CHALLENGING CHILDREN: A PRIMER ON CROSS-EXAMINING CHILD WITNESSES

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I. Introduction

You are a trial defense counsel who just received your next case. Suppose your client is accused of sexually abusing Vicky, his four-year-old daughter. As you begin to review the case file, several questions come to mind: Was Vicky's forensic interview conducted in accordance with best practices? If not, how can I use that to my client's advantage? What will happen if Vicky is too scared to testify? Assuming she does testify, should I cross-examine Vicky the same way I would an adult?

As the questions above illustrate, child witnesses raise unique legal issues. Accordingly, counsel's approach to confronting a child witness must be substantially different from that used to confront an adult. Successfully confronting a child witness requires counsel to examine the investigation for potential taint;[1] to analyze the forensic interview against best practices; and to assess the child's competency to testify. Additionally, counsel must be prepared to respond to motions for accommodations and, in order to deliver an effective cross-examination, be familiar with the language and mannerisms that are developmentally appropriate for that particular child.

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[1] By "taint," the author is referring to questioning techniques that may influence a child's report. Research has shown "the skill of the interviewer directly influences whether a child relates a true memory, discusses a false belief, affirms details suggested by others, embellishes fantasies, or provides no information at all." Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admissibility*, 65 L. & CONTEMP. PROBS. 149, 150 (2002).

Using a hypothetical scenario involving Vicky throughout, this article provides a rubric that counsel can use to prepare to effectively cross-examine a child witness. Section II discusses the origins of the forensic interview, its importance in child abuse cases, and highlights forensic interviewing "best practices." Section III informs practitioners of ways to successfully challenge a child's competency to testify at trial. Finally, Section IV summarizes the law on remote testimony and provides guidance on how to conduct an effective, age-appropriate cross-examination.

With the ongoing emphasis placed on prosecuting allegations of physical and sexual abuse, cases involving children are only likely to increase. By following the guidance contained in this article, counsel will be able to develop an effective strategy for confronting their next child witness.

II. Identifying Potential Taint

By the time you are detailed to the case, a child witness has likely already spoken with numerous individuals about the alleged abuse including school counselors, pediatricians, family members, lawyers,[2] law enforcement officials, and forensic interviewers, among others.[3] As a

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[2] Any alleged victim of a "sex-related offense" under Articles 120, 120a, 120b, 120c, and 125, Uniform Code of Military Justice (UCMJ) or of an attempt to commit such an offense under Article 80, UCMJ, who is eligible to receive legal assistance services is entitled to representation by a Special Victim's Counsel (SVC). 10 U.S.C. § 1044e (2015). This includes children who are the accused's military dependents. *Id.*; 10 U.S.C. § 1040(a)(5) (2015). As the case proceeds, practitioners should be aware that for alleged victims who are under eighteen years of age, Article 6b(c), UCMJ, requires the military judge to designate a representative of the estate, a family member, or other "suitable individual" to serve as the child's guardian ad litem (GAL) and "assume the victim's rights." UCMJ art. 6b(c) (2016). Because the GAL must represent the child's best interests and the SVC represents the child's expressed interests (which may or may not be one and the same), the SVC will not serve as the child's GAL. U.S. ARMY SPECIAL VICTIMS' COUNSEL PROGRAM, SPECIAL VICTIMS' COUNSEL HANDBOOK 4TH EDITION para 7-1b (9 JUNE 2017). As will be discussed throughout this article, defense counsel must be aware of the varying parties exerting influence upon the child witness, as well as their roles in the process. The SVC and GAL are just two individuals in a potentially very large pool.

[3] While discussed more substantively later in the article, a forensic interview is a "legally sound" and developmentally appropriate method of obtaining factual information about abuse or violence through a neutral and trained professional. Chris Newlin, et. al., *Child Forensic Interviewing: Best Practices*, OFF. JUV. JUST. & DELINQ. PREVENTION JUV. JUST. BULL., Sept. 2015, https://www.ojjdp.gov/pubs/248749.pdf.

general matter, you should carefully note the following while you review the investigation: (1) how many individuals the child spoke with about the alleged abuse; (2) when each disclosure was made (perhaps two weeks, three weeks, or four months after the alleged abuse); (3) the nature of the individual's questioning (open-ended or highly suggestive);[4] (4) the substance of the child's report to each individual; and (5) whether the allegations changed after each subsequent disclosure and, if so, how? You should also determine whether any physical evidence corroborates the allegations and if an apparent motive to fabricate exists.[5]

While this checklist offers a good start to discovering the potential for taint (or outright fabrications), counsel must also have a structured approach to analyzing the child's forensic interview as it may be the only formal interview conducted.[6] Further, and more importantly, there are circumstances under which the child's forensic interview could be admitted into evidence under the residual hearsay exception.[7]

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[4] "There is a good deal of scholarly debate in the area of child suggestibility and its effect on the reliability of the testimony of a child victim; however, scholars agree that the danger of false testimony from a child is greater when the child is subjected to highly suggestive interviewing techniques such as 'closed' (yes/no) questions and 'multiple interviews with multiple interviewers.'" United States v. Cano, 61 M.J. 74, 78 (C.A.A.F. 2005) (citing Thomas D. Lyon, *New Wave of Child Suggestibility Research: A Critique*, 84 CORNELL L. REV. 1004, 1070-72 (1999) and Stephen J. Ceci and Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33, 86 (2000)).

