this exception, the court must find that the hearsay statements are reliable. *In re Cindy L., supra*, 17 C4th at 28. Whether or not the child would be competent to testify as a witness, the child's reliable hearsay statement is admissible; if, however, the child is not available for cross-examination, his or her hearsay statements must be corroborated. 17 C4th at 29. *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, does not apply to juvenile dependency proceedings because the Sixth Amendment right of criminal defendants to confront witnesses against them does not apply to parents in dependency proceedings; therefore *Cindy L.* and *Lucero L.* are still good law. *In re April C.* (2005) 131 CA4th 599, 611, 31 CR3d 804.

It is generally agreed that the court may admit hearsay in social studies reports received in hearings held subsequent to the jurisdiction hearing without having the preparer present and available for cross-examination. See *Andrea L. v Superior Court* (1998) 64 CA4th 1377, 1387 n3, 75 CR2d 85.

c. [§3.25] Juvenile Delinquency Cases

For juvenile delinquency dispositions, the court may consider relevant evidence contained in a social study of the child. Cal Rules of Ct 5.785(a), (b); Welf & I C §§280 (duty of probation officer to prepare report), Welf & I C §706 (court must receive report in evidence when making disposition), and Welf & I C §706.5 (contents of report when foster care placement is at issue). The court may not, however, consider the contents of such a report at the adjudication hearing (*In re Gladys R.* (1970) 1 C3d 855, 860, 83 CR 671), except for the portion containing the jurisdictional facts (*In re Michael V.* (1974) 10 C3d 676, 683, 111 CR 681). Courts have not ruled whether the Confrontation Clause, and therefore *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, apply in juvenile delinquency proceedings.

d. [§3.26] Family Law Cases

Hearsay evidence in a custody investigation report is also admissible in family law cases but only with the stipulation of the parties. Fam C §3111(c); *Dahl v Dahl* (1965) 237 CA2d 407, 413, 46 CR 881 (decided under former CCP §263; see now Fam C §3111(c)). Similarly, Fam C §§7851(a), (d) provides that the court must receive the report of the probation officer, investigator, social worker, therapist, or county department into evidence in a family court proceeding for termination of parental rights. The report must contain a statement from the child about his or her thoughts and feelings about the proceedings. Fam C §7851(b)(2).

8. [§3.27] Child Hearsay Exception for Statements of Abuse or Neglect Victim Under 12 in Criminal Case

A recent but uncertain exception to the hearsay rule is found in Evid C §1360, which permits the admission of statements made by a child victim under 12 years old describing an act of abuse or neglect. Such a statement is admissible under this section if (Evid C §1360(a)):

- It is not already admissible under another statute or court rule;
- The court finds, after a hearing conducted outside the jury's presence, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- The child either
  - — Testifies at the proceedings; or
  - — Is unavailable as a witness, in which case the statement may be admitted only if there is independent corroboration of the abuse or neglect.

The validity of Evid C §1360 after *Crawford v Washington* (2004) 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177, has not been directly addressed, although *People v Sisavath* (2004) 118 CA4th 1396, 1403, 13 CR3d 753, considered whether a child witness's out-of-court testimony should have been excluded under Evid C §1360 after *Crawford*; the court found that it did not need to resolve that issue because admission of the statements violated the Confrontation Clause. In a case discussing a statute that is somewhat similar to Evid C §1360, however, a court held that Evid C §1380 (permitting admission of a testimonial videotaped statement of a victim of elder abuse) is unconstitutional on its face after *Crawford* because although Evid C §1380 requires unavailability,

it does not require the opportunity to cross-examine. See *People v Pirwani* (2004) 119 CA4th 770, 786, 14 CR3d 673. In the wake of *Crawford* if a statement is found to be "testimonial" the Confrontation Clause may preclude its admission into evidence.

When the statements to be admitted are not testimonial, some of the circumstances under which a court may find indicia of trustworthiness in a child witness's hearsay statements are (*People v Eccleston* (2001) 89 CA4th 436, 446–448, 107 CR2d 440):

- If available to testify, the child would otherwise be competent as a witness (understands relevant concepts and differentiates truth from falsity);
- The statements were spontaneously made and consistently repeated;
- The child showed both comprehension of his or her own statements and independence of thought while making statements;
- The child displayed sexual knowledge not normal for someone of that age;
- The child had no motive to fabricate; and
- The child was not asked leading questions during a taped interview.

Two additional indicia of trustworthiness in a child witness's hearsay statements may be that (*People v Brodit* (1998) 61 CA4th 1312, 1330, 72 CR2d 154):

- There was nothing in the child's mental state to indicate that the statements were unreliable, and
- Although the statements were not spontaneous, they were consistently repeated.

Child abuse means any act proscribed by Pen C §§273a, 273d, 288.5, and 11165.1, and neglect means acts proscribed by Pen C § 11165.2. Evid C §1360(c). In order for a statement to be admissible under this section, the proponent must give the adverse party sufficient advance notice of the intention to offer the statement and the particulars of the statement such that the adverse party is provided with a fair opportunity to prepare to meet the statement. Evid C §1360(b); see *People v Roberto V.* (2001) 93 CA4th 1350, 1368–1369, 1373, 113 CR2d 804 (because notice of the use of Evid C §1360 was not given to the defense until after the jury was sworn, child's statements were not admissible).

9. [§3.28] Additional Exceptions

Hearsay statements of a child witness, which are inadmissible for the truth of the matters asserted, may be admissible for other purposes. See, *e.g., In re Clara B.* (1993) 20 CA4th 988, 998, 25 CR2d 56.

Statements of an unavailable witness who is the victim of physical abuse or the threat of abuse may be admissible under Evid C §1370 if the statements (1) purport to narrate, describe or explain the injury or threat of injury, (2) are made at or near the time of the injury or threat, (3) are made within 5 years of filing of proceeding, (4) have indicia of trustworthiness, and (5) were written, electronically recorded or made to a physician, nurse, paramedic, or to a law enforcement official. However, after *Crawford*, Evid C §1370 must be read to require the defendant to have an opportunity to cross-examine the declarant before any testimonial hearsay can be admitted. *People v Price* (2004) 120 CA4th 224, 239, 15 CR3d 229. In *Price*, the requirement was met when the declarant testified at the preliminary hearing. *People v Price, supra*.

Use of videotaped testimony of an adult witness under Evid C §1370 did not violate the defendant's due process rights or right to confrontation when the witness suffered from physical

illness and extreme anxiety, and direct testimony would have been likely to harm the witness and impair truth gathering. *People v Williams* (2002) 102 CA4th 995, 1008–1009, 125 CR2d 884 (pre-*Crawford* case—defendant had opportunity to cross-examine); but see *People v Murphy* (2003) 107 CA4th 1150, 1157, 132 CR2d 688 (pre-*Crawford* case—court failed to hold hearing regarding necessity to use one-way mirror).

C. [§3.29] FRESH COMPLAINT

Because it is now known that victims of sexual assaults in general, and children in particular, do not often immediately disclose their victimizations, admissibility of their complaints no longer depends on whether they were "freshly" made. See *People v Brown* (1994) 8 C4th 746, 758, 763, 35 CR2d 407. Sexual abuse victims, including children, are reluctant to report abuse incidents and often delay in doing so. *People v Brown, supra,* 8 C4th at 758. The child victim is often not aware that the conduct is wrong and that what has occurred is not normal. *People v Brown, supra.* Indeed, the child victim may not speak up because he or she is experiencing confusion and guilt and wants to forget the incident; in addition, he or she may well have been threatened by the accuser. *People v Brown, supra*.

The specific relevance of the complaint evidence must be demonstrated in each case, and evidence of the fact of disclosure, and the circumstances surrounding the disclosure, is admissible in a criminal trial for nonhearsay purposes under applicable evidentiary principles. *People v Brown, supra,* 8 C4th at 763. Both the delay in complaining and the spontaneity of the complaint are factors to be considered in assisting the trier of fact to assess the significance of the victim's statements. *People v Brown, supra.* The evidence must be carefully limited to the fact that a complaint was made and to the circumstances surrounding the making of the complaint; it should not encompass the contents of the statements and any description of the alleged molestation (*People v Brown, supra,* 8 C4th at 762, 764) although it can include the identity of the alleged perpetrator. See *People v Burton* (1961) 55 C2d 328, 351, 11 CR 65.

VI. DETERMINING APPLICABLE PRIVILEGES

A. [§3.30] IN GENERAL

While there is no parent-child privilege in California (*De Los Santos v Superior Court* (1980) 27 C3d 677, 682, 166 CR 172) as there is in some other states, a number of other privileges apply to the child witness. The one most commonly claimed by or on behalf of the child witness is the psychotherapist-patient privilege (Evid C §§1010–1027). Other applicable privileges include the physician-patient privilege (Evid C §§990–1007), the attorney-client privilege (Evid C §§950–962), and the sexual assault victim-counselor privilege (Evid C §§1035–1036.2).

In dependency cases, these rules regarding privileges apply:

- The privilege not to testify and not to be called as a witness against the spouse under Evid C §972 is not available to the parent or guardian. Cal Rules of Ct 5.684(e).
- The confidential marital privilege under Evid C §980 is not available to the parent or guardian. Cal Rules of Ct 5.684(e); see Evid C §986.

Under Welf & I C §317(f), either the child or his or her counsel may invoke a privilege such as the psychotherapist-patient privilege; if the child invokes it, counsel may not waive it, but if counsel invokes it, the child may waive it. Counsel is the holder of the privilege if the child is neither old nor mature enough to consent to the invocation of the privilege. Welf & I C §317(f). See also discussion in §2.14.

B. PSYCHOTHERAPIST-PATIENT PRIVILEGE

1. [§3.31] Nature of Privilege

A psychotherapeutic patient has a privilege to refuse to disclose and to prevent others from disclosing confidential communications between the patient and the psychotherapist. Evid C §1014. See also Evid C §1010 (defining psychotherapist), Evid C §1010.5 (privilege applicable to educational psychologist), Evid C §1011 (defining patient), and Evid C §1012 (defining confidential communications). Statements made in the course of the relationship are also presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the statement was not confidential. Evid C §917(a). The purpose of the privilege is to permit the patient to be able to speak freely to the therapist in order to permit the building of trust. Therapists will usually reassure children and other patients at the outset of treatment that everything they say will remain confidential unless sexual abuse is disclosed or unless the therapist feels that the patient might cause serious harm to self or others.

Confidential communications also include communications made by the parents to the psychotherapist, because those communications are made to benefit the child and enhance the therapy. *Grosslight v Superior Court* (1977) 72 CA3d 502, 507, 140 CR 278 (child was 17-year-old psychiatric patient). The names of the other members of a therapy group come within the psychotherapist-patient privilege, as do the communications made by the patient to those members. *Farrell L. v Superior Court* (1988) 203 CA3d 521, 527, 250 CR 25 (patient was child). A communication to a therapist from a defendant in which he admitted sexual abuse of his child, however, is not confidential when the dominant purpose of the communication was not to seek treatment but to be admitted into a treatment program in order to avoid prison. *People v Cabral* (1993) 12 CA4th 820, 826−828, 15 CR2d 866.

2. [§3.32] Who May Claim Privilege

The privilege may be claimed by its holder (see Evid C §1013), a person authorized by the holder to claim it, or by the psychotherapist, unless no holder exists or the holder instructs the psychotherapist not to claim the privilege. Evid C §1014. See also Evid C §1015 (psychotherapist has duty to claim privilege when he or she has made or received a confidential communication and is present when the communication is sought to be disclosed). The psychotherapist cannot waive the privilege for the patient under Evid C §1015. *Roberts v Superior Court* (1973) 9 C3d 330, 341, 107 CR 309. A waiver can occur only when (1) the holder of the privilege, without coercion, discloses a significant part of the communication, consents to disclosure (Evid C §912(a)), or (2) the patient places his or her mental condition at issue (Evid C §1016).

Although the holder of the privilege is the guardian or conservator when the patient has a guardian or conservator (Evid C §1013(b)), the holder of the child's privilege is the child, not the parent, when the parent has been accused of sexual abuse and the child is in therapy to deal with the emotional effects of the abuse. *In re Daniel C. H.* (1990) 220 CA3d 814, 829, 269 CR 624. In this case, the court held that there is nothing in the fundamental nature of the parent-child relationship that would permit a parent to demand disclosure of confidential communications made by a child to his or her treating therapist when the child is a subject of a dependency proceeding. 220 CA3d at 827. If disclosure would harm the therapist-patient relationship or have a detrimental effect on the child's psychological well-being, a parent should be denied access to both the records of the child's therapist and the therapist's testimony. 220 CA3d at 828. Furthermore, the psychotherapist-patient privilege (which may be asserted by the child's attorney) does not yield to a parent's interest in presenting evidence in the parent's own behalf in a dependency proceeding.

220 CA3d at 829. Also, parental conflicts of interest may sometimes disqualify a parent from asserting or waiving a child's psychotherapist-patient privilege and may require the appointment of a guardian ad litem. *People v Superior Court* (Humberto S.) (2008) 43 C4th 737, 753, 76 CR3d 276.

The psychotherapist is a joint holder of the privilege with the child; waiver by one holder does not affect the other holder's right or duty to claim the privilege. Evid C §912.

3. [§3.33] Exceptions

There is no psychotherapist-patient privilege if the patient is under 16 years old and the psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child. Evid C §1027. The court in *People v Caplan* (1987) 193 CA3d 543, 556, 238 CR 478, overruled on other grounds in 5 C4th 1117, stated that Evid C §1027 is a limited removal of the privilege on behalf of the child-patient and places the privilege with the psychotherapist. When a crime has been committed against a child, the psychotherapist must claim the privilege by stating that the disclosure is not in the best interests of the child. *People v Caplan, supra.* However, the privilege remains with the child with respect to treating psychotherapists who do not know about the abuse. 193 CA3d at 557. See also *In re Courtney S.* (1982) 130 CA3d 567, 181 CR 843 (privilege inapplicable in dependency proceedings when child had told psychotherapist of molestation).

A number of other exceptions to the psychotherapist-patient privilege affect patients who are children. One is the dangerous-patient exception of Evid C §1024. See *In re Kevin F.* (1989) 213 CA3d 178, 181, 183, 261 CR 413 (privilege does not apply when child confessed arson to psychotherapist). A similar exception is created by the Child Abuse and Neglect Reporting Act (Pen C §§11164–11174.3), which provides for an exception to the privilege when the abuser confides the abuse to a psychotherapist. *People v Stritzinger* (1983) 34 C3d 505, 512, 194 CR 431. The privilege is broadly construed in favor of the patient and exceptions are narrowly construed. *People v Stritzinger, supra* 34 C3d at 511, 513. However, the exception to the privilege carved out by the Reporting Act extends only to information actually reported and not to "reportable" information that was not reported. *People v John B.* (1987) 192 CA3d 1073, 1078, 237 CR 659.

Another exception is the patient-litigant exception of Evid C §1016 invoked when the patient puts his or her condition in issue. See *Britt v Superior Court* (1978) 20 C3d 844, 863, 143 CR 695 (exception encompasses only those mental conditions that patient brings before the court). See also *In re Daniel C. H.* (1990) 220 CA3d 814, 829, 269 CR 624 (child does not "tender" his or her mental condition in a dependency proceeding by complaining of abuse; therefore, exception to privilege does not apply). Another exception applies when the court appoints a psychotherapist to examine the patient. Evid C §1017. However, a juvenile court referral for counseling is not equivalent to a court-ordered examination within the meaning of Evid C §1017. *In re Eduardo A.* (1989) 209 CA3d 1038, 1041, 262 CR 68.

4. [§3.34] Balancing Privilege With Need for Disclosure

The exception provided under Evid C §1027 does not extend to situations where the psychotherapist believes that no crime has occurred. When evidence of the child victim's emotional state is before the jury, and the psychotherapist's testimony would be substantially cumulative, the psychotherapist-patient privilege outweighs the potential value of the psychotherapist's testimony concerning the child victim's frequent lying and severe emotional problems. *People v Castro* (1994) 30 CA4th 390, 397–398, 35 CR2d 839, disapproved on other grounds in 11 C4th 434, 452. Indeed, the psychotherapist is in no better position to evaluate the

child's credibility than the jurors. 30 CA4th at 397. On the other hand, in a defamation action for allegedly false child abuse allegations between former spouses, the need for disclosure outweighs the right to claim the psychotherapist-patient privilege. *Roe v Superior Court* (1991) 229 CA3d 832, 843, 280 CR 380. In the dependency context, the privilege protects the child's communications and details of the therapy, but does not prohibit the psychotherapist from giving the court information gained in the information-gathering aspect of psychotherapy. *In re Mark L.* (2001) 94 CA4th 573, 584, 114 CR2d 499. When a dependent child undergoes therapy, the juvenile court may order the child's therapist to disclose limited information regarding the issues being addressed by the child in therapy, the general progress being made, and any concerns. In this way, the court can ensure the dual purpose of therapy in dependency cases—to treat the child and to provide the court and agency with information necessary to make reasoned recommendations and decisions regarding the child's welfare—is satisfied. See *In re Kristine W.* (2001) 94 CA4th 521, 527–528, 114 CR2d 369.

C. [§3.35] Sexual Assault Victim-Counselor Privilege

A person who consults a counselor for the purpose of securing guidance and assistance because of problems arising from a sexual assault has a privilege not to disclose and to prevent disclosure of confidential communications made during the consultation. Evid C §§1035 (definition of victim), Evid C §1035.8 (nature of privilege), Evid C §1035.2 (definition of sexual assault victim counselor), Evid C §1036.2 (definition of sexual assault). The holder of this privilege is the sexual assault victim when he or she has no guardian or conservator and the personal representative if the victim is dead. Evid C §1035.6. The privilege may be claimed by the holder of the privilege or a person authorized to claim the privilege by the holder; the sexual assault victim counselor may also claim the privilege unless there is no holder in existence or he or she is otherwise instructed by an authorized person. Evid C §1035.8. If the counselor is present when the communication is disclosed and is authorized to claim the privilege, he or she must claim it. Evid C §1036.

Despite this privilege, the court may compel disclosure of otherwise privileged confidential communications in criminal proceedings or proceedings related to child abuse if it determines that the probative value of the disclosure would outweigh the effect on the victim, the treatment relationship, and the treatment services. Evid C §1035.4. When the court is ruling on a claim of privilege under this section, it may require the person from whom disclosure is sought or the person claiming the privilege, or both, to disclose the privilege in chambers. Evid C §1035.4. Once the court determines that there is a reasonable likelihood that certain information is subject to disclosure under the balancing test described above, it must inform the defendant of the nature of that information. Evid C §1035.4(1). It must then order a hearing out of the presence of the jury to permit questioning of the counselor about the information. Evid C §1035.4(2). At the conclusion of the hearing, the court must make an order, ruling on which items may be disclosed. Evid C §1035.4(3).

A court may compel disclosure of information given to a sexual assault counselor only if it determines that probative value of the information outweighs the effect on the victim, the treatment relationship, and the services. Evid C §1035.4. Because of this, a sexual assault counselor may be compelled to testify that a child was present at a school program on child abuse in the face of the child's denial. *People v Gilbert* (1992) 5 CA4th 1372, 1391, 7 CR2d 660.

Because a child may be the victim of domestic violence, the confidential communications made by a child victim to a domestic violence counselor may be privileged under Evid C §§1037–1037.8. Similarly, if a child is a victim of human trafficking, the confidential communications

made by the child to a human trafficking caseworker may be privileged under Evid C §§1038–1038.2.

D. [§3.36] ATTORNEY-CLIENT PRIVILEGE

Although there is no parent-child privilege in California that protects a child's communications to his or her parents, the attorney-client privilege (Evid C §§950–962) may protect the communications made by a child to that child's parents, if the communications were made at the request of the child's attorney or to assist the attorney in preparation for trial. *De Los Santos v Superior Court* (1980) 27 C3d 677, 682, 166 CR 172. See also Evid C §952 (communications protected by attorney-client privilege may be made to third persons who are present to further the client's interest or those to whom the disclosure is necessary for transmission of the information). In *De Los Santos*, the communications were made to the mother who was the child's guardian ad litem in a personal injury case. The court held that the mother could assert the privilege in her capacity as guardian ad litem.

E. [§3.37] MARITAL PRIVILEGE AND PRIVILEGE NOT TO TESTIFY AGAINST SPOUSE

The privilege not to disclose confidential marital communications, which may be asserted by a spouse in most criminal proceedings against the other spouse, is governed by Evid C §§980–987. It is not applicable in criminal proceedings arising out of a crime committed against a child of the marriage (Evid C §985) nor in juvenile court proceedings (Evid C §986).

