

***The Science of Credibility: Who do you believe and why?***  
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**Credibility and Child Witnesses**  
**Judge Elizabeth Lee**

Adults often do not know when to believe children. There are few places where this uncertainty is more consequential than in a court of law where jurors may be forced to base their verdict largely on the testimony of children. Legal and cultural stereotypes undermine children's credibility as witnesses by portraying them as basically honest but highly manipulable, unable to differentiate fantasy from reality, and lacking in cognitive sophistication.

**~Goodman, G. S., Golding, J. M. and Haith, M. M. (1984), Jurors' Reactions to Child Witnesses. *Journal of Social Issues*, 40: 139–156.**

This presentation is intended to assist judges to:

- recognize situations where an implicit bias relating to children's testimony might be present, and
- learn best practices when questioning a child in the courtroom.

Resources:

Thomas D. Lyon. "3. Lyon, T.D., & Matthews, M. (2006). Model Brief. Questioning of Child Witnesses." 2006  
<http://works.bepress.com/thomaslyon/38>

National Institute of Child Health and Human Development (NICHD) protocol for interviewing children, <http://nichdprotocol.com/>

Children appearing in court is more frequent than one might think and is possibly on the rise:

- Criminal Proceedings
  - sexual abuse, domestic violence, child neglect cases
  - the child may be both witness and victim
  - percipient witness as an eyewitness to a crime
- Juvenile Proceedings in which juvenile judges probably have the most experience with children in the courtroom and are specially trained to handle children.
- Dependency Cases to determine what is in the best interest of the child, in which the child may be asked to talk about his/her wishes on returning to live with a parent and/or to remain in foster care.
- Delinquency Cases: the minor as a defendant
- Family Court Proceedings: testimony from a child is rare but in most states children who are 14 years old or older have a right to be "heard" as to child visitation/custody, up to court's discretion if a child is under 14 years old.
- Probate Matters/ Guardianship cases
- Contested Adoptions: Child may be asked to testify about his or her relationship with a biological parent versus a prospective adoptive parent/current caregiver.
- Civil Cases
- Personal Injury/Wrongful Death/Civil Child Abuse Cases: any kind

of case where damages are sought on behalf of a child who has been harmed, in which the child may be a percipient witness and/or the victim witness.

### **Federal Proceedings**

- Immigration Hearings: child may be an unaccompanied minor seeking to stay in the U.S.
- Hobbs Act Robbery: child may be a percipient witness to a crime involving a robbery where interstate commerce is involved
- Human Trafficking: minor victim of human trafficking involving sex trafficking or labor trafficking (generally speaking bigger cases involving more victims)

### **Absence of counsel for the child**

With the exception of Juvenile Cases, in large part child witnesses are not represented by counsel and (unlike victims of domestic violence) do not ordinarily have a child advocate present in the courtroom with them (although many states allow for a support person to be in the courtroom with the child especially in dependency cases, i.e. CASAs).

### **Who do you believe and why?**

What are the factors that influence how a finder of fact views a child's credibility? What does science say about children's credibility? What have we learned from scientific evidence about children and their disclosures of abuse?

While most of the literature addresses forensic interviews of children as opposed to court testimony, we can learn a lot from these best practices. Sometimes these practices actually conflict with the way children are

traditionally presented in court. How does that impact children's perceived credibility? Could it be that in some cases the trier of fact has been influenced more by the constraints put in place by the law on how a child testimony's come in (in other words by the kinds of questions that we ask children) than by the testimony itself?

## **Meet a Child Witness**

Presentation of portions of the training video by Professor Thomas Lyons, "Interviewing Children: Getting Less with More". This clip will introduce the audience to a child witness, demonstrate the rapport building portion of a forensic interview, and show how a reluctant child is encouraged to talk about the allegation at issue in the case.

**Matthew M** is a 6 year old boy whose mother was murdered. The father is a prime suspect in the homicide. The child's grandfather supports that father's version of the facts and says the mother was home and alive the night of the murder when he picked up the father and boy from the home. Matthew observed his mother being killed by his father contrary to what the father and grandfather are telling the police. In this clip, the interviewer establishes rapport with Matthew talking about his pet boa. Matthew discloses that his mother is dead and father in jail.

**Ashley V.** is an 11 year old girl who saw her mother killed by her father. The father is claiming self-defense and asserts that the mother pulled a gun on him first. Ashley disputes this defense.

## **What does the science say?**

**Narrative practice works best.** Asking open ended questions to children about allegations has proven to be the best way to elicit detailed information from a child concerning allegations of sexual abuse, domestic violence, and child abuse. Jurors are often persuaded that a child is testifying truthfully when the child is allowed the opportunity to give details as to the alleged incident. When a child is asked leading questions, jurors find a child's testimony to be less credible and more likely to be coached. This conflicts with the traditional way in which we question children on the witness stand where the examination of the witness is controlled and objections can be raised as to a "narrative" response by the witness.

**Prospective Jurors may come in with a bias against children** believing that children are less credible than adults and that younger children are less credible than older children. Research on juror's reactions to child witnesses in mock trials confirms this bias.