Similarly, the privilege not to testify against one's spouse is not applicable when one spouse is charged with a crime against a child of the marriage (Evid C §972(e)(1)), in juvenile court proceedings (Evid C §972(d)), and in child support proceedings brought against a spouse by a former spouse on behalf of the child of that spouse (Evid C §972(g)). See also Cal Rules of Ct 5.684(e) (privilege not to testify or be called as a witness against a spouse and confidential communications privilege are not available to a parent or guardian in a contested jurisdictional hearing in a dependency case).

In *People v Daniels* (1969) 1 CA3d 367, 376, 81 CR 675, the court of appeal held that letters written by a husband to his wife that would otherwise be protected by the privilege not to disclose confidential marital communications were admissible for impeachment purposes at the criminal trial for rape and incest of defendant's daughter. The privilege is not made applicable because the communications were made after, rather than before, the commission of the crime. 1 CA3d at 377.

F. [§3.38] PHYSICIAN-PATIENT PRIVILEGE

The physician-patient privilege is codified in Evid C §§990–1007. Like the psychotherapist-patient privilege, it gives a patient the privilege to refuse to disclose and to prevent others from disclosing confidential communications between the patient and the physician. Evid C §994. Unlike the psychotherapist-patient privilege which is applicable in both civil and criminal cases, the physician-patient privilege is inapplicable in criminal cases. Evid C §998.

The privilege is defeated when the patient puts his or her medical condition in issue. Evid C §996. The holder of this privilege is generally the patient. Evid C §994. The physician must claim the privilege if he or she is present when the disclosure is sought and is otherwise authorized to claim it. Evid C §995.

Although under ordinary circumstances it would be reasonable for a parent to claim the physician-patient privilege on behalf of the child, a mother whose baby was born under the influence of dangerous drugs may *not* assert the privilege in a dependency hearing when there is a

potential conflict between the mother's and the child's interests. *In re Troy D.* (1989) 215 CA3d 889, 900, 263 CR 869.

VII. USE OF EXPERTS

A. [§3.39] IN GENERAL

A subject is a proper one for expert opinion when it is "beyond common experience" and when the expert opinion would assist the fact finder. Evid C §801; *In re Cheryl H.* (1984) 153 CA3d 1098, 1118, 200 CR 789, disapproved on other grounds in 8 C4th 746. The inference made by the expert witness must be one that an expert is equipped to make as a matter of expertise, logic, and law. *In re Cheryl H., supra*. Expert testimony is not admissible when it would not assist the trier of fact, when the expert is no better equipped than the layperson to make the inference in question, or when the inference is an impermissible one on the part of either the expert or the layperson. *In re Cheryl H., supra*. It is not admissible if it consists of conclusions that can be just as easily reached by the fact finder as by the expert (*People v Valdez* (1997) 58 CA4th 494, 506, 68 CR2d 135) and when it would add nothing to the jury's common fund of information. *People v McDonald* (1984) 37 C3d 351, 367, 208 CR 236, overruled on other grounds in 23 C4th 896, 914.

In a death penalty case, the Supreme Court has held that the experience of child victims of violent sexual assaults is not sufficiently within common experience under Evid C §801 that expert assistance is not required. *People v Smith* (2005) 35 C4th 334, 363, 25 CR3d 554.

When expert testimony is admitted, however, a trier of fact is always free to reject the expert's conclusions because of doubt as to the material on which they were based. *People v Stoll* (1989) 49 C3d 1136, 1155, 265 CR 111.

The qualification of expert witnesses, including foundational requirements, is within the sound discretion of the court. *People v Ramos* (1997) 15 C4th 1133, 1175, 64 CR2d 892. Once a witness has been qualified as an expert by means of special knowledge, skill, experience, training, or education (Evid C §802), he or she may assist the trier of fact by testifying on subjects that are outside the realm of common experience (Evid C §801(a)). The expert's opinion must be based on matters that are of a type to be reasonably relied on and that are perceived or personally known to him or her. Evid C §801(b).

The expert may give an opinion embracing the ultimate issue in the case if that testimony is otherwise admissible. Evid C §805. In a case involving a child witness of sexual abuse, the ultimate facts are whether the abuse occurred and who was the abuser. More particularly, the ultimate legal issue in criminal proceedings is whether the defendant is guilty, and in juvenile dependency proceedings, whether the court should assume jurisdiction over the child. While experts may not testify as to the defendant's criminal responsibility or juvenile court jurisdiction, they may nevertheless provide testimony embracing the ultimate facts concerning the abuse. Myers et al, *Expert Testimony in Child Abuse Litigation,* 68 Neb L Rev 18 (1989).

The court may appoint an expert on its own motion or on the motion of any party whenever it appears that expert evidence may be required. Evid C §730. Payment for the expert is made from county funds in criminal and juvenile court proceedings. However, if the expert is appointed for the court's needs, the compensation shall be a charge against the court. Evid C §731. When an expert is appointed by the court, he or she may be called and examined by the court or by any party. Evid C §732. The parties may cross-examine a court-appointed expert witness as if he or she had been called by the adverse party. Evid C §§732, 775. Additional experts may be called by the parties who must bear the expense of these witnesses. Evid C §733.

The trial court's decision on whether or not to permit expert testimony will not be disturbed on appeal unless there has been a manifest abuse of discretion. *People v Kelly* (1976) 17 C3d 24, 39, 130 CR 144.

B. [§3.40] COURT-APPOINTED CHILD DEVELOPMENT EXPERT

Young witnesses often have special needs that must be understood if they are to testify effectively. In some cases, it may be appropriate for you to appoint a neutral expert on child development to assist the court in understanding the developmental and psychological needs of particular child witnesses. A developmental expert could assist court and counsel in numerous ways, such as advising the court on steps that could be taken to make testifying less traumatic for a child. The expert might inform the court of a child's cognitive and communicative abilities so that the court can control the proceedings to enable the child to communicate effectively.

A court-appointed expert on child development should not offer testimony on the substance of allegations of child sexual abuse. The expert should remain strictly nonpartisan. The expert's role is not to prove or disprove abuse, but to assist the court in executing the difficult responsibilities of ensuring a fair trial, protecting vulnerable child witnesses, and fostering complete and accurate testimony (110, pp 144–145).

C. [§3.41] WHEN EXPERT TESTIMONY IS NEEDED

Experts may be needed to assist the trier of fact in determining whether or not abuse has occurred from a medical point of view. See, *e.g., People v Newlun* (1991) 227 CA3d 1590, 278 CR 550; *People v Belasco* (1981) 125 CA3d 974, 979, 178 CR 461 (physician was able to testify to forced penile entry of 14-year-old girl). (See discussion by Myers, 111). Experts may also be useful to rebut attacks on the child's credibility arising from inconsistencies in the child's story or delay in reporting the abuse. See, *e.g., People v Harlan* (1990) 222 CA3d 439, 449, 271 CR 653. Expert testimony may occasionally be helpful to advise the fact finder on a child's abilities and limitations. See *People v Stark* (1989) 213 CA3d 107, 113, 261 CR 479 (expert testified that child victim witness was not retarded despite the fact that he was hydrocephalic and had a large head, and also explained about child's learning disabilities to alert the fact finder to the child's sequencing difficulties). Mental health experts are also used to testify as to whether the child is psychologically "unavailable" to testify under Evid C §240 for the purpose of admitting certain hearsay statements of the child (see, *e.g.,* Evid C §1228 (statement of child under 12 establishing corpus delicti of sex crime), Evid C §1230 (declaration against interest), Evid C §1251 (statement of prior mental or physical state), and Evid C §1291 (former testimony)). An example of this use of an expert witness was encountered in *People v Gomez* (1972) 26 CA3d 225, 228, 103 CR 80, in which treating physicians testified that the child victim of sexual abuse was unavailable to testify because testifying would be a traumatic experience that would likely impair her present and future health. In that case, the victim's former (preliminary hearing) testimony was received in evidence under Evid C §1291.

In addition, mental health experts are used to determine unavailability for the purposes of using the video recording of the child's preliminary hearing testimony at the actual trial. See Pen C §1346(d); Evid C §1291. A mental health expert would also presumably be needed to show that a preliminary hearing should be closed to the public when testimony by the child victim of sexual abuse before the public would be likely to cause serious psychological harm (see Pen C §868.7(a)(1)), as well as to show that the trial itself should be closed during the child's testimony (Pen C §859.1(b)(6) (disclosure of child's identity would cause serious harm to child witness)).

Experts also frequently testify on proper interviewing techniques, addressing the concern that the child's testimony can be contaminated through the interview process. The literature on child interviewing is vast and consensus exists on many points (See discussion by Myers, 111). Experts agree

- Children should be interviewed as soon as possible by interviewers who encourage children to provide as much information as possible in their own words with the least information introjected by the adult (*e.g.*, 47, 86, 89, 112–113);
- The number of interviews should be minimized, although more than one interview is sometimes necessary, and when children are interviewed non-suggestively, they generally do quite well (114–115);
- Interviews should be video-taped (111);
- Interviewers should be trained and receive regular peer review of their work (*e.g.*, 112);
- Children should never be coerced into answering questions; and
- Highly suggestive techniques are to be avoided (116).

Based on the best available science, there is

- Near universal emphasis on maximal use of open-ended questions that require multi-word responses;
- Minimal and cautious use of closed-ended questions that can be answered in a single word or phrase (*e.g.*, yes or no); and
- Avoidance of multiple misleading suggestive techniques (*e.g.*, questions that ask for verification of adult preconceptions, invite speculation, express disbelief, suggest interviewer preconceptions or biases).

Many, if not most, agency protocols and professional guidelines follow this general approach (*e.g.*, 82, 85). Studies show that a few suggestive questions do not invalidate a child's entire report, however, no definitive method for avoiding contamination exists (97, 109, 117). Although 3-year-olds are particularly susceptible to suggestions of false details, actions, and identities in research studies, it is also the case that the remainder of their reports can be unaffected and quite accurate. See §§4.43–4.44 for additional details.

> TIP: Although scientific experts have relevant information to offer in this regard, you will want to be skeptical of those who claim extreme positions.

See §3.40 on using a child development expert as an advisor to the judge on the conduct of the trial.

D. [§3.42] Qualifications of Expert

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education qualifying him or her as an expert in the area that is the subject of the testimony. Evid C §720(a). The expert's knowledge, skill, experience, training, or education may be shown by any admissible evidence. Evid C §720(b).

Lay witnesses may give opinions that are rationally based on their own perceptions and are helpful to a clear understanding of their testimony (Evid C §800), but they may not testify as to the credibility of other witnesses (*People v Melton* (1988) 44 C3d 713, 744, 244 CR 867). In *People*

v Sergill (1982) 138 CA3d 34, 187 CR 497, a conviction for violation of Pen C §288a was reversed because of admission of opinion testimony by two police officers that the 8-year-old complaining witness was telling the truth. The court held that this testimony was not proper because the police officers were not experts under Evid C §720(a) in judging credibility despite the fact that they had taken numerous reports from abused children during their careers. 138 CA3d at 39.

In *Sergill,* the officers' testimony also did not qualify as admissible opinion testimony of a lay witness, since that type of testimony is only admissible if the lay witness could not adequately describe his or her observations without using opinion wording. 138 CA3d at 40. Because both these officers were able to describe their experiences with the girl in full and concrete detail, their opinions as to her truthfulness were not necessary or even helpful to an understanding of their testimony. But see *People v Dunnahoo* (1984) 152 CA3d 561, 577, 199 CR 796 (police officer's testimony that it is not unusual for child abuse victims to be reluctant to talk about their experiences was admissible as *expert* opinion testimony under Evid C §801).

Witnesses who have been permitted to testify as experts in cases involving sexually abused children include:

- Person with master's degree in social work, specialized training in treatment of abuse, and experience with several hundred sexually abused children. *People v Harlan* (1990) 222 CA3d 439, 448, 271 CR 653.
- Clinical psychologist. *In re Sara M.* (1987) 194 CA3d 585, 239 CR 578.
- Psychiatrist. *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 239 CR 422; *In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789, disapproved on other grounds in 8 C4th 746.
- Physician experienced in examining children for sexual abuse. *People v Mendibles* (1988) 199 CA3d 1277, 245 CR 553 (physician: conducted a study concerning hymeneal openings in 120–150 preadolescent and adolescent girls and had written articles on sexual abuse); *People v Newlun* (1991) 227 CA3d 1590, 278 CR 550.
- Police officers. *People v Dunnahoo, supra*; *People v McAlpin* (1991) 53 C3d 1289, 283 CR 382. But see *People v Sergill, supra*.

No one profession or discipline holds a monopoly on expertise in the field of child abuse and neglect or family functioning. It is an interdisciplinary field and valuable experts may come from the professions of psychiatry, psychology, social work, pediatrics, or law enforcement. For many purposes, the ideal expert is someone who is knowledgeable in both the clinical arena, possessing significant experience with children, and the research arena, either conducting relevant studies or keeping abreast of the changing nature of knowledge in the fields of family functioning, child development, and child abuse. Clinicians who are not familiar with current research findings may base opinions on their own experiences, often in private practice. These opinions may be based on a relatively biased and nonrepresentative sample of children.

In some instances, researchers who have no experience working with children in a clinical context may provide useful testimony about children as a class. For example, testimony regarding the literature on child development may be appropriate to inform triers of fact in making custody plans or in rehabilitating a child's testimony. However, experts who testify about the research base will be most helpful if they temper their theoretical generalizations with clinical experience in working with children because some questions cannot be studied experimentally.

The medical or mental health professional who serves as an expert witness may also have been the doctor or therapist who was treating the child. See, *e.g., In re Daniel C. H.* (1990) 220

CA3d 814, 833, 269 CR 624, in which the trial court properly appointed psychiatric experts as evaluators even though one had treated the child and the other had had contacts with the mother who was in an adversarial position with respect to the father. In addition, the court held that the father's due process rights were not violated when the court prohibited him from engaging an independent expert of his own since there was no evidence of bias in the court-appointed experts and since examination by yet another expert would have been detrimental to the child. 220 CA3d at 835. The prosecution may call the same witness as both the treating doctor and as an expert as long as the jury is not confused. See *People v Luna* (1988) 204 CA3d 726, 737, 250 CR 878, disapproved on other grounds in 51 C3d 294, 322.

E. [§3.43] LIMITATIONS ON USE OF EXPERTS

Because exposure of child sexual abuse victims to multiple examinations by experts can be experienced by some children and parents as highly stressful, many judges believe that the better practice is to obtain a stipulation from all parties to a single expert. At least one court has used former Pen C §288(c) (now Pen C §288(d)) to deny a defense motion for physical examination of complaining witnesses based on the facts that the examination would produce equivocal results at best and would contravene former Pen C §288(c) in subjecting the children to emotional harm. *People v Nokes* (1986) 183 CA3d 468, 482, 228 CR 119 (preliminary examination of a criminal prosecution for child abuse).

F. [§3.44] *KELLY* RULE

The *Kelly-Frye* test was adopted by California courts to ensure that novel scientific methods of proof be based on matter that may reasonably be relied on. See *People v Municipal Court* (Sansome) (1986) 184 CA2d 199, 201, 288 CR 798; *In re Sara M.* (1987) 194 CA3d 585, 592, 239 CR 578. This test was devised to satisfy Evid C §801(b) (expert's testimony must be based on reasonably reliable matter) and Evid C §720 (expert must be qualified on the subject to which testimony relates) and is based on the holdings of *Frye v U.S.* (DC Cir 1923) 293 F 1013, and *People v Kelly* (1976) 17 C3d 24, 130 CR 144. In *Daubert v Merrill Dow Pharmaceuticals, Inc.* (1993) 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469, the United States Supreme Court overruled *Frye v U.S.* (DC Cir 1923) 293 F 1013 (which held that scientific evidence is admissible only if it is generally accepted in the scientific community) and held that it is up to the court to decide whether scientific evidence is based on scientific knowledge. This case is based on the Federal Rules of Evidence, which differ from the California Evidence Code.

The California Supreme Court held that the more flexible approach to the admission of scientific evidence outlined in *Daubert* does not require overruling *People v Kelly, supra*. *People v Leahy* (1994) 8 C4th 587, 604, 34 CR2d 663. Therefore, what used to be called the *Kelly-Frye* rule (or, since *Daubert* overruled *Frye*, the *Kelly* rule) is still good law and courts must still require a preliminary showing of acceptance in the scientific community before novel scientific evidence may be introduced. *People v Leahy, supra.*

The tests that must be met before admission of expert evidence relating to a new scientific technique (*People v Morganti* (1996) 43 CA4th 643, 657–663, 667, 50 CR2d 837 (agglutination inhibition and polymerase chain reaction analysis)) are:

(1) There must be general acceptance in the scientific community, which may be established by endorsement of the technique in a published California appellate opinion. If it has not been established by this method, courts should use an overview of the literature along with testimony of experts and relevant decisions from other jurisdictions to determine if there is acceptance.

(2) The expert must be qualified; in this regard, an expert may have some interest in the technique (a certain degree of interest must be tolerated if scientists familiar with the technique are to testify at all).
(3) Correct scientific procedures must have been used.

The third prong, which cannot be satisfied by relying on a published appellate opinion, assumes that the first prong has been met, and focuses on whether the procedures used in the current case complied with the technique. *People v Venegas* (1998) 18 C4th 47, 81, 74 CR2d 262. The expert who testifies about this third prong need not evaluate the validity of the technique or its scientific acceptance, although he or she must thoroughly understand the technique and be able to testify as to whether the procedures used were correct. *People v Venegas, supra*.

Testimony regarding the behavior of sexual abuse victims based on the expert's observations is not subject to *Kelly-Frye. Wilson v Phillips* (1999) 73 CA4th 250, 254, 86 CR2d 204 (drawing "a distinction between expert medical testimony and evidence derived from a new scientific device or procedure"). This is distinguished from testimony based on a syndrome or profile. In *Sara M.,* the court held that the evidence proffered by a clinical psychologist expert on the "child molest" syndrome did not meet the *Kelly-Frye* test because the syndrome is not recognized by professional organizations. *In re Sara M.* (1987) 194 CA3d 585, 593, 239 CR 578. In *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 239 CR 422, the court also found that syndrome evidence did not meet *Kelly-Frye* because the view of only one expert (who was a treating psychiatrist) was offered based on one article published 4 years earlier by the expert's former colleague. 194 CA3d at 313.

The *Kelly-Frye* rule is applicable to civil cases and therefore to juvenile dependency cases. *In re Amber B., supra.* The presence or absence of an expert's opinion is not a necessary factor in determining the applicability of the *Kelly-Frye* rule; it applies even when lay people testify. *In re Christie D.* (1988) 206 CA3d 469, 479, 253 CR 619 (program director/therapist in program for emotionally disturbed children and sheriff's detective testified about child's sexually precocious play with dolls).

The court has no sua sponte duty to raise a *Kelly-Frye* objection when counsel has failed to do so. *People v Kaurish* (1990) 52 C3d 648, 688, 276 CR 788. Failure to raise a *Kelly-Frye* objection at trial waives the right to raise it on appeal. *In re Clara B.* (1993) 20 CA4th 988, 1000, 25 CR2d 56.

G. Areas for Expert Testimony

1. [§3.45] Characteristics of Abused Children

One of the most difficult areas for judges who handle criminal or juvenile dependency cases in California is admissibility of expert testimony concerning characteristics of sexually abused children. While experts agree that there are many behavioral and psychological characteristics consistent with a history of abuse, individual children may vary widely in their reactions, each showing a subset of these characteristics that may or may not overlap. Moreover, most of these characteristics are not unique to sexual abuse and are also seen in other groups of children as discussed below.

Sexual abuse can result in stress-related symptoms, including nightmares, regression to earlier stages of development (*e.g.*, bedwetting or soiling in toilet trained children), symptoms of acute distress disorder, post-traumatic stress disorder, depression, anxiety disorders, attachment disorders, poor self-esteem, behavioral and interpersonal problems at home and at school, somatic problems, such as headaches and stomachaches, academic decline, hypervigilance, and fear (See

discussion in Myers, 111). In particular, sexually abused children can display inappropriate or precocious sexual knowledge and behavior; one third meet the diagnostic criteria for Post-Traumatic Stress Disorder (APA, DSM-5, 2013). And yet some genuinely abused children display no overt symptoms at all. Moreover, stress-related symptoms are not unique to abuse; for example, neglected children and children witnessing domestic violence display them as well (*e.g.*, 118–119). In addition, poverty, family disorganization due to parental substance abuse or parental mental illness are stressful for children. Hence, psychological symptoms seen in sexually abused children also are seen in non-abused populations. There is no one symptom found only among abused children (73–75, 120–121). There is no psychological test that can identify whether a child was abused.

The more often a symptom is observed in abused children, and the less often in non-abused children, the greater the potential probative value (111). However, little comparison data is available on the prevalence of various symptoms among abused and non-abused children. Since the population of non-abused children is much larger than the population of abused children, most children who display a particular characteristic will be non-abused. Still, the more stress-related symptoms a child displays, the more likely the child experienced some stress-inducing event, although abuse is not the only possibility.

There are some symptoms that have a strong relation to sexual abuse; particularly concerning are aggressive sexuality in young children, imitation of adult sexual acts, and sexual knowledge that is unusual for a child of a certain age (122). Still, children exposed to pornographic media can become preoccupied with adult sexual behaviors as well. Although some courts are comfortable admitting testimony about symptoms "consistent with" abuse because it is a step away from the ultimate issue, Myers (2010) discusses several problems with such testimony you may want to consider (111).

A syndrome is a list of generally observed, associated characteristics. In clinical practice, syndromes may be helpful in making a diagnosis and in planning treatment. One "syndrome" that has figured a great deal in cases in which there have been allegations of sexual abuse is the child sexual abuse accommodation syndrome (CSAAS), first delineated by Dr. Roland Summit in *The Child Sexual Abuse Accommodation Syndrome,* 7 Int'l J of Child Abuse and Neglect 177 (1983). The CSAAS is an explanation of children's reactions and accommodation to abuse and is useful for rehabilitating children's testimony upon impeachment, but it may not be used to prove that a child was abused. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §6.20 (2005). Dr. Summit's article explains why children may not report the abuse promptly and why they may be likely to recant or deny previous allegations even if the abuse occurred. Because adults might assume that delay in reporting, recanting, and accommodating the abuser are evidence that a child is lying about abuse, Dr. Summit suggests an alternative explanation for these behaviors.

It is perhaps a misnomer to entitle Dr. Summit's explanation a syndrome because it was never intended to be a constellation of symptoms that may be used for diagnosing abuse. See Myers et al, *Expert Testimony in Child Abuse Litigation,* 68 Neb L Rev 67 (1989). Rather, the CSAAS assumes that abuse has occurred and explains the child's reactions to it. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §6.22 (2005).

a. [§3.46] Use of Characteristics To Prove That Abuse Occurred

Generally, characteristics of abused children or syndromes cannot be used to prove that abuse occurred (*People v Bowker* (1988) 203 CA3d 385, 393, 249 CR 886) or to identify the abuser (*In*

re Heather H. (1988) 200 CA3d 91, 97, 246 CR 38; *In re Christine C.* (1987) 191 CA3d 676, 681, 236 CR 630). In *People v Bowker, supra,* 203 CA3d at 393, the court stated:

> It is one thing to say that child abuse victims often exhibit a certain characteristic or that a particular behavior is not inconsistent with a child having been molested. It is quite another to conclude that where a child meets certain criteria, we can predict with a reasonable degree of certainty that he or she has been abused. The former may be appropriate in some circumstances; the latter—given the current state of scientific knowledge—clearly is not.

The *Bowker* court based its reasoning on *People v Bledsoe* (1984) 36 C3d 236, 249, 203 CR 450, in which the Supreme Court held that the rape trauma syndrome was not devised to determine whether a rape has occurred, but is instead a therapeutic tool to identify, predict, and treat emotional problems of rape victims. The *Bowker* court held that expert testimony providing characteristics of abused children (CSAAS, in this case) is improper when the expert applies CSAAS to the facts of the case and concludes that the victim was molested. *People v Bowker supra*, 203 CA3d at 393. However, it is equally improper to have the expert give "general" testimony describing the syndrome in such a way as to permit the jury to apply the syndrome to the facts of the case and conclude that the child was abused. 203 CA3d at 393. A number of courts have followed *Bledsoe,* analogizing to the rape trauma syndrome and holding that a syndrome based on symptom clusters is a therapeutic tool and not an indicator that child abuse has occurred. See, *e.g., People v Roscoe* (1985) 168 CA3d 1093, 215 CR 45. In *Roscoe,* the treating psychologist testified that certain tests corroborated his clinical findings that the complaining witness was a victim of sexual abuse. Holding that admission of this expert testimony did not comply with *Bledsoe,* the court of appeal stated that an expert on children may discuss sexual abuse victims as a class, but may not testify about the credibility or diagnosis of a particular child witness. 168 CA3d at 1100.

In criminal cases, courts have consistently refused to allow syndrome testimony to prove abuse as part of the prosecution's case in chief. *People v Jeff* (1988) 204 CA3d 309, 338, 251 CR 135 (it was irrelevant that prosecutor told jury that expert witness would merely describe symptoms that she observed and that conclusion would be up to jury); *People v Willoughby* (1985) 164 CA3d 1054, 1069, 210 CR 880 (prosecution should not be permitted to offer evidence of sexual trauma expert on the issue of child victim's honesty); *People v Luna* (1988) 204 CA3d 726, 736, 250 CR 878 (treating physician may only give syndrome evidence as long as he relates it to victims as a class and makes no connection with any actual diagnosis of child); see also *People v Housley* (1992) 6 CA4th 947, 958, 8 CR2d 431 (CSAAS testimony may be extremely susceptible to being misconstrued by a jury).

In *In re Cheryl H.* (1984) 153 CA3d 1098, 200 CR 789, disapproved on other grounds in 8 C4th 746 (a pre-*Bledsoe* juvenile dependency case), the court permitted a doctor to use her expertise to draw inferences that a 3-year-old child was sexually abused. No *Kelly-Frye* objection had been made in *Cheryl H.* In *People v Roscoe* (1985) 168 CA3d 1093, 1100, 215 CR 45, the court stated that while *Bledsoe* precludes admission of evidence concerning characteristics of abused children as applied to the discussion and diagnosis of a particular witness in a criminal case, such evidence might be admissible in a dependency hearing because rules of admissibility are less strict in noncriminal cases.

In administrative hearings, expert testimony on syndrome evidence may not be used to identify the abuser. *Seering v Department of Social Servs.* (1987) 194 CA3d 298, 307, 239 CR 422. However, *Seering* held that while *Kelly-Frye* prevents an expert from testifying about syndrome evidence in an administrative proceeding, an expert could base an opinion that a child

was molested on interviews with the child in the light of the expert's own experience in interviewing approximately 100 victims of sexual abuse. 194 CA3d at 312, 314.

In addition to impropriety of expert testimony on characteristics of abused children to prove that abuse has occurred because of the *Bledsoe* rationale, a number of courts have not permitted this type of testimony because it has not met the *Kelly-Frye* test (see §3.44). See, *e.g., In re Sara M.* (1987) 194 CA3d 585, 592, 239 CR 578 (child molest syndrome).

b. [§3.47] Use of Characteristics To Show Abuse Did Not Occur

Expert testimony that the child witness does not exhibit the usual features of someone who has been abused is not admissible under *Bledsoe*; such testimony is not necessary to disabuse the jury about possible misconceptions, in contrast to testimony on CSAAS, and thus could only be used to provide an expert opinion on the child witness's credibility, which is not permitted. *People v Wells* (2004) 118 CA4th 179, 189–190, 12 CR3d 762.

c. [§3.48] Use of Characteristics for Rehabilitation

Courts have permitted expert testimony on characteristics of abused children to rehabilitate the child witness whose delay in reporting, inconsistency, or retraction have operated to impeach the child's testimony. For example, in *People v Bothuel* (1988) 205 CA3d 581, 588, 252 CR 596, disapproved on other grounds in 9 C4th 331, 347−348, the court held that expert testimony on CSAAS was clearly admissible to explain why a child would delay in reporting abuse, and in *People v Gray* (1986) 187 CA3d 213, 220, 231 CR 658, the court held that it was proper for an expert to speak about child victims as a class showing outward affection toward the perpetrator, delayed reporting, etc. The *Gray* court held that an expert may testify about child victims in general without needing to satisfy *Kelly-Frye.* 187 CA3d at 218. The court held that because the reactions of child abuse victims are beyond common knowledge, expert testimony plays the useful role of correcting the jury's misconceptions concerning similarities between child and adult behavior when faced with abuse.

In accord are *People v Sanchez* (1989) 208 CA3d 721, 735, 256 CR 446 (expert may testify as to CSAAS to dispel common misconceptions that juries may hold regarding children's reactions to abuse), and *People v Harlan* (1990) 222 CA3d 439, 271 CR 653 (expert testimony may be used to explain general behavior of child sexual abuse victims as a class as long as expert is qualified and testimony is limited to explaining such behaviors as delay in reporting when defense has used those behaviors to impeach the witness). In *Sanchez,* the court held that the prosecution need not wait until the rebuttal stage of trial to present the CSAAS evidence. 208 CA3d at 736 (it was proper to introduce expert testimony to rehabilitate child's testimony following child's cross-examination during case in chief).

Finally, in *People v McAlpin* (1991) 53 C3d 1289, 1302, 283 CR 382, the court held that a police officer could properly give expert testimony to explain the *mother's delay* in reporting the abuse of her child in order to rehabilitate the testimony of the mother as corroborating witness.

(1) [§3.49] Precautions on Use of Evidence

Although syndrome evidence is generally admissible to disabuse the jury of misconceptions about victims, the prosecution need not explicitly identify the myth or misconception that the expert's testimony is intended to rebut; the expert's testimony should reveal the misconception by explaining why the child's behavior is consistent with his or her having been an abuse victim. *People v Humphrey* (1996) 13 C4th 1073, 1095–1096, 56 CR2d 142.

However, even when you permit experts to provide syndrome evidence, you must take certain precautions. For example, you may want to limit evidence to child victims as a class and not permit the expert to connect the syndrome with the diagnosis of any particular child. *People v Luna* (1988) 204 CA3d 726, 736, 250 CR 878; see also *People v Stark* (1989) 213 CA3d 107, 116, 261 CR 479 (CSAAS admissible for sole purpose of showing that victim's reactions are consistent with class of molested children). In addition, before permitting such expert testimony, judges may wish to find that the syndrome testimony is needed. In *People v Bowker* (1988) 203 CA3d 385, 393, 249 CR 886, the court held that at a minimum, the syndrome evidence that is used to rebut an attack on the victim's credibility must be targeted to a myth or misconception suggested by the evidence. The court held that when there is no danger of jury confusion, there is no need for the expert testimony. 203 CA3d at 394.

A judge may also want to balance syndrome evidence against the danger of prejudice arising from the testimony on the syndrome. See *People v Jeff* (1988) 204 CA3d 309, 339, 251 CR 135; *People v Roscoe* (1985) 168 CA3d 1093, 1100, 215 CR 45 (Evid C §352 required court to exclude psychologist's testimony). In addition, it is not always necessary that the syndrome be mentioned by name. If the import of the expert's testimony is that the child is a molest victim, whatever the syndrome is called, the judge may want to take the same precautions. 168 CA3d at 1098.

(2) [§3.50] Jury Instructions When Experts Have Testified

When expert testimony has been given on syndrome evidence for purposes of rehabilitating the child witness's testimony against attacks on the child's credibility, a court has a sua sponte duty to instruct the jury simply and directly that the expert's evidence is not to be used to determine whether the molestation claim is true. *People v Bowker* (1988) 203 CA3d 385, 394, 249 CR 886. CALCRIM 1193; CALJIC 10.64. In accord is *People v Housley* (1992) 6 CA4th 947, 958–959, 8 CR2d 431, which held that the judge has a sua sponte duty to give a limiting instruction when an expert testifies as to CSAAS that must state that:

- The evidence is admissible only to show that the child victim's reactions are not inconsistent with having been molested, and
- The expert's testimony must not be used to determine whether the victim has been molested.

People v Housley, supra, 6 CA4th at 959.

Other courts have held that such a limiting instruction need be given only on request. *People v Sanchez* (1989) 208 CA3d 721, 735, 256 CR 446 (if requested, judge should instruct jury that expert's testimony is not to be used to determine whether molestation claim is true); see also *People v Stark* (1989) 213 CA3d 107, 116, 261 CR 479 (admonishment should be given only on request).

In *People v Bergschneider* (1989) 211 CA3d 144, 159, 259 CR 219, disapproved on other grounds in 33 C4th 1015, 1028, the court of appeal upheld the trial court's failure to provide a limiting instruction on CSAAS because the jurors were generally skeptical about the victim's credibility and the prosecutor initially identified the misconceptions that she sought to rebut and focused on them in her questioning of the psychologist. Generally, the prosecution may introduce CSAAS evidence in its case in chief if there is otherwise the potential for jury misunderstanding. *People v Patino* (1994) 26 CA4th 1737, 1744–1745, 32 CR2d 345.

Moreover, while a limiting instruction is generally necessary when an expert speaks about common characteristics of child victims of sexual abuse, the court has broad discretion as to *when*

to give the instruction. *People v Yovanov* (1999) 69 CA4th 392, 407, 81 CR2d 586 (here the judge waited until he gave the concluding instructions to give the limiting instruction).

2. [§3.51] Anatomical Dolls

In *In re Amber B.* (1987) 191 CA3d 682, 691, 236 CR 623, the court of appeal held that the practice of detecting sexual abuse in children by observing the child's behavior with anatomical dolls and analyzing the reports of abuse is a new scientific process operating on purely psychological evidence and is thus subject to the *Kelly-Frye* rule. In accord is *In re Christine C.* (1987) 191 CA3d 676, 679, 236 CR 630 (use of anatomical dolls as basis of expert testimony requires first meeting *Kelly-Frye* test). In *Christine C.,* the court held that the failure to satisfy *Kelly-Frye* was a harmless error because the children testified and were otherwise believable. See also *In re Christie D.* (1988) 206 CA3d 469, 479, 253 CR 619 (expert testimony should not have been permitted because, although witnesses did not actually state that they thought the child had been abused based on her inappropriately precocious activity with the anatomical dolls, the record is clear that they suspected abuse).

Judges should be aware that even though sexual abuse cannot be detected from observing children's doll play, there may be other valid uses for anatomically detailed dolls. See discussion on nonverbal communication in §1.13. For example, there are ways that dolls might be used in a nonleading manner in pretrial interviews (76). Children might be asked to name all the body parts on a doll (including genitalia) and then be asked to tell each part's function and if it has ever gotten hurt and if so, how it got hurt. However, as mentioned previously, there is insufficient evidence to suggest that dolls provide more information than verbal questions alone, and doll use can increase the risk of erroneous reports of touch, especially among preschoolers (76–79, 81). Most professional practice guidelines do not include the use of dolls. Each case of doll use will need to be evaluated on its own merit.

3. [§3.52] Medical Evidence of Sexual Abuse

A medical expert may base an opinion on a colposcopic examination without satisfying the *Kelly-Frye* test. *People v Luna* (1988) 204 CA3d 726, 736, 250 CR 878. Medical opinion has always been admissible as to the cause of an injury based on expert's deduction from appearance of the injury. A colposcope is nothing more than a microscope to aid in assessing the appearance of injury. *People v Mendibles* (1988) 199 CA3d 1277, 1293, 1295, 245 CR 553. Moreover, a diagnosis as to the cause of a particular injury need not be based on absolute certainty, but may be based on probability. 199 CA3d at 1293.

Medical expert testimony may bolster the testimony of the child witness. In *People v Newlun* (1991) 227 CA3d 1590, 1601, 1602, 278 CR 550, while the very young child victim's account of the sexual abuse might not, by itself, have been sufficient to support a conviction, the doctor's expert testimony that it would have taken at least 12 to 14 anal penetrations and six vaginal penetrations to produce the child's injury was substantial evidence of sexual abuse.

Finally, it has long been settled that the diagnosis of "battered child syndrome" is an accepted medical diagnosis of physical child abuse. *People v Jackson* (1971) 18 CA3d 504, 507, 95 CR 919. Admitting the doctor's testimony into evidence on this syndrome is not an invasion of the jury's province. 18 CA3d at 508.

4. [§3.53] Expert Testimony Regarding the Molester

An expert's opinion that a defendant displays no signs of deviance is admissible in a criminal prosecution for child sexual abuse if the opinion is based on the Minnesota Multiphasic Personality

Inventory (MMPI) or other standard psychological test. *People v Stoll* (1989) 49 C3d 1136, 1140, 265 CR 111. Such expert testimony is relevant character testimony under Evid C §1102 (49 C3d at 1152) to which the *Kelly-Frye* rule does not apply (49 C3d at 1157). The *Kelly-Frye* rule is inapplicable because this type of psychological testing is not novel either to psychology or to the law, nor does it carry a misleading "aura of scientific infallibility." *People v Stoll*, *supra*. See also *People v Ruiz* (1990) 222 CA3d 1241, 1246, 272 CR 368 (trial court should have permitted foundation to be made for expert to testify that defendant did not fit profile of known pedophiles) and *People v McAlpin* (1991) 53 C3d 1289, 1302, 283 CR 382 (police officer's testimony that there is no profile of a typical child molester was admissible because it would assist the trier of fact who might otherwise entertain erroneous beliefs about pedophiles). On the other hand, it would be error to permit expert testimony showing that a defendant meets the profile of a typical molester. *People v Robbie* (2001) 92 CA4th 1075, 1085–1087, 112 CR2d 479. Although expert testimony based on psychological testing may be admitted for character testimony, it is error to admit expert testimony on a defendant's credibility because the jury is just as capable of assessing credibility. See *People v Smith* (2003) 30 C4th 581, 628, 134 CR2d 1 (death penalty case).

A test for sexual deviance that measures the level of physical arousal when the test subject is shown "erotic" pictures is not as accepted as the MMPI and should be required to meet *Kelly-Frye* criteria before the expert may testify to an opinion based on it. *People v John W.* (1986) 185 CA3d 801, 805, 229 CR 783, disapproved on other grounds in 49 C3d 1136, 1153 n18. This type of test has not yet met *Kelly-Frye* standards. *In re Mark C.* (1992) 7 CA4th 433, 444, 8 CR2d 856.

H. Dissolution Cases

1. [§3.54] Reliance on Experts

The complex task before you in a custody dispute is to determine the best distribution of physical caretaking and decision-making authority within the family over the long term. This task requires a good deal of knowledge about children's needs at different stages of development and about family functioning during and after divorce. Some judges feel qualified to gather the information necessary to make this determination from children and parents themselves. However, many judges prefer to obtain recommendations from mental health professionals or court mediators who have evaluated the children and parents. This is especially true when there are allegations of drug use, mental illness, or abuse. The expert's opinion is not meant to usurp the court's role as trier of fact or assessor of the credibility of potential witnesses, but to inform and assist the court in determining the costs and benefits associated with potential outcomes regarding how best to allocate parental resources to meet the long-term needs of family members.

Child custody evaluations may require a mental health professional to spend several hours alone with the child, to conduct individual interviews with each parent, and to observe children interacting with parents. It may also include teacher reports, home visits, psychological testing, and other activities. The mental health professionals should have specialized training in interpreting children's developmental needs, preferences, parental mental health, and family dysfunction. They should conduct evaluations in less stressful environments over long periods of time so that family members may reveal information below the surface that is useful. Such evaluations also provide an opportunity to educate parents about the impact of divorce and different parenting arrangements on children's development. The professional's therapeutic skill can be called into play to help children accept the disposition.

2. [§3.55] Expert's Reports

The report should speak to the "optimal distribution of physical caretaking responsibility and decision-making authority to create a restructured family to best meet children's needs". It should not reflect a contest comparing the parents' mental health or morality, except as relevant to meeting children's needs. It should not merely restate the participants' hearsay accusations, although it may discuss areas where the data are consistent or inconsistent with various claims. Reports should state the data from which inferences are drawn and not merely give opinions. Experts should be able to provide the reasoning process underlying their recommendations.

VIII. [§3.56] DEFENDANT'S RIGHT TO CONFRONTATION

The need for judges to consider the defendant's Sixth Amendment right to confrontation in criminal cases arises in a number of situations, including:

- When the child witness testifies by closed-circuit television or when the courtroom configuration is changed to meet the needs of the child.
- When out-of-court statements of the child witness are admitted because the child is unavailable as a witness or for other reasons.
- When the child witness asserts a privilege, thereby preventing disclosure of information that the defendant is seeking.

A. [§3.57] COURTROOM CONFIGURATION IN CRIMINAL CASES

The Confrontation Clause provides a number of protections for a criminal defendant, including the right to cross-examination and the right to physically face witnesses who are testifying against him or her. *Pennsylvania v Ritchie* (1987) 480 US 39, 107 S Ct 989, 94 L Ed 2d 40 (child abuse prosecution). This constitutional right generally requires face-to-face confrontation between the defendant and the accusing witnesses. *Coy v Iowa* (1988) 487 US 1012, 1021, 108 S Ct 2798, 101 L Ed 2d 857 (placement of child witnesses behind screen during testimony violated defendant's right to confrontation when defendant could only dimly see witnesses, and witnesses' sight of defendant was entirely blocked). Questioning a 5-year-old alleged sexual abuse victim at the preliminary hearing in such a way that the defendant could hear but not see the witness was an unconstitutional denial of defendant's Sixth Amendment rights. *Herbert v Superior Court* (1981) 117 CA3d 661, 671, 172 CR 850.

However, since these cases, the United States Supreme Court has found that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh a defendant's right in some cases to face his or her accusers in court. A significant majority of states have enacted statutes to protect child witnesses from the trauma of giving testimony by allowing the court to use special procedures when necessary. *Maryland v Craig* (1990) 497 US 836, 853, 110 S Ct 3157, 111 L Ed 2d 666.