- In a study that was done in a mock trial concerning a vehicular homicide where an eyewitness to the crime gave crucial testimony, the age of the witness was changed from a 30 year old, to a 10 year old, to a 6 year old. All other factors remained the same.
- Jurors were selected from a cross section of the community.
- The eye witness claimed the defendant ran a red light while the defendant claimed the pedestrian/decedent ran in front of his car.
- On a credibility scale ranging from 1 to 7, with 7 indicating optimum credibility, the mock jurors judged the 10 year old as a less credible witness than the adult and the 6 year old as less credible than the 10 year old.
- Might this bias against younger children as witnesses be amplified by the way we instruct jurors as to how to view the testimony of a child and/or how children are questioned on the witness stand?

**The NICH protocol, which has been accepted as a best practice and is utilized all over the world, discourages leading questions to a child witness.**

- The children who we see in court are those who have already disclosed abuse (or the incident), therefore leading questions are not necessary.
- Studies have shown that children are 2x more likely to disclose details of abuse and provide many more details when asked the question: "tell me why you are here" rather than leading them with "has anyone touched you inappropriately?"
- How does this affect the way jurors or a trier of fact views answers given by a child on cross-examination consisting of leading questions?

## **Jury Instructions**

- JIs for Child Witnesses may enhance a bias against a child's testimony: the pattern instruction says "Cautionary" and notes that this type of testimony presents "difficulties".
- Pattern Criminal Jury Instructions, Instruction 28, Federal Judicial Center

### **28. Testimony of a Child: Cautionary Instruction**

You have heard the testimony of , and you may be wondering whether his young age should make any difference. What you must determine, as with any witness, is whether that testimony is believable. Did he understand the questions? Does he have a good memory? Is he telling the truth?

Because young children may not fully understand what is happening here, it is up to you to decide whether \_\_\_ understood the seriousness of his appearance as a witness at this criminal trial. In addition, young children may be influenced by the way that questions are asked. It is up to you to decide whether \_\_\_ understood the questions asked of him. Keep this in mind when you consider \_\_\_'s testimony.

#### Commentary

This instruction is somewhat shorter than the standard child's testimony instruction. The committee believes that it is sufficient to call to the jury's attention the basic difficulties with the testimony of a child, specifically stressing the kinds of issues which may arise in connection with such testimony.

### **Another significant factor: trauma**

- Affects the brains of children and might affect their demeanor in court
- Neurological, psychological, and epidemiological research demonstrates that exposure to childhood maltreatment and other traumas has a strong negative impact on a child's brain development,

mental and physical health, cognitive development, and emotional and behavioral functioning. The more types of traumas experienced by a child, the greater the risk to that child's development. Potential cognitive impacts include language delays, attentional issues, and memory problems.

- Many children who later become witnesses in court have already experienced complex trauma in their very young lives (e.g., the two child witnesses who were introduced earlier on tape).
- Research has shown that jurors are often persuaded by factors concerning a witness' appearance in court (i.e., the witnesses' consistency, confidence, projected intelligence, and detail of report). However, with child witnesses, particular those who suffer from complex trauma, their demeanor in the courtroom, influenced by their behavioral history may not reflect consistency, confidence, intelligence and remembered details.

### **Credibility: Truthfulness**

- Studies have shown that children who "promise to tell the truth" are more likely to actually tell the truth.
- Children who are asked and can tell the difference between a truth or a lie are **not** necessarily more likely to tell the truth.
- So, it's important that when children are asked whether they promise to tell the truth, they understand what they are agreeing to do.
- Studies have also shown that children respond to authority figures. They think that if you ask them a question, it might be a trick question and that you already know the answer. They will say "yes" or agree to your question not because that is the truth but because they think that is what you want them to say and you know best.
- Studies show that children will be hesitant to let you know that they don't understand a question (which allows them to be ripe targets for cross examination) but if you provide them with instructions in

advance of what they need to say, giving them examples, they are more likely to let you know they don't understand.

- Children who have a rapport with the interviewer are more likely to open up and disclose difficult things. In this video, you can see how the interviewer builds that rapport and you probably felt that this child was likeable and you would be more inclined to believe this child.
- **Jurors are better able to assess a child's credibility and ability to understand the seriousness of the testimony if they are allowed to see more and hear more from the child.**

## Summary

- 1- Judges need to be educated about the implicit bias that might be present in various forms across the board when a child's testimony is involved.
- 2- With this education and knowledge, Judges will be better able to interject and/or rule on objections when the questioning appears designed to confuse or manipulate a child witness.
- 3- We will be better equipped to craft reasonable and even handed special jury instructions tailored for the particular facts of each case.
- 4- We will be able to make well-informed decisions as to when scientific evidence is allowed into the trial through the testimony of expert witnesses.
- 5- And when we are the triers of fact and/or the ones who are questioning the child, we will be able to elicit more details from the child (or listen for them) thus ensuring a better basis from which to assess the credibility of a child's statement or testimony.