For example, under Pen C §1347 the court has the discretion to employ alternative procedures to protect the rights of a child witness by balancing the rights of the defendant against the need to protect the child witness and to preserve the integrity of the court's truthfinding function. With at least 3 days prior written notice by the prosecutor prior to the date of the scheduled testimony of the minor, or upon the court's own motion during the proceeding, the court may order that the testimony of a minor 13 years of age or younger be taken in another place out of the presence of the judge, jury, defendant(s), and attorneys, and communicated to the courtroom by means of closed-circuit television if all the factors in Pen C §1347(b)(1)–(3) are found.

The United States Supreme Court has upheld testimony of a child victim by closed-circuit television. See *Maryland v Craig*, *supra*. In this case, the defendant could see the child witness but the child could not see the defendant. The court held that the state's interest in protecting the child witness from the trauma of testifying in the usual manner may outweigh the defendant's interests in confronting the witness, when it is shown that the trauma would substantially impair the child's ability to communicate. 497 US at 850–852. Because the child witnesses testified under oath, were subject to full cross-examination, and were able to be observed by the defendant, the jury, and the judge, defendant's right to confrontation was preserved. 497 US at 858. Thus, in order to dispense with the face-to-face requirement of the Confrontation Clause the court established a two-part test that requires a case specific finding that (1) it is necessary to promote an important public policy interest and (2) the reliability of the witness's testimony can be otherwise assured by rigorous adversarial testing. 497 US at 857.

It may also be permissible for the child witness to look away from the defense table while testifying. *People v Sharp* (1994) 29 CA4th 1772, 1781–1782, 36 CR2d 117, disapproved on other grounds in 11 C4th 434, 452. Distinguishing *Herbert v Superior Court, supra,* the court held that it did not violate defendant's due process rights for the child to turn away from the defense table while testifying; even though the witness could not see the defendant, the defendant could see her and observe her general demeanor and reactions. 29 CA4th at 1781. In this case, the procedure met the two-part test established by *Maryland v Craig, supra.*

The courtroom arrangement was necessitated by the state's interest in obtaining a complete and accurate account of the interactions between appellant and the child victim and in protecting the child victim from unnecessary emotional trauma. The witness appeared in open court, testified under oath, was subjected to contemporaneous cross-examination, and no physical barrier, screen or technological devices were employed to insulate the witnesses from the accused, thereby ensuring the reliability of the testimony. 29 CA4th at 1783.

B. [§3.58] Courtroom Configuration in Juvenile Dependency Cases

Parents in dependency proceedings are not entitled to full confrontation and cross-examination rights. *In re Sade C.* (1996) 13 C4th 952, 992, 55 CR2d 771. Due process requires a balance. In *In re Mary S.* (1986) 186 CA3d 414, 417, 230 CR 726, the court upheld a procedure authorized by Welf & I C §350(b) against a challenge that a parent's right to confrontation was at issue when the children were permitted to testify outside both parents' presence. The court held that, although dependency proceedings are civil in nature so that the Confrontation Clause does not apply, there is a due process right to cross-examine and confront witnesses. 186 CA3d at 419; see also *Denny H. v Superior Court* (2005) 131 CA4th 1501, 1513, 33 CR3d 89 (parent in dependency proceeding has due process right to confront and cross-examine persons who prepared reports or documents submitted to court by petitioning social services agency, and witnesses called to testify at hearing). The in-chambers testimony was justified, however, by the juvenile court's finding that the children were fearful and would be unable to testify fully in their parents' presence, and the parents' due process rights were met in that the father's attorney was present during the children's testimony and was able to cross-examine the children. *In re Mary S. supra,* 186 CA3d at 422. See generally §2.19 on children's testimony in chambers.

In addition, the court has the inherent authority to take steps necessary to facilitate the child's testimony, including the use of closed-circuit television. *In re Amber S.* (1993) 15 CA4th 1260, 1266–1267, 19 CR2d 404.

C. [§3.59] PRIVILEGES

A defendant's right to confrontation must also be balanced against a witness's right to assert a privilege. The right to confrontation does not authorize pretrial disclosure of information protected by the psychotherapist-patient privilege. *People v Hammon* (1997) 15 C4th 1117, 1127, 65 CR2d 1 (defendant was charged with sexual abuse of foster child). Moreover, the statutorily created psychotherapist-patient privilege should not yield to a father's interests in presenting evidence in his own behalf. *In re Daniel C. H.* (1990) 220 CA3d 814, 831, 269 CR 624. Without a statutory exception to the privilege and with no criminal charges filed against the father, the court refused to find that the father's interests are paramount. 220 CA3d at 832.

Chapter 4
MONITORING AND INTERPRETING CHILDREN'S TESTIMONY

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I. [§4.1] THE CHILD AS WITNESS

Judges who handle cases involving children often need to adjust their usual decision-making criteria and courtroom practices because standard procedures do not always take full advantage of children's capabilities, nor take into account their limitations and needs. Further, the way evidence is typically elicited can compromise children's testimony and place high levels of stress on children during their formative years of development.

In managing child witness cases, you possess broad discretion to balance the needs and limitations of children with other interests at stake in the case. Three factors that you should take into account, both in fact-finding and in managing the courtroom, are (1) the child's stage of development, (2) the child's emotional adjustment, and (3) situational factors leading up to the case and in the courtroom.

A. Factors Affecting Testimony of Children

1. [§4.2] Developmental Stage

A child's stage of development greatly influences the kinds of information to which the child can testify and the different conditions under which the child can provide meaningful testimony. Children of different ages have different capabilities, limitations, and needs. Although a 5-year-old and a 10-year-old who witnessed the same event can both give reliable accounts, their renditions will take very different forms. Because they are at different stages of development, the two children will differ in their abilities to comprehend adult questions, independently retrieve details, resist suggestive questioning, and narrate past experiences (1). For example, when asked, "What happened?" the 10-year-old may respond with a highly detailed narrative in chronological order, while the 5-year-old may simply say "We played." The younger child may be able to describe central actions that occurred quite accurately in response to simple nonleading prompts; however, some of the details provided by the older child may be omitted and the events may not be listed in order of occurrence (96, 123–124). Typically, younger children's testimony is less detailed than the testimony of older children or adults, but even very young children can provide quite accurate and reliable information. Even 3- to 5-year-olds have the skills needed to testify when asked simple, direct, nonleading questions about a distinctive, personally meaningful event. With maturation, children learn to search their own memories more systematically, exhaustively, and independently, retrieving more detail with less need for adult prompts (125–127). Three- to 5-year-olds have the greatest difficulties providing detailed information independently and resisting suggestive questions (97, 128). Dramatic progress is made in the 5- to 7-year-old range, although children continue to develop the skills required of a witness throughout elementary school. Hence,

it is hazardous to generalize too quickly from research on preschool children to school-age children.

Judicial decision making often requires taking into account the fact that children gradually develop the capabilities required of a witness as they mature. Many skills develop concurrently, including intelligible speech, language comprehension, memory, knowledge, reasoning, and social and emotional maturity. A child's stage of language development dictates the ability to comprehend the vocabulary and grammar of adult questions and to express memories in language that adults can accurately interpret. A child's level of memory development dictates to what degree responses will be sparse or detailed or whether they will be influenced by suggestive questioning. The child's stage of cognitive development determines the kinds of questions he or she can answer and how their answers should be interpreted.

By way of illustration, consider this fact of cognitive development: children do not merely absorb the adult view of reality; they spontaneously create their own explanations for what they observe around them. When a child alleges sexual assault and describes "white glue coming out of his penis," the response should not be interpreted on the basis of its factual inaccuracy. It is developmentally appropriate for a child to liken an unfamiliar substance (semen) to a familiar one (glue) on the basis of its physical characteristics in order to make sense of the unfamiliar experience. Mischaracterization of semen as glue is a developmentally expected reasoning error that highlights the authenticity of the response, not its unbelievability. As children's knowledge bases expand and their reasoning skills develop, they can make greater sense of the experience as it takes place, store a more detailed representation of the event in memory, and make more accurate inferences about what happened. Unfortunately, young children's limited experience, immature knowledge, and their deference to the adult's superior knowledge base make them more susceptible to suggestions from adults (129–131).

Your job would be easier if these developmental differences could be converted into simple formulae based on age that would predict the ability to provide sufficient testimony. But the usefulness of age limits is undermined by the fact that an individual child may be delayed or advanced for his or her age. Moreover, a child may be advanced in one area (*e.g.,* early walker, athletic) and delayed in another (*e.g.,* late talker, inarticulate). Complicating matters further, children's performance often depends on the context. A child may perform at a very high level in one situation but not in another, offering more detailed accounts when the context is familiar, supportive, and understandable but not in situations that are unfamiliar, intimidating, distracting, or complex. Thus, seeming inconsistency in a child's statements may arise from the fact that the child may not be able to apply a skill in the courtroom setting (*e.g.,* telling time to help evaluate a suspect's alibi) even though the child was able to apply it well in less complex settings. In short, hard and fast age limits are not reliable predictors of testimonial ability; however, judges who are familiar with the developmental trends and influences on children's testimony will be better able to communicate effectively with children and understand their testimony.

2. [§4.3] Emotional Factors

Knowledge of a child's stage of development is not, in itself, sufficient information for such aspects of judicial decision making as assessing the child's testimony. Children of the same age can differ in temperament, emotional maturity, and ability to cope with the stress. For example, a shy, insecure, and withdrawn 5-year-old may refuse to testify or burst into tears, while an outgoing, friendly, and self-confident 5-year-old may proceed with minimal difficulty. These differences have little to do with their age or the truthfulness of their testimony. Nevertheless, the former child may be judged incompetent or less credible than the latter on the basis of temperament alone. With

the use of protective measures (*e.g.,* a support person), the insecure and withdrawn child might offer equally accurate and complete testimony in court (11, 21–22, 31–33, 58).

Children differ in the ways they cope with the stress of victimization, parental discord, and violence, regardless of age. Where one child might become depressed, another might become unbearably anxious, and another angry, aggressive, or self-destructive. For example, a child who suffers depression may exhibit long delays before responding, show poor concentration, or display a show of indifference out of intense feelings of hopelessness and helplessness. These symptoms can make a child appear as if she is an uncooperative and untrustworthy witness who is taking time to confabulate responses. Such symptoms can undermine a child's credibility at any age.

Children also differ in their ability to cope with the stress of testifying. Fears of the unknown, humiliation, loss of love, or peer rejection can make a child tearful, ill, or inarticulate in the courtroom. A common syndrome in victims of violence of all ages is post-traumatic stress disorder. Children with this disorder are especially vulnerable to the stresses of participating in the investigative and judicial process. One hallmark of this disorder is the need to avoid all reminders of the initial trauma that can stimulate flashbacks that feel as if one is reliving, not merely retelling, events. All sorts of efforts to avoid painful questions are seen on the stand. Depending on the form the avoidance takes, these young witnesses can be misunderstood as hostile or may not be able to testify at all. Often, special court procedures can reduce stress and allow children in this vulnerable category to testify. Consideration of the child's emotional condition will affect the way one interprets the child's responses and determines the need for protective measures.

3. [§4.4] Situational Factors

Sometimes situational factors associated with the crime itself or the child's path through the legal system can influence a child's testimony by affecting memory. Consider the role of the child (participants recall more than bystanders); length of the retention interval (longer time from crime to testimony promotes forgetting of details,); or familiarity with people and places (familiar situations are recalled better than unfamiliar ones) (*e.g.,* 132). Pretrial factors can also be influential. Sometimes a case involves a series of biased, highly suggestive interviews, raising the potential for distortion of young children's reports (133).

Other situational factors, such as the kind of support system available to a child, may affect testimony (23, 34, 61, 64, 134). For example, the conviction with which the child testifies and, in turn, the child's credibility, can be affected when the child is required to testify against a parent, and the rest of the family may not believe the witness or may hold the child responsible for the breakup of the family. In such a case, the child witness may be more ambivalent about testifying than the child who testifies against a stranger and who has the support of the entire family.

Situational factors not only can affect memory and stress, but also can contribute to whether a given child will be adversely impacted by the judicial process itself (11). Relevant factors may include: (a) number of times the child has to testify (the more times, the more adverse the impact); (b) child's relationship to the accused (the more closely related, the more distress); (c) extent of corroborating evidence (the more evidence from other sources, the less pressure on the child); (d) severity of the abuse (the more severe the violence, physical pain, humiliation, or coercion, the more difficult for the child to testify in open court); (e) whether the child was threatened (the more frightened the child is of real or perceived consequences, the more likely testimony will be distressing) (158). A child's ability to testify is not only a function of age and emotional adjustment, but also of specific situational characteristics of the case at hand.

4. [§4.5] Interaction Among Factors

Consider the interaction among developmental status, emotional adjustment, and the situation in the following examples: A 4-year-old is allegedly the victim of sexual abuse by a teacher's aide in a preschool 6 months earlier. A child of that age may provide accurate information about the central events because she is testifying about a familiar person and place and a salient, personally meaningful event. She is likely to provide such information when she has had strong parental support, shows no signs of serious long-term psychological distress, and is not questioned in a highly suggestive manner. The examination, however, must take into account her stage of cognitive development. Questioning about time, date, number, and other concepts that develop gradually and are not mastered by 4-year-olds will require creative methods of eliciting information (see §§4.24–4.33). A 4-year-old may need age-appropriate preparation, the presence of support persons, and the comfort of a favored object brought to the stand in order to feel comfortable and provide the most reliable testimony of which she is capable (4, 31, 135).

Consider, on the other hand, a hypothetical 11-year-old alleged victim of sexual abuse, suffering from symptoms of post-traumatic stress disorder, testifying in a high-profile case to charges of forcible rape by an uncle who is a well-respected member of the family and community. Her age suggests good probability of accurate and relatively detailed memory of the event and a high level of resistance to suggestion. However, her age also suggests that she is old enough to experience acute levels of embarrassment and self-consciousness that could render her testimony incomplete or cause it to be inconsistent with out-of-court statements, especially if she perceives the likelihood of public exposure and consequent social rejection by peers. Moreover, the severity of her abuse, the use of threats and force, and her current emotional disturbance may make it more difficult to obtain complete and truthful testimony in open court. Testifying under conditions of high emotional stress could stimulate even more serious psychiatric symptoms in vulnerable children (*e.g.,* suicidal thoughts). In such a case, it may be necessary to consider even more extensive protective measures than those suggested for the 4-year-old, such as closing the courtroom.

II. [§4.6] JUDGE'S DUTY TO CONTROL EXAMINATION OF WITNESSES

Evidence Code §765 requires you to control the examination of witnesses. It applies in family law proceedings, as well as criminal and civil proceedings. See Fam C §3042(b), requiring the court to control examination of the child under Evid C §765(b) and *Marriage of Okum* (1987) 195 CA3d 176, 180, 240 CR 258 (court used Evid C §765 to justify questioning the child outside parent's presence in family law proceedings). See also Welf & I C §§350, 366.26(h)(3); Cal Rules of Ct 5.534(c) (juvenile court judge must control proceedings and may permit child to testify in chambers); Fam C §§7891, 7892 (in termination of parental rights proceedings, child may testify in chambers). Generally, the court is under an obligation to exert reasonable control over the method of interrogation of a witness to serve two purposes: (1) To ensure that the questioning is as effective as possible for the ascertainment of the truth and as expeditious and as clear as possible; and (2) to protect the witness from undue harassment or humiliation. Evid C §765(a).

Under Evid C §765(b), when there is a witness who is under 14 years old (or a dependent person with a substantial cognitive impairment), the court must take special care to

- Protect the child from undue harassment or embarrassment and restrict the unnecessary repetition of questions;

- Ensure that questions are stated in a form that is appropriate to the child's age or cognitive level; and
- In the interests of justice, forbid the asking of a question in a form that is not reasonably likely to be understood by someone the child's age or cognitive level, if there has been an objection to the question.

These provisions give the court power to protect a child witness from certain types and forms of questions. In *Marriage of Okum,* the court's reliance on Evid C §765 to question the children in chambers with only the attorneys and court reporter present was upheld when the judge was concerned that the "particularly acrimonious" nature of the litigation might have affected the children's later relationship with their parents, particularly if their father were to have questioned them.

In addition to the judge's duty to control the style of questioning and the form of the questions in a prosecution for sexual abuse, the judge may permit leading questions to be asked during direct examination of a child witness who is under the age of 10. Evid C §767(b) (codifies prior rules giving discretion to judges to allow leading questions when witness is young or mentally disabled). See, *e.g., People* v *Tober* (1966*)* 241 CA2d 66, 69, 50 CR 228 (in prosecution for sexual abuse, trial judge has wide range of discretion in permitting leading questions of very young witness). But see *People v Whitehead* (1957) 148 CA2d 701, 704, 107 P2d 442 (trial judge overstepped bounds by seeming to suggest to 6-year-old witness that defendant had touched her lower down than witness was indicating). See also discussion in §§4.19–4.23 on leading questions.

In addition to your duties to control questioning of children under Evid C §765, you may also be required to manage questioning of children in sexual abuse prosecutions by Pen C §288(d), which requires the judge to consider the needs of the child victim of sexual abuse and to do whatever is necessary to prevent psychological harm to the child.

A. [§4.7] Need for Judge To Intervene

Children often appear to be unreliable witnesses for a variety of reasons unrelated to their competence or honesty. Often, questions are asked in language too complex for young children to comprehend about information too abstract for them to understand. Other times, young children are asked highly suggestive, misleading questions. Because of this, judges need to control the questioning of children by attorneys. See Evid C §765 (requiring court to control examination of witnesses).

> TIP: You should require that the attorneys phrase questions to correspond to the child's stage of development. Because few attorneys are schooled in child development, miscommunications may originate from both sides of the adversarial process. Judges sometimes require that all questions be submitted in advance for review. Some judges review the submitted questions aloud with both attorneys before either may question the child.

Children often try to answer questions they do not fully understand (2). A child's answer may relate to a part of the question the child did understand, but may not answer the intended question. When questions contain many words, replete with embedded clauses and convoluted with abstract references, young children may respond to the very end or very beginning of the question because they know they are supposed to take their turn in the conversation but cannot remember the entire question nor parse its grammar accurately. Adults may then misinterpret the child's responses and

proceed with follow-up questions down a spurious path towards unnecessary confusion and inconsistency, obscuring the fact-finding process.

The following examples highlight another problem—children try to answer questions they do not yet possess the skills to answer. In a criminal prosecution for sexual abuse, a 3-year-old child was asked how many times someone hurt her. She said she did not know. In another case, a 4-year-old answered, a hundred times raising 10 fingers. How are their answers to be interpreted? They may suggest the assaults never happened. On the other hand, such answers could also suggest that the children have not yet learned to count. The first child knows whether something happened "once" or "more than once," but not the exact number. The second child knows a few numbers to guess from and is trying to give the task his best effort. It does no good to ask a child who cannot count, how many times something happened. See discussion on counting in §4.33.

In another instance, a child insisted that the abuse did not take place in California: "It happened in San Diego, not California." Preschoolers do not have a sophisticated hierarchical understanding of locations. In this case, the child may not have been able to reason that if a city is in a state, and something happened in that city, then it also happened in that state.

Moreover, attorneys who are representing defendants charged with sexual abuse may deliberately seek to confuse the child in order to weaken the prosecution's case (3, 52, 55). See Whitcomb, *Prosecuting Child Sexual Abuse-New Approaches*, NIJ Reports, p 2 (May 1986). A defense attorney's tactics may not be limited to badgering the child, a device that will often backfire. Instead, the attorney might cajole the child into confusion.

An adult witness has the ability to correct misunderstandings and explain that the attorney has not understood the meaning of the response. Unfortunately, young children allow misinterpretations to stand uncorrected (2). They are less likely to disagree with or correct an adult (as discussed in §4.44 on suggestibility). Children under 8 years of age often fail to recognize that the adult listener has misunderstood the answer. They have a limited ability to put themselves in someone else's shoes and see the situation from another's perspective (136–137). Their credibility is often compromised by this mismatch between the expectations of adults and the capabilities of children.

B. How Judge May Require Rephrasing of Questions

1. [§4.8] Form of Question

You should require attorneys to keep questions short and to use the simplest grammatical constructions possible. A rule of thumb is "the younger the child, the shorter the question." This means that the attorneys should use several short sentences rather than one long complex one.

Attorneys should use monosyllabic rather than multisyllabic words. In one case, a child asked to "identify" (four-syllable word) someone who hurt her was not able to respond to the request. This surprised adults to whom she had already disclosed the crime. However, when she was asked to "point to" (two one-syllable words) the person, she complied readily.

Attorneys should use the simplest tenses possible (simple past—"ed" suffix) involving one-word verbs (was) rather than complex tenses requiring several words (might have been). For example, "What happened" should be asked instead of "What might have occurred." Attorneys should be instructed to rephrase questions involving complicated tenses. Young children have a limited number of words they can understand in a sentence (138). Three should not be wasted on a verb (*e.g.*, might have been).

Moreover, the young child will not comprehend the subtle element of possibility conveyed by the verb phrase "might have been" because their immature understanding of time and causality

does not allow them to reason about what might have happened in the past if some hypothetical event had or had not taken place. This requires advanced reasoning skills that young children have not yet developed (139). Thus, *-ed, did, has,* or *was* are the best choices for past tense.

Judges should consider requiring that the attorneys use the active voice ("Did he hit you?"), not the passive voice ("Were you hit *by* him?") (139). Even adults have more trouble understanding the passive than the active voice.

2. Vocabulary

a. [§4.9] Legal Terms

Even the most common legal terms are often unfamiliar to children under 10 years of age (18). Many terms have more than one meaning. For example, children may think that a *court* is a place to play basketball, a *hearing* is something you do with your ears, *charges* are something you do with a credit card, a *minor* is someone who digs for gold, and *dates* are places you go with a boyfriend.

Thus, asking children, "Do you know what the word *allegation* means?" may not be sufficient to determine if they understand a question. A child may say "yes," but be thinking about *alligators.* When a legal term is used, you should ask elementary school-aged children to tell what it means in their own words to assess if the child understands. Then you can instruct the attorneys to rephrase questions as necessary. Just remember that the average preschooler may not be able to provide definitions, especially of abstract concepts.

b. [§4.10] Uncommon Usage/Asides

Often common terms are used in uncommon ways that are understood only by those familiar with court procedures. For example, the attorney might say, "Now tell me about the abuse; *I'll strike that;* did you go with your daddy into the house?" Young children will not understand that "strike" is being used as an aside to other legal professionals and is not being used in its familiar sense (1). You should consider intervening when questions with asides are used or common terms are used in an uncommon fashion.

c. [§4.11] Unclear References

Unclear references to things mentioned earlier are often used in court to maintain formality. Chunks of information are omitted and pronouns are used to replace the missing information, most commonly "it" or "things," for example, "Are you sure you told *those things* to the policeman?" Attorneys should be directed to repeat the "things" rather than use pronouns and risk that the child and the adults are not thinking about the same things. Children have limited attention spans and may not be able to do the mental work of reviewing previous conversations for the content of "those things," and inserting the appropriate information into the current question before answering (1).

Similarly, attorneys should be directed to use the name of a person each time that person is identified. Even though young children may use "he, she, him, her, and they" in their own speech, it does not ensure that they are thinking of the same person the attorney is referring to unless the name is repeated. For example, "What did she do with them?" should be phrased as "What did Mary do with Bob and John?" especially for children 7 years old and younger.

It is confusing for children to comprehend or produce referents, that is, words that can refer to different things at different points in time such as here/there, yesterday/tomorrow. These are difficult concepts for young children to master since they are not stable, concrete, or easily visualized. This is also true of pronouns that refer to different people at different points in time.

d. [§4.12] Relational Terms

Questioning children about places, activities, and events often requires extensive use of relational concepts (*e.g.,* more-less, first-last, same-different). These concepts require children to make judgments with respect to a standard or situation that can change. For example, when someone is standing in the front of the room, the front of the room is *here*, but if he walks to the back of the room, it is *there*. What was once *near* is now *far*. What was to the child's *right* in one position is to his *left* in another. While the tennis ball is the *largest* ball when compared to balls for playing jacks, it is the *smallest* ball when compared to volleyballs and basketballs. Although preschoolers are rapidly developing basic concepts such as right, left, above, below, different, etc. (95, 139), many children enter school without having mastered these concepts. This is especially true of children from impoverished backgrounds. Relational concepts are not stable or easy to visualize. They shift from one situation to another. Before second grade, children vary greatly in their understanding of these concepts.

For example, terms understood by 80 percent of middle- and upper-income kindergartners (but not necessarily before) include: top, next to, through, first, front, away from, most, some, not many, part, widest, corner, behind, row, between, bottom, every, end, over, starting, every, last, whole, side, few, above, below, after, beginning, as many, several, alike, never, always. These terms may be understood by only 50 percent of low-income kindergartners (95).

Furthermore, terms not generally mastered until second grade include: different, few, above, below, after, beginning, as many, several, other, farthest, second, alike, never, match, always, before, forward, skip, third. For some children from low-income families, the following terms may also not be mastered until second grade: center, medium-sized, right, half, separated, left (95).

Therefore, you should consider intervening when very young children are asked questions demanding mastery of complex relational terms.

3. Confusing Types of Questions

a. [§4.13] Overloaded Questions

Problems often arise when one question contains a number of previously established facts. It is better to rephrase such a question into several short sentences, each with one topic. For example, "When you were with your uncle in the bedroom of the blue house your mom took you to that Sunday, what did he do to you?" should be broken down into several short questions, such as, "Where did your mom take you Sunday? Who was there? What rooms did you go to? What happened in the bedroom?'

If a question is too long and complicated, a child's ability to remember may not encompass the entire question. A child may respond just to the part he or she remembers, typically the beginning or the end. In addition, with a complex question, a child may not be able to comprehend the subject and predicate and will, therefore, be unable to decipher its meaning.

b. [§4.14] Negatives

Use of the negative placed in unusua1 positions that break up and fragment the content of a question is confusing to all witnesses, and particularly to young children who may not realize they do not understand. For example, the lawyer might ask, "You had a bruise, *didn't you,* on your arm?" Is this question asking "Did you have a bruise?" "Was it on your arm?" or "Do you remember that?" The child's response could be to any of these three questions (1).

Use of the negative as a tag ending is also confusing. "This happened on Friday, *did it not?"* "Did it not" may imply that the question means that "It did not happen on Friday," or that "It did

happen on Friday." These questions are open to a variety of interpretations. Young children cannot be relied on to announce their confusion; they may try to respond despite confusion, not realizing that they may ask for clarifications from adults (1).

Use of double negatives is especially confusing. *"Didn't your* mom tell you *not* to go there?" should be rephrased as "Did your mom tell you not to go there?"

If an attorney asks a child, "Is that *not* true?" you should consider requiring rephrasing of the question to "Is that true?" to help a young child unable to fathom complex uses of the negative.

Uncommon uses of the negative, such as "Did not Susan go to McDonald's last night?" or "Did *not* Peter hit you with the stick?" overload the content of the question. They are rare in the everyday conversations familiar to children, but frequent in the formality of the courtroom. Questions loaded with unnecessary negative terms frustrate children's attempts to tell the truth (1).

c. [§4.15] Changing Topics

Comments that link what has just been discussed with the next topic of conversation are common in typical conversations, but are often omitted in the formal questioning of the court. Questions often jump from one topic to another without the necessary introduction for children to follow the conversation and switch frames of reference (1).

Children require transitional comments to signal a change of topic. For example, "Before, we were talking about school. Now I want to ask you some questions about your mother." The cumulative effect of rapid switching of topics without proper introduction leaves children with no cues about how or why the questions are being asked. Judges should ensure that children are notified when topics change and have adequate transition time to avoid becoming disoriented. If necessary, you should direct attorneys to slow down.

d. [§4.16] Nominalization

Use of nominalization is frequent in court, but confusing to young children. Nominalization refers to the linguistic process of making an action (verb) into an object (noun). For example, instead of saying "When Henry hit you . . ." the verb hit is referred to as "the hitting," as in "when the hitting occurred" (1, p 66). This is frequently used in cross-examination because it avoids pairing the defendant's name with the action and has the appearance of objectivity.

Although grammatically correct, this form is not developmentally appropriate for children. Young children have not yet mastered this linguistic form and it is even difficult for adults to interpret.

e. [§4.17] Yes/No Questions

Some long and complex questions contain multiple options, yet restrict answers to yes or no, *e.g.,* "Well, did he take hold of you and make you do anything? Did he grab hold of your hand and do anything with your hand?" "No" (1, p 67). In such cases, it is impossible to know what the child's "No" refers to since the question includes multiple options. A child may answer one part of the question and not realize that the answer is interpreted as applying to other parts as well.

An adult witness may be able to explain that a compound question cannot be answered by a simple "yes" or "no," even if the attorney does not object, but you should consider intervening with a child witness when the attorney has not objected. Often, yes/no questions can be reworded to request multi-word responses. "Did he hit you?" can be rephrased as "What did he do with his hands?" The goal is to elicit responses in the child's own words. You can ask attorneys to rephrase yes/no questions as more open-ended questions that begin with "what, who, where . . ."

f. [§4.18] Repetitive Questioning

You should limit repetitive questions to young children, especially closed-ended questions that can be answered with a single word or phrase. In particular, the use of repeated questions asking for a yes or no response suggests to the child that his or her first answer was incorrect, indicating the adult wants the child to change the answer (9, 140, 141). Another problem is the repeating of unanswerable questions until children try to answer (142). In controlled research studies, children's inconsistency and error rates increase when asked repeated questions (143). It is not necessarily problematic, however, to repeat open-ended "wh" questions beginning with who, what, where, when, why, or how (143, 144). Such questions ask for a multi-word response and researchers have not found detrimental results when these types of questions are repeated within a conversation.

g. [§4.19] Suggestive Questioning

Although leading questions are generally not permitted during direct or redirect examination (Evid C §767(a)), the court may permit leading questions to be asked of a child under 10 years of age in a sexual abuse or child neglect prosecution (Evid C §767(b)). Recent research suggests, however, that questions that convey to young children the adult's interpretation of events are more likely to lead to reports of inaccurate information than those that do not carry such an interpretation. In general, questions can be placed on a continuum from non-leading and beneficial to highly suggestive and detrimental. At one end of the continuum are questions that actually increase the completeness of children's reports without decreasing accuracy ("What did he do with his hands?"). At the other end of the continuum are questions that merely ask children to confirm the questioner's presumption ("When he hit you, he used his hand, isn't that true?").

> TIP: Courts should be cautious about permitting leading questions. The most useful situations in which to permit leading questions are when the child has difficulty testifying because of fear, shyness, embarrassment, and the like. It is recommended beginning with nonleading questions and proceeding to leading questions if the child is not otherwise able to testify. See 1 Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* §3.02[F] (2005).

The following types of highly suggestive questions are responsible for the bulk of false information reported in research studies as discussed in the section on children's suggestibility (88). Judges should require rephrasing of questions when the following types occur.

(1) [§4.20] Tag Questions

Tag questions are really statements followed by requests for affirmation, making clear the questioner's beliefs ("He hurt you, didn't he?" "It was John, wasn't it?" You asked him to take you, isn't that true?"). These are easy to recognize because the request for verification is tagged onto the end of the question. Tag questions disproportionately distort the answers of younger children who may be afraid to contradict adults.

(2) [§4.21] Negative Term Insertion Questions

These question types are also statements looking for confirmation; they masquerade as questions by virtue of the speaker inserting a negative term into the statement (*e.g.,* "Didn't he hurt you?"). They increase error rates in the reports of young children.

(3) [§4.22] Suppositional Questions

Suppositional questions embed information into the question that is presumed by the questioner without giving the child an opportunity to affirm or deny the presumption. For example, "When John hurt you, was it morning or afternoon?" presumes the child was hurt and by John without the child necessarily having ever said so previously. "When Bob took the money, was your mother or father home?" presumes Bob took the money and backs the child into a corner. The only way to offer an alternative explanation is to contradict the adult who is often assumed to have superior knowledge of the incident by virtue of their status as an adult (88). Often, suppositional questions force the respondent to make a choice between two options suggested by the questioner ("Did he hit you with his hand or with the club?") In research studies, young children make more errors in response to suppositional questions than to other question types, highlighting the importance of asking rather than telling young children what happened (88).

h. [§4.23] Other Suggestive Techniques

Below are a list of suggestive techniques that increase children's errors in research studies (*e.g.*, 140, 145–151).

- Assisting children to visualize details when they have already stated they cannot remember or asking children to pretend after they deny knowledge;
- Presenting false physical evidence;
- Using stereotype inductions conveying incriminating or exculpating comments (*e.g.*, "What did the *bad* man do to you?"; "What did the *nice* woman say to you?");
- Providing negative feedback that challenges or contradicts children's memories (*e.g.*, "You got it wrong." "Are you sure about that? I don't think that is correct.");
- Expressing disbelief when children fail to acquiesce to milder forms of persuasion ("I don't really think that happened, but that might be the case, don't you think?");
- Providing positive (supportive) or negative (unsupportive) behaviors (*e.g.*, praise, approval, agreement, disapproving statements) contingent on specific responses;
- Selectively reinforcing false details or responses consistent with adult preconceptions or inconsistent with children's prior statements;
- Misinterpreting, inaccurately paraphrasing, contradicting, or distorting what children have said, even if unintentional;
- Inviting speculation about possibilities after denial or admission of lack of knowledge;
- Overtly trying to talk children out of their answers (*e.g.*, "I think someone told you to say that. That's what really happened, isn't it?" "I think it happened to your friend, not you." "I think you are making that up.");
- Trying to talk children into saying something occurred by implying child is incompetent (*e.g.,* "I think it did happen, but you weren't paying attention." "You can't quite remember it; you've forgotten it."); and/or
- Pressuring children with comments suggesting that peers or parents have already told the child what happened.

4. Content of Questions

a. [§4.24] Measurement in General

The content of an attorney's question can be problematic when the answer requires measuring skills the child has not yet developed. For example, asking a child who has not yet learned about feet or inches, "How tall was he?" can lead children to try to answer the question when they lack the necessary skill (50). Adults may then misinterpret their answers.

Young children may not have learned conventional systems for measuring time, distance, or weight, *i.e.,* in minutes, hours, months, years, inches, feet, or pounds. These are skills learned in school over the course of the elementary years and are not fully mastered until pre-adolescence For examples, see §§4.25–4.27.

(1) [§4.25] Timing of Events

Often, child witnesses are asked to place events in time so that a suspect's alibi can be investigated. They are asked to date the last or first time something happened or to judge which of two events are most recent. Often they are asked to order events chronologically.

In general, our ability to remember when something occurred is quite poor (152). Memories are not time-stamped (*i.e.*, tagged with the date and time) and they are probably not stored sequentially in order of occurrence. Still, there are numerous ways we extract temporal information from memory. Often we can reconstruct the timing of a past event by remembering the weather, the location, or who we were with when a given event occurred, or we may remember that the event occurred near the time of some other event whose time is known.

As children discover time, they learn that time flows independently of their own subjective experience (*e.g.,* even though a boring half-hour activity feels like it takes longer than their favorite half-hour television program, they take the same length of time). They learn the ordinal numbers (first, second) and the sequencing vocabulary (then, later, next, finally) necessary to indicate chronological order in describing a past event. It is not always a smooth process and children may have many misconceptions along the way to mastery.

Often, children's use of temporal terms may not be accurate. For example, a preschooler may describe anything that has happened in the past as happening yesterday or state that something that happened yesterday happened a long time ago.

(2) [§4.26] Telling Time

Telling time is typically part of the kindergarten through second grade curriculum. Some children can read numbers at 3-and-a-half or 4 years of age. They may read the numbers on a digital display but without understanding many of the critical dimensions of time. In one case, a kindergartner was asked what time the accused entered the house and she responded that she did not know, although when she was asked if she could tell time, she said "yes." She was unable, however, to read the face of the clock in the courtroom. It might seem to the trier of fact that she is lying about her ability to tell time and possibly about the entire event. Although she could not tell clock time, her parents had taught her to read the numbers on a digital display to "tell them the time." Her interpretation was that she could, in fact, tell time.

TIP: If the child had been asked a more developmentally appropriate question, such as what television program she was watching when the accused came in, she might have been able to identify the show. The adults could have referred to the television guide to estimate the time of the event. This type of alternative method for eliciting information often needs to be considered with young children.

The earliest signs of true time telling emerge around age 4 and the related skills continue to develop until age 10 (153). The majority of children appear to be able to identify times on a clock on the hour by 6 years of age, times to a 5-minute interval by 7 or 8 years of age, and times to the minute by 8 to 10 years of age (153). By third grade, most children can distinguish a.m. from p.m. By fifth or sixth grade, children are accurate on almost all time problems and can apply their considerable computational skills to time calculations (153).

(3) [§4.27] Estimating Numbers of Times

In cases of chronic and repeated abuse, it is very difficult for witnesses of any age to count episodes without estimating. Before they enter school, many preschoolers know how to solve addition problems, but they often count on their fingers, limiting problems to sums below 10. By 5 to 6 years of age, children can use simple strategies to help them estimate. However, it is not until fourth or fifth grade that children begin to estimate the way adults do (154).

An adult may be able to estimate that if the event happened each time the mother was away at night school and she had classes twice a week for 10 weeks, then it must have happened about 20 times. However, this mathematical reasoning process would be typical of an 8- to 10-year-old, not a 5-year-old. The younger child may be left trying to guess wildly in such a situation. The child can, however, tell that the event occurred each time mother was away at night school. The adults have to do the rest. This example requires the child to multiply. Simple multiplication is usually taught in second grade (7-, 8-year-olds) and multiplication tables are memorized in third or fourth grade (8-, 9-, 10-year-olds). Division begins in third grade and continues to be learned in fourth and fifth grade (9-, 10-year-olds).

Questions about how many times things happened must be monitored carefully. Even adults would have great difficulty counting how many times in the past year they had sexual contact with their partner, let alone how many times in the last 3 years. These types of questions are frequently asked of alleged victims of sexual abuse. See §4.32 on children's ability to count as it affects estimating numbers of times.

b. People Issues

(1) [§4.28] Physical Appearance

Young children's answers to questions about someone's physical appearance (*e.g.,* "What did he look like?") may be limited. One study found 4- to 7-year-olds produced little more than one piece of information about the person's appearance in response (155). Such answers underestimate children's ability to provide descriptive information. Follow-up questions ("What clothes was he wearing? What did his clothes look like?") help, but many limitations, like the ones listed below, will often make it difficult to obtain a good description of a person's appearance.

Young children are not able to estimate a perpetrator's age in years, height in inches, and weight in pounds, because they do not understand age, height, and weight in this manner (50, 156). Not until 10 to 12 years of age can children use conventional systems of measurement to give reliable estimates of age, height, or weight. Even then, 10-year-olds can have difficulty identifying

an adult's age or weight. However, information can often be obtained in other ways. Children can give concrete pieces of information that give clues to the person's age or weight (*e.g.,* white hair, wrinkles) that can help an adult reconstruct physical appearance. Still, in certain situations, preschoolers tend to focus on one aspect of information at a time. They may think the tallest person in the room is the oldest person. They may focus on height to indicate age and not process information about hair color or wrinkles as indications of age. Thus, when they say someone was old, a follow-up question must be asked to determine why they think the person was old (*e.g.,* "What makes you think he was old?" "Did he have any hair?" "What color was his hair?"). You should consider intervening when responses are not followed up or indicate misunderstanding

Another difficulty is that young children may not understand that adults can change their appearance (hair style and color, presence or absence of glasses, etc.) and may focus on the very aspects that are most readily changed. There is often more than one possible explanation for inconsistencies in details of physical descriptions.

(2) [§4.29] Ethnicity

It is unlikely that young children will spontaneously offer the person's ethnicity. Children in the 3- to 5-year age range do notice differences in skin color and other racial cues (156–158), but it is not until somewhere between 5 and 9 years of age that children begin to spontaneously mention features characteristic of a person's ethnicity or to label the person's ethnicity (159). When asked directly to label someone's race or skin color, 5- to 7-year-olds' words are often unhelpful. When asked to identify a Hispanic woman's "race or skin color," some 5- to 7-year-olds responded with comments like "Her skin was brownish pink." "She was kinda peach colored."

(3) [§4.30] Behaviors

Often, witnesses are asked to try to explain someone else's behavior. Such questions may even be more frequent with children because their spontaneous explanations sound implausible or contain gaps that create confusion. Young children's descriptions are often fragmentary and vague. If asked open–ended questions, children progress from vague, global terms, like *he's nice* or *he's mean*, to more differentiated descriptions explaining why someone is nice or mean (*e.g.,* "He wouldn't help us").

With age, children become better able to explain why people do what they do and why they feel the way they feel. For example, an 8-year-old sibling of a physically abused child stated of her sibling, "She used to yell and hit me after my dad hit her. But I don't think she really hates me; she just gets so mad and upset cause my dad hits her all the time." Such explanations should not be expected in the statements of younger children. Children who are 5 to 7 years old typically recount what people did (*e.g.,* 160) and should not be expected to offer the kinds of explanations of the causes of events and relations among events that children begin to be able to do when they are in the 8- to 10-year-old range (161). By 8 to 10 years of age, children are better able to infer others' intentions and make sense of the sequence of interactions they observe.

(4) [§4.31] Kinship Relations

Questioning 2- to 4-year-olds about the identities of family members using kinship terms can be confusing. As children begin to learn the meaning of kinship terms they may overextend the terms' true meaning and use it where it does not belong (153). For example, 2-year-olds may assume that the label "daddy" refers to all men, not only men with children, or not only their own father. There is some concern that this tendency could result in children referring to perpetrators who are not their fathers by using the term daddy, thereby misleading authorities (162). Moreover,

when asked "If a new man came to live in a little girl's house would he become her daddy?" a 3-year-old might agree that he would (162). This difficulty would be characteristic of 2- or 3-year-olds, but not older children unless they are language delayed.

Another source of confusion is related to young children's suggestibility. When asked more than once, they may change their answers, despite knowing the person's identity (162). Sometimes the problem can be addressed by asking the child what name someone else (sibling, teacher) calls the person in question ("What name does your teacher/mommy call this person?") or where the person lives. Many children, as young as 3, know the first name of their relatives.

A complete understanding of all kinship relations is not fully developed until about 8 to 10 years of age.

In one case, an attorney was trying to establish where an event took place and who was present. Since the event ostensibly took place at the paternal grandmother's sister's house, very complicated kinship relations were involved. Consider the interchange:

> **Attorney:** "When you were at your grandma's house with your daddy, whose mamma is your grandma?"
> **Child:** "Grandma Ann" (gives grandma's name)
> **Attorney:** "Is she your daddy's mamma?" Child: "Huh?" (doesn't understand the question)
> **Attorney:** "Is she your daddy's mamma?" (Leading question requiring only a nod)
> **Child:** "Daddy's mamma" (repeats the end of the sentence; common response when communicating with children fails)
> **Attorney:** "Is grandma daddy's mother?" (Requires only a nod to force the adult to stop this line of questioning)
> **Child:** "She has a boyfriend, two boyfriends" (irrelevant response)

This 4-year-old appears to be unable to identify her grandmother who was allegedly present at the time. However, the name Grandma Ann is like the name Mary Jo. Knowing the name that grandma is called by does not imply a child can imagine that daddy was once a baby and he had a mother, just like she does, and that this older woman is that person. This requires the mental operation of reversibility, the ability to change direction of thought. For example, a child this age knows she has a sister, but may not realize she is a sister to her sister. Inquiries about kinship with children under 10 must be carefully monitored and names should be substituted for kinship terms wherever possible.

c. Objects and Events

(1) [§4.32] Colors of Objects

Sometimes children are asked to provide the colors of automobiles, clothing, or other objects. This can be a risky enterprise with 2- to 3-year-olds because they may use color names inconsistently, often becoming fixated on a single color or applying color names haphazardly (163). Although very young children can visually discriminate most shades of color (matching and categorizing color swatches accurately) less than 50 percent of 2- to 3-year-olds correctly apply basic color names (red, yellow, green, blue) (164). Three quarters of 4-year-olds use primary color names accurately, but they are unlikely to know the names for more obscure colors such as chartreuse, mauve, or tan.

(2) [§4.33] Counting Objects and Events

Child witnesses are often asked how many times something happened, how many people were present, how many minutes went by, how many actions occurred, or how many times something

was said. These questions require counting of objects, events, actions, and utterances. Consider the following example. A 4-year-old made several consistent out-of-court statements, but contradicted herself during the courtroom examination excerpted below:

> **Attorney:** "How many times did daddy do this to you?"
> **Jenny:** (raises both hands, fingers spread widely)
> **Attorney:** "Ten times?"
> **Jenny:** (raises 2 fingers)
> **Attorney:** "Are you saying it was two times?
> **Jenny:** "Five times" (aloud)
> **Attorney:** "Which is it, 10, 2, or 5?" (in a frustrated voice)
> **The court:** "Can you count to 10 for me?" (stopping the interchange to test whether the child can count)
> **Jenny:** "1-2-3-4-5-6-7-8-9-10" (proudly)

It appeared that Jenny could count, but she did not know how many times the event occurred, diminishing her credibility. However, for very young children, counting numbers can be like reciting words in a song. It does not imply they understand the underlying number concepts and can actually count events in time. Children learn to count as a rote activity very early.

The easiest things for children to count are physically present, visually accessible objects like the number of crayons on the table. Within certain constraints, children as young as 2 and a half years have been reported to count concrete objects (154). Children learn to count more abstract things, like sounds, actions, thoughts, or properties later. Counting skills continue to increase as the child gets older.

The problem with asking children to count events in time is that events do not possess discrete boundaries like objects. The beginning and the end of the event are often not specified in the question and it is difficult for children to figure out what it is that they are supposed to be counting. If a child is asked, "How many times did your daddy do this to you?" it requires the child to devise the units to be counted. The term *"this*" is a vague reference to some previously mentioned activity. Instead, the adult should specify the unit to be counted (*i.e.*, the specific physical activity). It is best to describe a picture of the activity, specifying the beginning and end of the incident to be counted ("How many times did he hit you with the belt?" "How many times were you and Robert together naked?"). Often, the court will have to be satisfied with children saying "a lot" or "a little," "once" or "more than once."

To be on the safe side, questioners should avoid any demands that suggest to young children under 5 or 6 years of age to provide a number. For example, when 4-year-old Allejandra was asked how many uncles were at the family reunion, her response was "*a hundred*." When asked to name them, she gave the name of aunts, cousins, and siblings as well. She was using the word "uncle" to refer to any relative and the term "a hundred" to mean a lot, probably more than she could count.

See also discussion in §4.27 on estimating the number of times that something happened.

d. [§4.34] Abstract Reasoning

Questions that require child witnesses to do complex, abstract reasoning often obscure the fact-finding process. Children are not aware of their own limitations and may try to reason out something by trial and error that can only be solved with more complex reasoning skills (165). Preschoolers reason on the basis of what they see. Requests that involve other types of reasoning, such as hypotheticals, lead children to try to answer questions they are incapable of answering.

An example of a question involving complex reasoning is, "If he had gone to the store that night, then how could he have been at your house?" If-then statements may require hypothetical-deductive reasoning skills not present until early adolescence. They may involve abstractions and the ability to consider alternative solutions, and simultaneously to predict alternative outcomes. These skills are mastered gradually.

e. [§4.35] Perspective

Although 3- and 4-year-olds can sometimes see another person's point of view quite accurately, it is not until the age of 7 or 8 that children have a fully developed ability to view the world from another's perspective accurately and consistently (136). Children gradually develop the ability to infer what other people are intending, thinking, feeling, and perceiving. Consequently, young children have difficulty answering questions about what another person might have been intending. Questions such as "Why didn't you run away when he shut the windows and closed the doors?" require a young child to draw inferences about someone else's intentions. Children may end up contradicting themselves, not because they are lying, but because they are stretching to try to explain something they do not understand.

f. [§4.36] Comparisons With Past Statements

At times, witnesses are asked to compare current testimony with out-of-court statements, recall a statement and hold it in mind, then compare the current statements to past ones for consistencies and inconsistencies, and finally generate and evaluate possible reasons for discrepancies, all of which require great mental effort and concentration. This is often beyond the ability of young children with limited attention spans, who reason on the basis of what they see in the here and now and who have not yet developed hypothetical-deductive reasoning skills.

Very often, a child is asked to explain inconsistencies between statements made when he or she was at a much earlier stage of development and current testimony. The child is asked why he or she is revealing something now that was not revealed previously. At the earlier stage, the child may not have had the skill required to answer the question, but may have developed the capacity by the time of the testimony. At ten, a child may be able to reason back to the event to determine the season, month, or day of the week an event occurred, something the child was unable to do at the time of the first questioning when he or she was 6 years old.

> TIP: You should consider interrupting questioning that undermines children's self-esteem and causes unnecessary confusion when they are asked to explain something that is clearly beyond their developmental stage, although you may not prohibit defense counsel from bringing out inconsistencies.

g. [§4.37] Recalling Quotations

Asking young children to recall quotations of their own or of others may elicit confused answers. Children do not remember what was said as well as they remember something they experienced or observed (166). Preschoolers particularly may find it difficult to think and talk about the mental processes of thinking and talking. If children's responses appear confused in such situations, you should consider intervening.

In addition, a child may be confused if what he or she said in response to a question in one context is used in another context to verify or rephrase evidence. The child is being asked to comment not on what happened, but on what was said about what happened. The child is being asked to comment about both remembering when evidence was given and the content of the

evidence. When a child is asked two questions under the guise of one question, the two questions must be disentangled for the child to be able to answer.

An example from a transcript is, "Do you remember telling the court just before lunch that you had your tracksuit pants on when you sat on [the perpetrator's] lap; do you remember that or not?" "No." Does the child's response refer to whether she remembers when she said the comment (before lunch) or whether she had her pants on or off? In this case, she was saying, "No, I said I had my tracksuit pants off." When children are restricted to yes/no answers and questions can be interpreted in more than one way, children may not have the ability to recognize when adult listeners have misinterpreted their responses. This requires taking the listener's perspective. You should carefully monitor requests for children to compare quotations or past statements for misunderstandings.

h. [§4.38] "Wh" Questions

Much of language is learned in a specific sequence that is relatively constant among English-speaking children. They learn "Wh" questions in the following order: what, who, where, when, why, how, and whose (138, 167). This implies that the earliest forms learned are the easiest ones for the child to use and understand. "Who," "what," and "where" questions are the first learned because this is the kind of concrete information they understand—agents, objects, and locations.

In contrast, "when" questions are more difficult because young children do not yet understand time concepts adequately. "Why" questions may not be mastered until kindergarten or first grade. "Why" questions require an understanding of causality. They also tend to take on a confusing negative connotation because they are frequently used to reprimand children (*e.g.,* "Why did you do that?").

"How" can also be confusing because young children think of "how" in the very concrete, physical, mechanical sense of actions. Preschoolers reason on the basis of what they see. They will typically try to answer a "how" question by describing a series of movements they have seen. Trying to explain how people have acted and why things have happened may be equally difficult tasks for young children. Although children's responses to "what, where, who" questions are generally accurate, you should pay careful attention to young children's (under 7 years of age) answers to "why, when, and how" questions.

III. LISTENING TO TESTIMONY/INTERPRETING CHILDREN'S ANSWERS

A. [§4.39] CHILDREN'S ASSUMPTIONS

There are times when confusion in children's testimony stems from the assumptions young children make. They may assume that the adults view things as they do because they have trouble taking another's perspective. In fact, they may believe that the adult has the same thoughts about the event or that adults are privy to knowledge only the child knows.

Young children may also assume that adults already know the answers to the questions they are asking. Children assume adults have a superior knowledge base (131). In school, teachers frequently know the answers and test the child's knowledge (88). Preschoolers do not yet understand the necessity of perception when attributing knowledge. They often make inaccurate assumptions about who knows what. They can be surprised when a defense attorney they have never met knows information they perceived to have been provided confidentially to others in a pretrial interview. They can be frustrated and angry when they have to answer the same questions that they have already answered in previous interviews with the same attorney or that they have

just answered on direct examination. If children appear confused in this regard, judges should consider explaining that the answers have to be repeated for the record, the judge, and the jury.

B. [§4.40] CHILDREN'S LOGIC

Adults are often baffled by a few unbelievable comments that tend to invalidate the rest of what a child may have to offer. Children try to make sense of unfamiliar experiences using the limited knowledge and vocabulary, and flawed logic available to them at an immature stage of development. In one case, a young child described that the suspect put a "balloon on his penis—a hotdog balloon" (Elliott, personal communication). Children's testimony is replete with similar, age-appropriate attempts to describe unfamiliar objects for which they have no label, like condoms, likening them to something familiar.

Unbelievable comments can occur because children reason from one idea to another without logically connecting them. They may generalize in ways that seem illogical as they go about creating explanations for what they observe (165). For example, they may assume that two events observed closely together in time are causally related, *e.g.,* "I have not had my nap yet, so it isn't afternoon yet." These misunderstandings are not fantasies or lies, but have a logic of their own. Adults must be careful to avoid assuming that the child understands or responds in the same way adults do.

Requiring children to respond with either yes or no can be a dangerous practice because one cannot be certain that the child has in fact answered the intended question. However, with a few simple follow-up questions (*e.g.,* "What makes you think so?"), many miscommunications can be avoided.

C. [§4.41] FANTASY-LIKE RESPONSES

There are times when a child's answer can be easily interpreted by adults to reflect fantasy instead of reality. Sometimes the problem is due to the vocabulary used by the child as in the interchange below. Such instances illustrate that follow-up questions to fantasy-like responses are critical.

A: "What else did you play?"
C: "We played with monsters."
A: "There were monsters in the room with you? What kind?"
C: "Ugly."
A: "Ugly monsters...O.K...Did you play on the bed or how did it go?"
C: "We sat in the chair and the monsters sat on our laps. We put them right here on our thighs and talked to them."
A: "What kind of monsters were they?"
C: "They were puppet monsters."
A: "Oh. They were puppets—like dolls?"
C: "Yeah."

If this exchange had been terminated too soon, the adult could have been left with the impression that the child was inventing the incident.

Putting miscommunications aside, there is some evidence to suggest that the presence of fantastic elements should not necessarily undermine a child's credibility (168). For some children it may be easier to say they were molested by a monster than to reveal the name of someone they love or someone who threatened them not to tell. There are other children, however, who tell highly elaborated, fantastic, yet unbelievable narratives (*e.g.*, 87). These children are in the minority and

as discussed previously, typically these are highly exuberant and impulsive preschoolers with immature executive functions of cognitive control (105). See §3.7 for more detail. Adult prompting can result in encouraging such tales to entertain the adult without children understanding the serious consequences of such behavior in legal settings.

There are also developments in children's understanding of causality that contribute to fantasy-like statements. Young children, 3 to 4 years old, engage in magical thinking, creating, or accepting highly illogical explanations for events. Often this takes the form of a child believing that inanimate objects have animate characteristics (*e.g.,* if you cut a piece of thread or a strand of hair, the thread and hair experience pain) (165). Such invalid reasoning does not necessarily render the rest of a child's testimony inaccurate or irrelevant. The child's stage of reasoning should be considered in determining the credibility of the child's testimony.

D. [§4.42] Children's Sexual Knowledge and Fantasy

Much of the concern that children may testify to sexual fantasies rather than real life experiences originated with classical Freudian theory. This notion has fallen from prominence in current theories of child development. There is little evidence to suggest a substantial risk of detailed false reports of sexual abuse (*e.g.*, genital and oral penetration) based solely on children's sexual fantasy life. Graphic descriptions of oral and anal sex as well as details related to orgasm (pace of breathing) and ejaculation (taste of semen) are indicators of unusual sexual knowledge. Although these behaviors are outside the average preschooler's knowledge base, exposure to pornographic video and coaching also can produce graphic descriptions. Behaviors that indicate developmentally unusual sexual knowledge include: attempting to engage in explicit sex acts with others, inserting objects into a child's or someone else's vagina or anus, initiating French kissing, excessive masturbation, masturbating with an object, and imitating sexual intercourse (11, 169–170). However, as previously mentioned, sexual preoccupation and hypersexualized behavior also occur in children who have never been sexually abused and alternative explanations must be ruled out. See §3.45 for further discussion.

Due to their lack of sexual knowledge, children's descriptions can sound implausible as they go about trying to make sense of the world around them and create explanations of what they observe. For example, in one case a child described semen as tasting like orange juice. However, in response to follow-up questions ("What makes you think it tasted like orange juice?"), he explained it was because they both taste a little sweet and sour at the same time. His credibility was restored. As in this instance, a number of adult assumptions about children's fantasies turn out to be a function not of children's lies, but of adult failures to bridge the gap between the world of the child and the adult world. For further discussion of evaluating children's honesty in the context of determining competency, see §§3.2–3.10.

E. [§4.43] Children's Memories

How well do children remember and report their experiences? On the one hand, infants and preschoolers demonstrate remarkable memory abilities over long periods of time. On the other hand, very young children's memory abilities are still far below adult levels of competence. As children grow, their memory abilities improve dramatically (96–97, 124). Unfortunately, there is no simple formula to determine at what age a witness's memory is sufficient for testimony. The reliability of an individual child's memory for a specific event is difficult to predict (88, 123, 127, 144, 171–173). There are a number of relevant factors, including the child's age, stage of language and cognitive development, the type of event to be recalled, the atmosphere in which questioning occurs (*e.g.*, intimidating versus supportive), and the types of questions asked, as discussed below.

Some limitations on young children's memories are a function of the child's stage of brain development and cognitive functioning. While it is true that infants and toddlers have surprising memories for personally experienced events over long periods of time, children who are nonverbal at the time of the event, usually under 2 years of age, are unlikely to ever be able to give a narrative account of events that occurred prior to the acquisition of language (*e.g.*, 96–97, 125). Most adult's first memories start around 3 years of age. Once children are verbal, usually around 2 and a half to 3 years of age, there is a qualitative shift in ability to retain and report accurate memories over long delays (125), although forgetting is a normal process (96–97).

Children as young as 3 and 4 years of age can provide reliable information about their life experiences through carefully conducted interviews (97, 128). Children 3 to 5 years old can readily talk about events that occurred more than a year previously, although these early memories may become forgotten over time. When children aged 2 to 13 years old were interviewed about highly memorable injuries, and subsequent emergency room treatment (after 2- and 5-year delays) the children were remarkably accurate. After a 2-year delay, 2-year-olds correctly reported 51 percent of the available information; the 5- to 6-year-olds reported 79 percent, in comparison to 81 percent reported by 8- to 13-year olds (97).

Researchers examining scientific case studies compare children's reports of traumatic events to documentation of what actually occurred with quantitative analyses (*e.g.*, videotape or photograph of abusive act; audiotape of confession; computer records; 174). These studies suggest that children can accurately recall traumatic experiences even after long delays; however, a certain percentage of children fail to disclose their traumatic experiences, or omit sensitive information, due to a number of reasons, including forgetting, fear of reprisal, pacts of secrecy, lack of parental support, and feelings of guilt, shame, and perceived responsibility (175).

Without suggestive questions or coaching, the errors that creep into children's reports over time tend to be a matter of confusing details of similar experiences, especially when the event to be recalled is not very distinctive or personally meaningful. Three- to 5-year-olds can have the memory ability needed to testify when asked simple, direct questions in a neutral or supportive atmosphere about distinctive, personally meaningful events (89, 96, 127, 144).

Nevertheless, in the 3- to 5-year-old range, there remain significant deficiencies. As children grow out of this age range, their testimony improves. Narrative abilities improve alongside memory and language abilities, understanding of self and others, and time and causality. The vocabulary needed to describe a memory verbally improves, so less of what is stored in memory is omitted from verbal testimony. Skill at narrating an event independently improves over time and the description becomes less fragmented and is decreasingly driven by the adult's questions. Initially, young children's narratives are skeletal and difficult to obtain without specific questions and prompting (128). By 5 years of age, narratives are more elaborated and spontaneous; however, they are often still insufficient for legal decision-making and lack the kind of detail adults are seeking without additional questions that drive the conversation forward. By 9 years of age, narratives become longer and more detailed, with less extraneous detail, more overt markings of time, more introduction and setting information, more concern for motivations, internal reactions, and causality, and more complex episode structure. Neurobiological studies have documented gains in these abilities up to 11 years of age (176).

As children's knowledge bases expand and reasoning skills develop, a child's ability to make sense of the experience as it takes place also improves (172). This allows for a richer, more detailed initial representation of the event in memory, facilitating more accurate inferences and changing the types of cues needed to elicit details later. Older children are more likely to notice, make sense

of, and store more information of forensic relevance at the time the event is experienced, increasing the amount available for later retrieval. Last but certainly not least, older children have the ability to generate and deploy the kinds of retrieval strategies (memory jogging techniques) used regularly by adults to search their memories efficiently, exhaustively, and systematically.

The incompleteness of children's memory reports is not only a function of an immature memory process. Sometimes incompleteness is related to the child's lack of motivation. Adult pressure to recant, fear of humiliation, fear of reprisal, self-blame, or fear of angering a loved one can lead to inadequate or sparse testimony. Remembering details is a demanding task that requires high levels of motivation, attention, and effort. Children who are ambivalent or unmotivated may spend insufficient effort retrieving detailed memories. Or, sometimes children's difficulty in reporting details is related to the characteristics of the event to be recalled. Certain facts are just easier to recall than others. Central actions and salient details of personally meaningful events are easier to recall than peripheral details of less distinctive, less meaningful events. Traumatic and other negative events, such as sexual assault, that children witness or experience in early childhood can also be retained (although like all memories they are likely to fade over time), and even 2-year-olds can communicate parts of these memories to others. However, researchers have not proven that stressful events are recalled with greater or lesser accuracy than other memories.

At other times, the legal system itself exacerbates the problem. Continuances and delays increase the amount of forgetting over time. There are distractions in the courtroom that interfere with the child's ability to concentrate sufficient attentional resources on the multi-dimensional task of retrieving details. Fear of strangers and misunderstanding of the incomprehensible, invisible rules of evidence can diminish children's reports. As mentioned in §1.8, the types of questions posed in pretrial and trial interrogation, such as repeated suggestive or incomprehensible questions, can also degrade the quality of the child's testimony, as discussed in §§4.13–4.22.

Generally, human memory performance is a complex, dynamic process. Children bring both strengths and weaknesses to the witness stand in terms of their abilities to remember and report their experiences. Overall, children's reports are less detailed than adults, although even young children occasionally outperform adults, reporting details that go unnoticed by adults. Of significance in the forensic context is the fact that as children get older they are better able to cue themselves independently to report forensically relevant information and are less in need of direction by adult questions to retrieve and report, and less in need of an optimal environment to function at their highest level of ability, free from distractions and fears.

Conversely, younger children still benefit from open-ended questions that guide children to search their memories more thoroughly and systematically, cue them to activate additional aspects or dimensions of a memory, and make known the kind of information and level of detail relevant to the court or the investigation (*e.g.*, 47, 83, 86, 89). The specific questions that children benefit from need not be suggestive. They can direct children's attention to a particular topic of interest to the court, usually one that the child might not have realized was relevant, such as the participants ("Who else was there? What did the person look like? What was the person's name? What did the person say?") or the setting ("What was the weather like that night?") or ask the child to elaborate on a previously mentioned topic ("Tell me more about the time when….You said a lady was there. What was she doing?"). These questions often begin with a "what, who, where, when, how, which, or why," require multi-word responses, and do not presume information or suggest an answer. Specific questions may encourage children to elaborate further about details in question but should rely on information already provided by the child rather than other sources.

Of course, some types of specific questions are highly suggestive, stating the adult's view and merely asking the child to affirm the adult's presumptions ("It was John that hurt you, wasn't it?"). Children's vulnerability to suggestive questions is discussed in §§4.19 and 4.44 and suggestive question types to be avoided are discussed in §§4.19–4.23.

Researchers have also identified a few instructions that serve to improve children's memory reports. These include warning children that they might not understand all the questions and instructing them to notify adults when they fail to comprehend a question; warning children that adults might make a mistake or mislead children and giving permission for them to correct the interviewer; informing children that the adult does not already know the answer; and reassuring children that they will not get in trouble with the adult questioner for telling the truth (*e.g.*, 47, 89).

F. [§4.44] Children's Suggestibility

The argument is sometimes made that an interviewer can mislead a child into making false allegations of abuse by asking leading questions; in some cases, this argument may have merit. Studies suggest that young children, especially those in the 3- to 5-year-old range, can be particularly vulnerable to suggestive interviewing (*e.g.*, 109, 133). Although such children are more suggestible to false memories than older children, especially when events are plausible, both groups are more suggestible than adults (129).

There is a legitimate concern that a young child's courtroom testimony may become a blend of initial memories and information suggested by interviewers or parents in repeated pretrial interviews and suggestive questioning by attorneys in courtroom examination. Whether a particular child will be suggestible in a specific instance depends on the child's age, importance of the event to the child, whether the suggested information is central or peripheral, plausible or not, and the timing, type and number of suggestive techniques employed (88, 127). Questioning techniques must be scrutinized closely before concluding that a child's testimony in a particular case has been tainted. A wide range of performance is typical in studies of children's eyewitness memory, from largely accurate reports (when children have not been exposed to misleading questions) to highly inaccurate reports (when multiple highly suggestive techniques are used simultaneously). Even when very young children acquiesce to false information, much of the rest of the information they report can be quite accurate (*e.g.*, 109).

Children as young as 4 can be resistant to suggestions about abuse-related events (177) and can freely recall as much information in unbiased interviews as 8-year-olds (178). While older children are significantly more resistant to suggestion than 3- to 4-year olds, it is still possible to create conditions where they report as many erroneous details as younger children. However, with requests for clarification, older children can distinguish between suggested and experienced events, and often retract their errors (179). Children are not uniformly more suggestible than adults, but there are at least three factors that make them more vulnerable.

First, young children usually store more information in memory than is reported in spontaneous accounts and in their responses to open-ended probes, such as, "What happened?" . Follow-up questions may be necessary to elicit everything stored in memory. If follow-up questions are suggestive and misleading, children's reports may be distorted. See §4.42 on children's memories for additional discussion.

Second, young children trust that the adult's knowledge base is superior to their own (131). When adults convey their presumptions to children, either inadvertently or intentionally, young children are more likely to defer to the adult's rendition. Preschoolers may not realize that if the child was present at the event in question and the adult was not, the child may in fact possess the

superior knowledge base. Preschoolers assume adult superiority by virtue of the adult's status in the world.

Third, sometimes individuals of all ages acquiesce to a suggestive question and subsequently accept the false information as true and incorporate it into subsequent reports of the event (180). This danger is raised if the individual cannot distinguish between memory of the original event and memory of the suggestive questions. This problem is particularly acute with 3-year-olds who can have great difficulty identifying the source of their own beliefs (181). Fortunately, by 5 years of age, children show a strong ability to identify the correct source of their knowledge on simple tasks (181); however, if researchers make the discrimination tasks difficult and complex, even the brightest 5-year-old may have trouble (182).

Suggestive techniques vary widely from misinformation embedded into a few misleading questions that even preschoolers resist (183) to packages of highly suggestive techniques that distort the reports of both younger and older children up to 9 to 10 years of age (150). See §§4.19–4.23 for suggestive techniques that increase children's error rates. In fact, many suggestive techniques also produce erroneous reports in adults, hence older children are not immune (130, 184). See §§4.19 and 4.23 for suggestive techniques that increase children's error rates.

Appendix A

Qualifying Children to Take the Oath: Materials for Interviewing Professionals

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These materials are based on research conducted with maltreated children at the Edelman Children's Court in Los Angeles County, and with non-referred children attending Bing Nursery School at Stanford University. The research was supported by Grant No. 90-CA-1553 from the National Center on Child Abuse and Neglect. We thank the current and former Presiding Judges of the Los Angeles County Juvenile Court, the County Department of Children's and Family Services, Dependency Court Legal Services, County Counsel, several hundred private attorneys, and the Child Advocate's Office for their support of the research. Joyce Dorado, Tina Goodman-Brown, Debra Kaplan, and Robin Higashi assisted in the research. David Lyon illustrated the tasks. Correspondence regarding these materials may be sent to the first author: University of Southern California Law School, University Park, Los Angeles, California 90089-0071. Email: tlyon@law.usc.edu © 1998 Thomas D. Lyon & Karen J. Saywitz.

Introduction

The purpose of these materials is to assist you in determining whether a child witness understands the difference between the truth and lies and appreciates the importance of telling the truth. Our research has suggested that common techniques used to qualify young children often misevaluate children's true capacities (Lyon & Saywitz, in press). The following materials were designed to both minimize the difficulties children face in defining and discussing the truth and lies, and to ensure that children will not falsely appear competent due to guessing or following the lead of the questioner.

There are two tasks. The first task (truth vs. lie) evaluates whether the child understands that the words "truth" and "lie" refer to statements that correspond to reality and statements that fail to correspond to reality, respectively. The second task (morality) determines whether a child understands the consequences of telling a lie, for example, that telling a lie will result in "trouble."

We recommend that a child be given four truth vs. lie problems (set A, B, or C) and four morality problems. If a child answers four of four problems correctly, this demonstrates good understanding of the concept (there is only a 6% likelihood that a child would answer four of four problems correctly by chance).

We recommend that you emphasize the words that appear in all capital letters in the script when reading the script to the child.

Once a child gives an answer to an item question, say "OK" in a friendly way that does not indicate whether they answered correctly.

Always start with the boy/girl on the left of the picture.

If the child shows good understanding on the first two items of each task, some of the language may be omitted for the last two items:

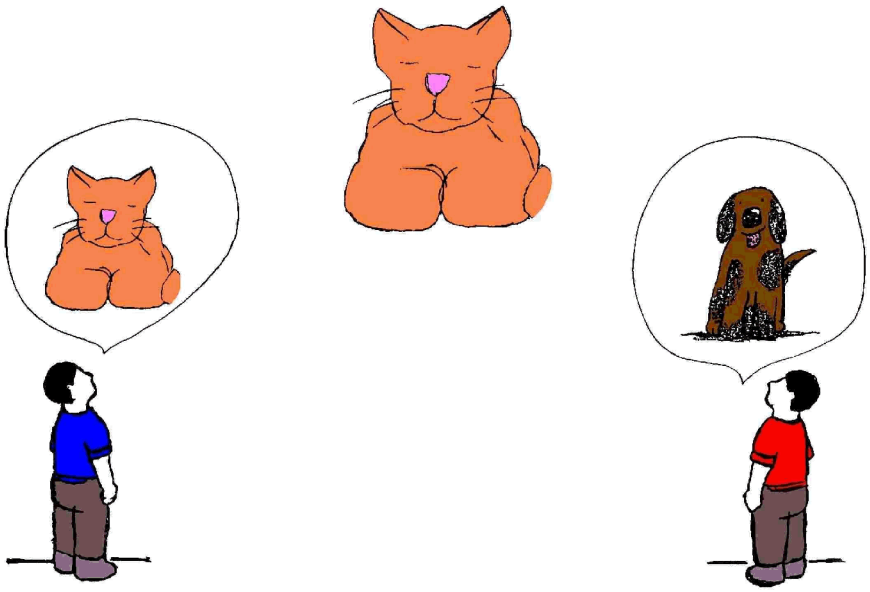
(a) For the truth/lie task, "One will tell a lie and one will tell the truth," may be omitted.

(b) For the morality task, "Well, one of these girls/boys is going to get in trouble for what she/he says," may be omitted.

References

Lyon, T.D., & Saywitz, K. J. (1999). Young maltreated children's competence to take the oath. *Applied Developmental Science*, *3,* 16-27.

TRUTH VS. LIE TASK (A1)



Here's a picture. Look at this animal--what kind of animal is this?

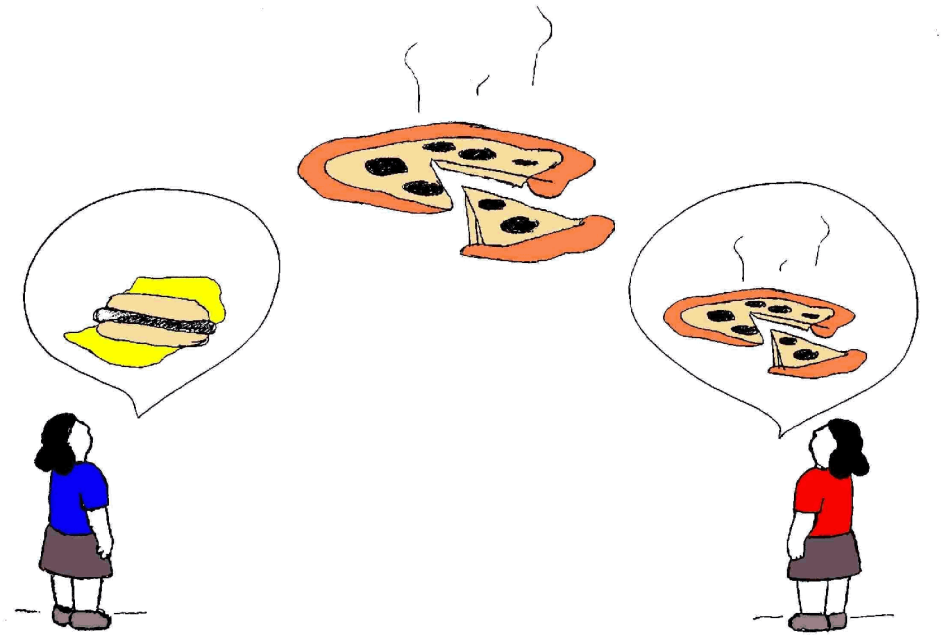
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(*point to boy on the left*) THIS boy looks at the [child's label] and says "IT'S a [child's label]."
(*point to boy on the right*) THIS boy looks at the [child's label] and says "IT'S a PUPPY."

Which boy told the TRUTH? *(correct answer is boy on the left.)*

TRUTH V. LIE (A2)



Here's another picture. Look at this food--what kind of food is this?

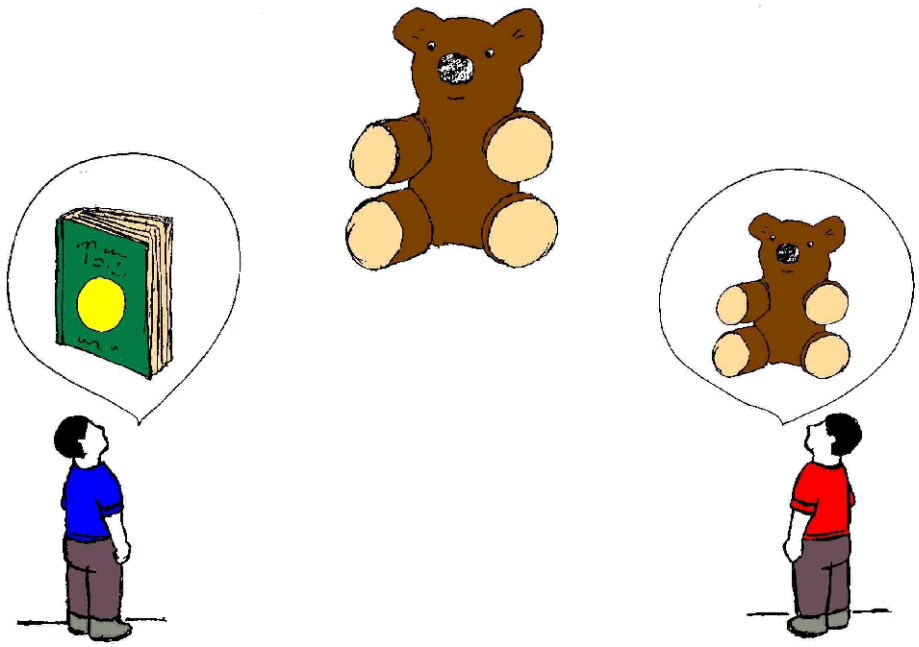
OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a HOT DOG."
(point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a [child's label]."

Which girl told a LIE? *(correct answer is girl on the left)*

TRUTH V. LIE (A3)



Here's another picture. Look at this toy--what kind of toy is this?

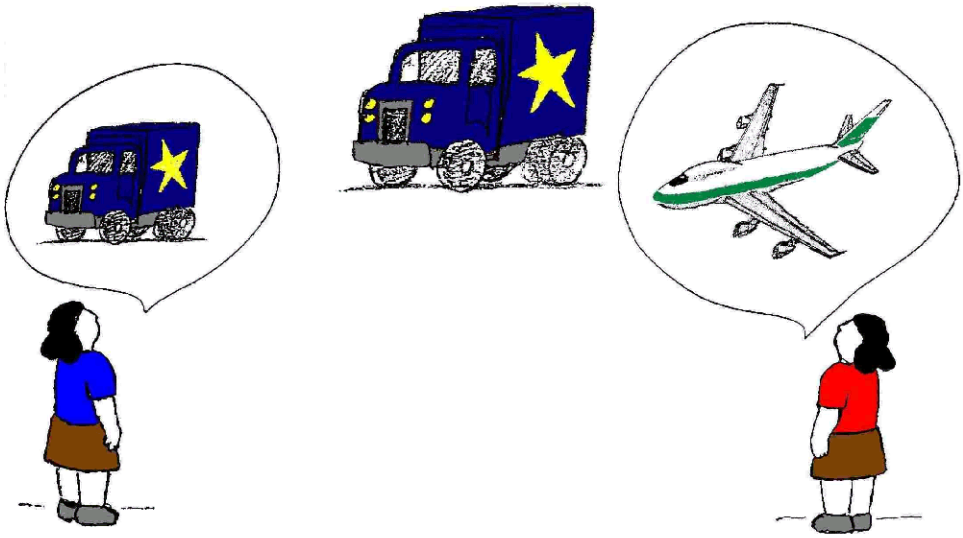
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to boy on the left) THIS boy looks at the [child's label] and says "IT'S a BOOK."
(point to boy on the right) THIS boy looks at the [child's label] and says "IT'S a [child's label]."

Which boy told the TRUTH? *(correct answer is boy on the right)*

TRUTH V. LIE (A4)



Here's another picture. Look at this toy--what kind of toy is this?

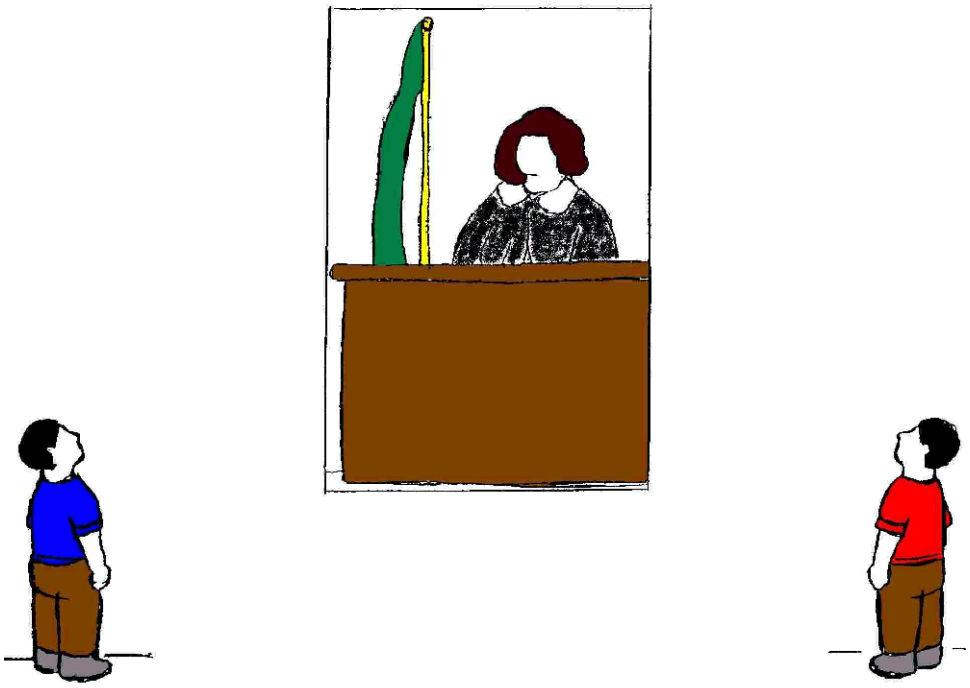
OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a [child's label]."
(point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a PLANE."

Which girl told a LIE? *(correct answer is girl on the right)*

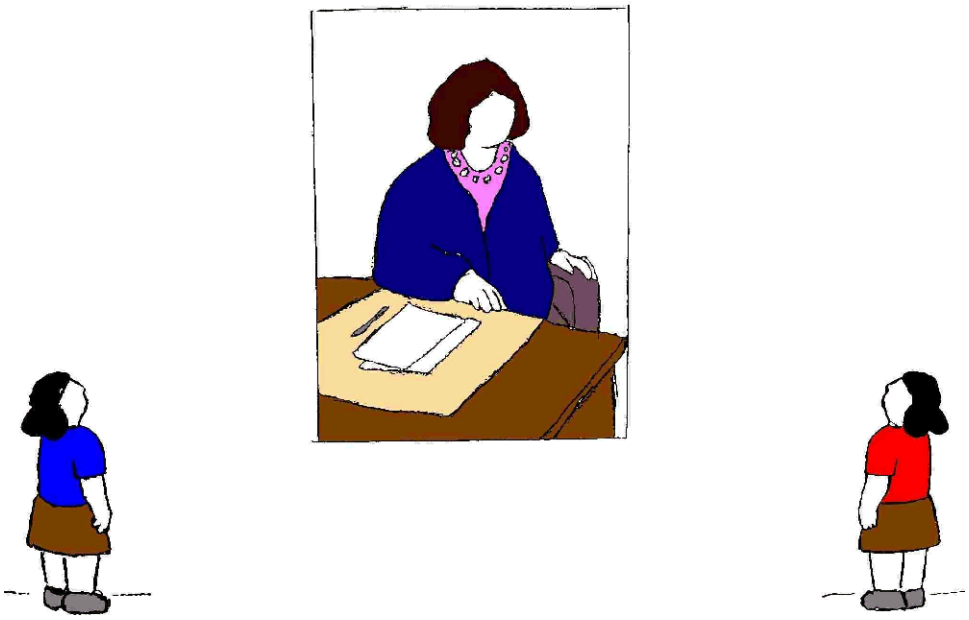
MORALITY TASK (1)



Here's a Judge. She wants to know what happened to these boys.
Well, ONE of these boys is GONNA GET IN TROUBLE for what he says, and YOU'LL tell ME which boy is GONNA GET IN TROUBLE.
LOOK [child's name],
(point to left boy) This boy tells the TRUTH.
(point to right boy) This boy tells a LIE.

Which boy is GONNA GET IN TROUBLE? *(correct answer is boy on the right)*

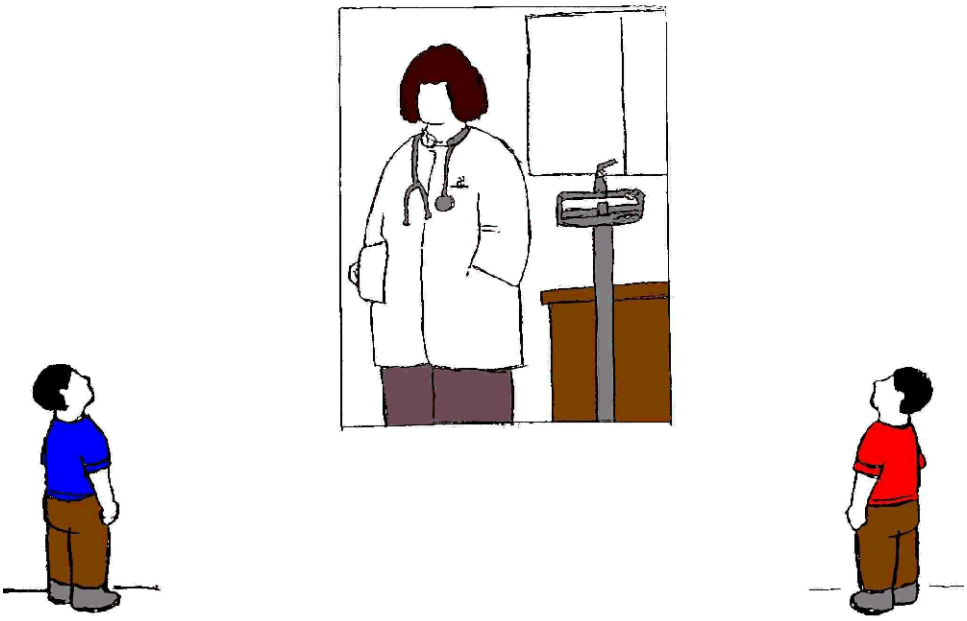
MORALITY TASK (2)



Here's a Lady who comes to visit these girls at home. She wants to know what happened to these girls.
Well, ONE of these girls is GONNA GET IN TROUBLE for what she says.
LOOK [child's name],
(point to left girl) This girl tells a LIE.
(point to right girl) This girl tells the TRUTH.

Which girl is GONNA GET IN TROUBLE? *(correct answer is girl on the left)*

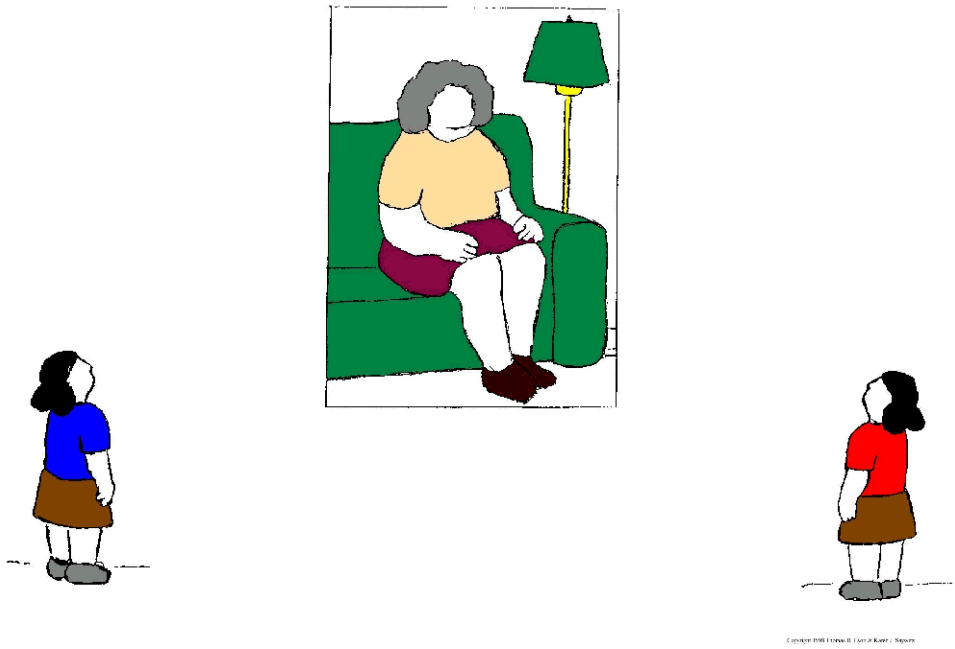
MORALITY TASK (3)



Here's a Doctor. She wants to know what happened to these boys.
Well, ONE of these boys is GONNA GET IN TROUBLE for what he says.
LOOK [child's name],
(point to left boy) This boy tells a LIE.
(point to right boy) This boy tells the TRUTH.

Which boy is GONNA GET IN TROUBLE? *(correct answer is boy on the left)*

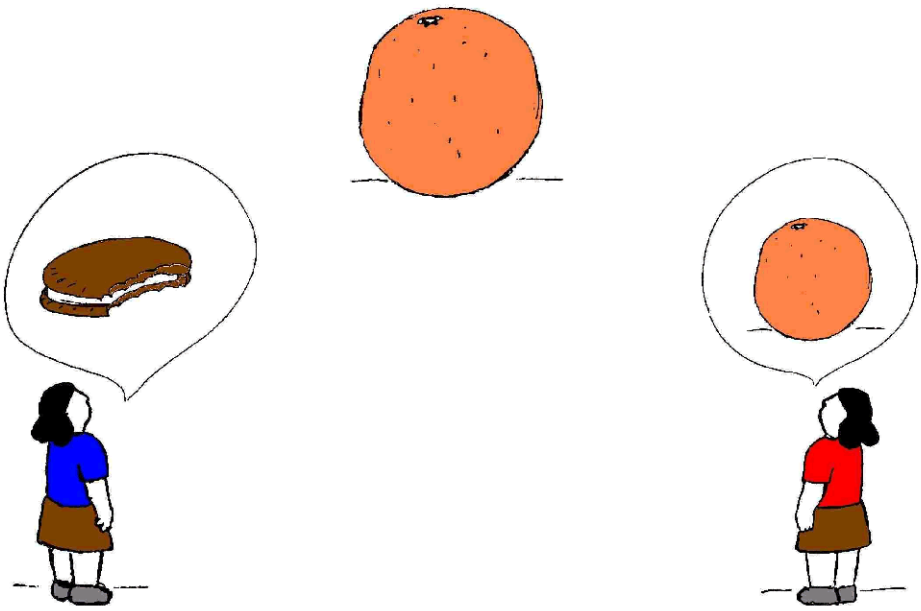
MORALITY TASK (4)



Here's a Grandma. She wants to know what happened to these girls.
Well, ONE of these girls is GONNA GET IN TROUBLE for what she says.
LOOK, [child's name],
(point to left girl) This girl tells the TRUTH.
(point to right girl) This girl tells a LIE.

Which girl is GONNA GET IN TROUBLE? *(correct answer is girl on the right)*

TRUTH VS. LIE TASK (B1)



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(*point to girl on the left*) THIS girl looks at the [child's label] and says "IT'S a COOKIE."
(*point to girl on the right*) THIS girl looks at the [child's label] and says "IT'S a [child's label]."

Which girl told the TRUTH? *(correct answer is girl on the right)*

TRUTH VS. LIE TASK (B2)

Here's another picture. Look at this toy--what kind of toy is this?

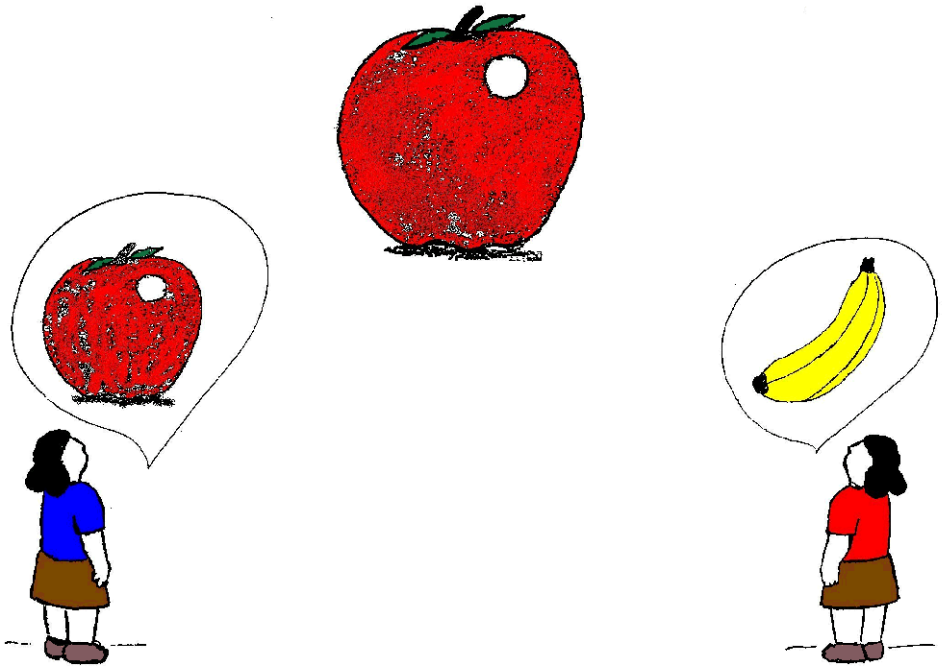
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to boy on the left) THIS boy looks at the [child's label] and says "IT'S a [child's label]."
(point to boy on the right) THIS boy looks at the [child's label] and says "IT'S a FOOTBALL."

Which boy told a LIE? *(correct answer is boy on the left)*

TRUTH VS. LIE TASK (B3)



Here's another picture. Look at this food--what kind of food is this?

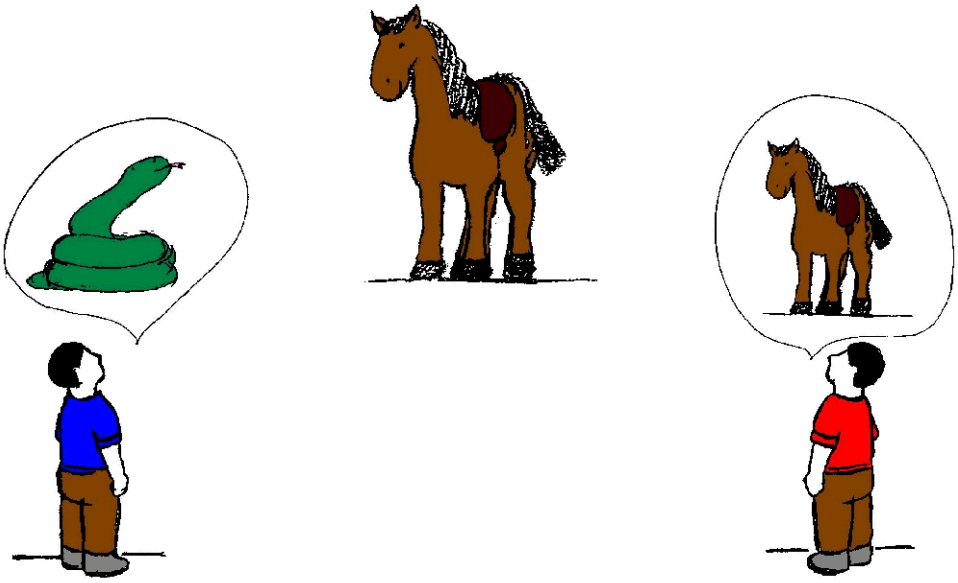
OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a [child's label]."
(point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a BANANA."

Which girl told the TRUTH? *(correct answer is girl on the left)*

TRUTH VS. LIE TASK (B4)



Here's another picture. Look at this animal--what kind of animal is this?

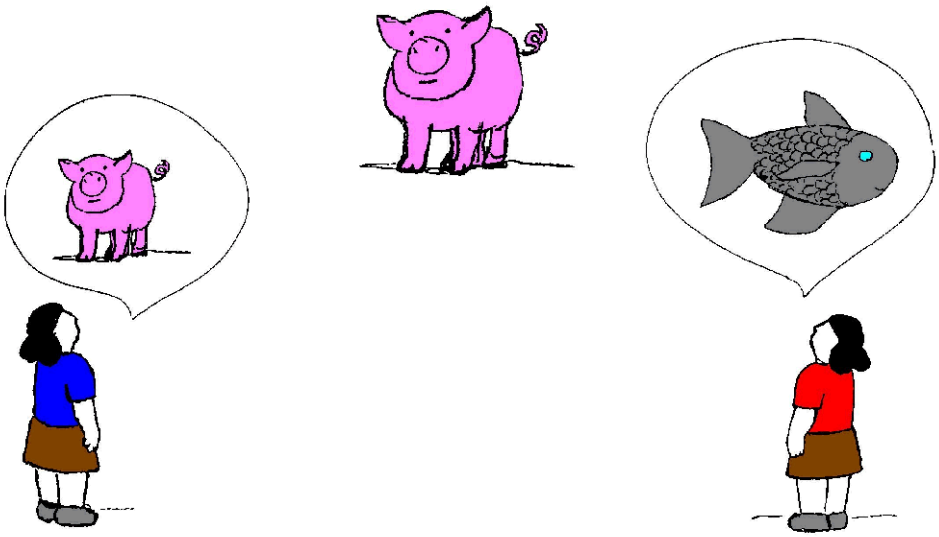
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to left boy) THIS boy looks at the [child's label] and says "IT'S a SNAKE."
(point to right boy) THIS girl looks at the [child's label] and says "IT'S a [child's label]."

Which boy told a LIE? *(correct answer is boy on the left)*

TRUTH VS. LIE TASK (C1)



Here's a picture. Look at this animal--what kind of animal is this?

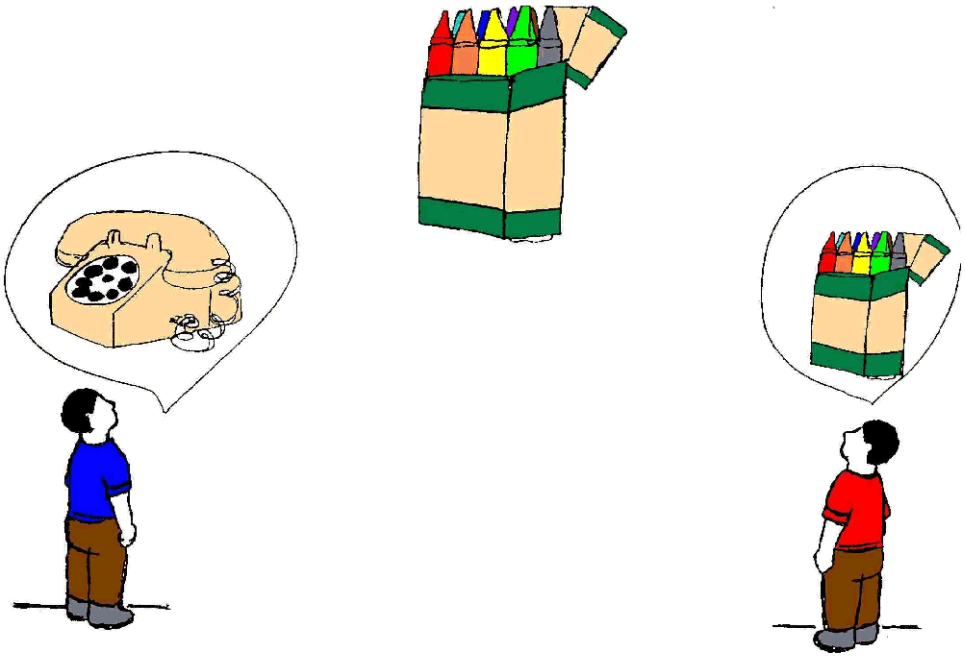
OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(*point to girl on the left*) THIS girl looks at the [child's label] and says "IT'S a [child's label]."
(*point to girl on the right*) THIS girl looks at the [child's label] and says "IT'S a FISH."

Which girl told the TRUTH? *(correct answer is girl on the left)*

TRUTH VS. LIE TASK (C2)



Here's another picture. Look at this toy--what kind of toy is this?

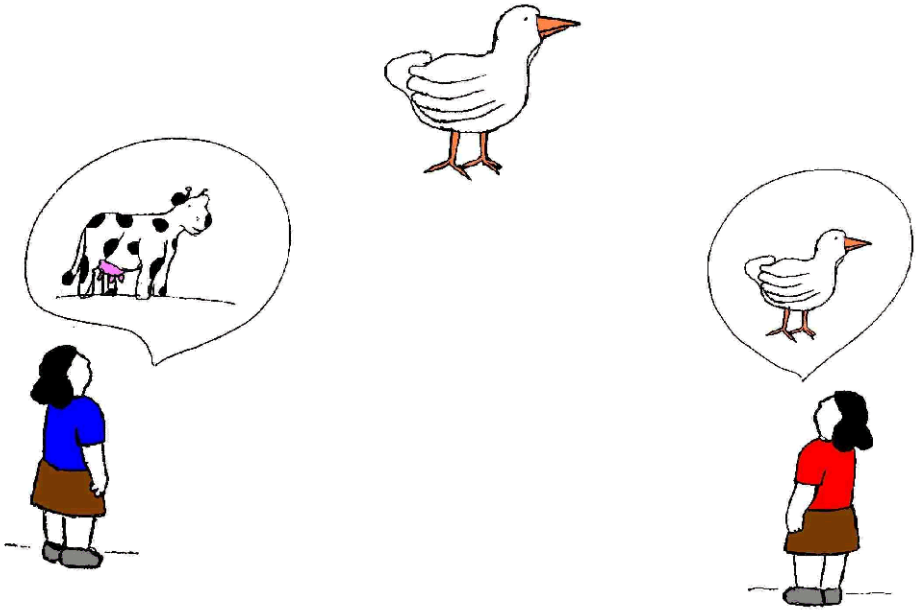
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to left boy) THIS boy looks at the [child's label] and says "IT'S a PHONE."
(point to right boy) THIS boy looks at the [child's label] and says "IT'S a [child's label]."

Which boy told a LIE? *(correct answer is boy on the left)*

TRUTH VS. LIE TASK (C3)



Here's another picture. Look at this animal--what kind of animal is this?

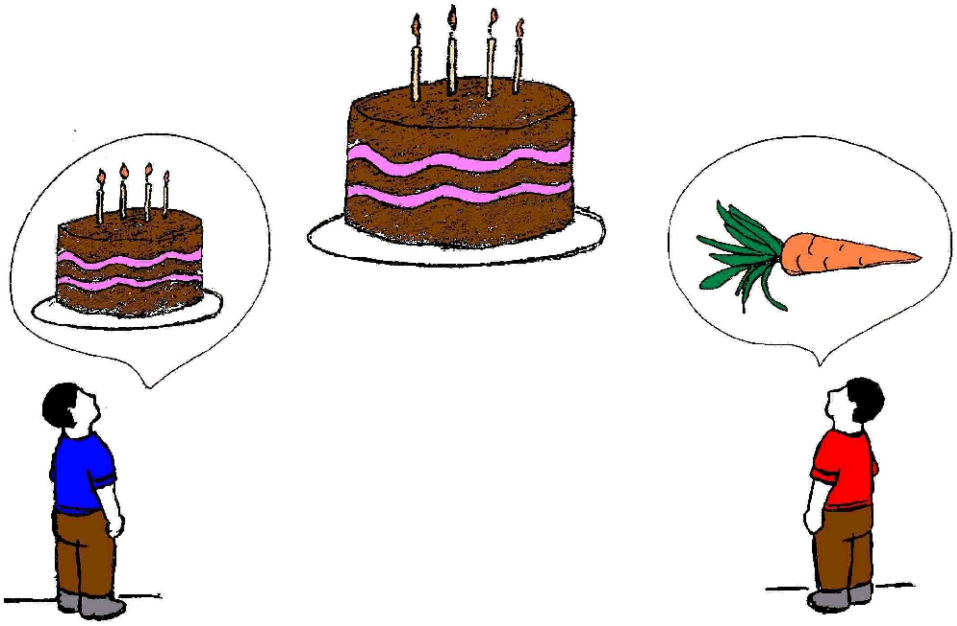
OK, that's a [child's label].

LISTEN to what these girls say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH.

(point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a COW."
(point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a [child's label]."

Which girl told the TRUTH? *(correct answer is girl on the right)*

TRUTH VS. LIE TASK (C4)



Here's another picture. Look at this food--what kind of food is this?

OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH.

(point to boy on the left) THIS boy looks at the [child's label] and says "IT'S a [child's label]."
(point to boy on the right) THIS boy looks at the [child's label] and says "IT'S a CARROT."

Which boy told a LIE? *(correct answer is boy on the right)*

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In the text, numbers in parentheses indicate references made by the author to the publications below.

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