[5] For example, a child could fabricate an allegation as a means of getting attention, to deflect attention away from his or her own misbehavior, or to express anger at a parent for ending the marital relationship.

[6] Civilians cannot be compelled to testify at preliminary hearings. MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 405(h)(2)(B) Discussion (2019) [hereinafter MCM]. Further, while counsel may prevail on a motion for equal access under Article 46, UCMJ, such a remedy would likely come fairly late in the game, maybe even just prior to trial.

[7] Military Rules of Evidence (M.R.E.) 807 permits the introduction of hearsay testimony not otherwise covered by M.R.E. 803 or M.R.E. 804, where, given equivalent circumstantial guarantees of trustworthiness, the military judge determines: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (3) the general purpose of the rules and the interests of justice will best be served by admission of the statement into evidence. MCM, *supra* note 6, MIL. R. EVID. 807 (2019). The proponent must also give advance notice of its intent to offer any such statement into evidence. *Id.* For a case where the court admitted a child's forensic interview into evidence under the residual hearsay exception, *see* United States v. Barbary, 2017 CCA LEXIS 235, A.F. Ct. Crim. App. 2017 (finding the military judge did not abuse his discretion by admitting the child's forensic interview into evidence under M.R.E. 807 because such evidence was necessary due to the child's

Accordingly, counsel must be prepared to show why the child's statements given during the forensic interview are not reliable and, consequently, inadmissible. One way to demonstrate this unreliability is through cross-examining the forensic interviewer to show how the child's forensic interview deviated from the forensic interviewing best practices discussed below.[8]

A. Forensic Interviews

1. Background

During the 1980s and 1990s, problems associated with child witnesses rose to national prominence as a result of high-profile acquittals like the McMartin trial which involved allegations of sexual abuse at a preschool.[9] Despite the enormous amount of time and money prosecutors invested in the case, the highly suggestive questions asked during the interviews and the fantastic stories told by the children made it impossible to determine

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demonstrated lack of memory and reluctance to testify during trial). For a case where the military judge failed to make reasonable efforts to determine the necessity of hearsay evidence, *see* United States v. Czachorowski, 66 M.J. 432, 435 (C.A.A.F. 2008) (rejecting the trial counsel's proffer that the child had forgotten the alleged abuse as sufficient justification to admit the child's pretrial statements to her mother and grandparents under the residual hearsay exception). For a comprehensive analysis of rules of evidence and statutes governing the admissibility of out-of-court statements from children, *see* NAT'L DISTRICT ATTORNEYS ASS'N, RULES OF EVIDENCE OR STATUTES GOVERNING OUT OF COURT STATEMENTS OF CHILDREN (May 2014), https://ndaa.org/wp-content/uploads/Statutes-Governing-out-of-Court-Statements-of-Children.pdf?click=Rules%20of%20Evidence%20or%20Statutes%20Governing%20Out%20of%20Court%20Statements%20of%20Children%20(updated%20May%202014).

[8] In addition to the basic tools for analyzing a forensic interview provided in this article, counsel would be wise to request expert assistance in the field of forensic interviewing immediately upon preferral and, if denied, to file a motion with the court immediately upon referral. While the court will likely provide a pretrial order, nothing prohibits counsel from filing motions ahead of the predetermined schedule.

[9] CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY (Gail S. Goodman & Bette L. Bottoms, eds., 1993). In addition to the allegations of sexual abuse, some children claimed during interviews that they had been taken on plane rides, forced to drink blood, and had to watch animals being mutilated. David Shaw, *COLUMN ONE: NEWS ANALYSIS: Where was Skepticism in Media?: Pack Journalism and Hysteria Marked Early Coverage of the McMartin Case. Few Journalists Stopped to Question the Believability of the Prosecution's Charges.* L.A. TIMES (Jan. 19, 1990), http://articles.latimes.com/1990-01-19/news/mn-226_1_media-coverage.

whether the reports of sexual abuse were accurate.[10] In response to problems associated with the child interviewing techniques law enforcement used during the McMartin trial and other high-profile child sexual abuse cases, the need for a "forensic interview" conducted by trained professionals emerged.[11]

2. Defined

While there is no agreed upon definition of what constitutes a "forensic interview," the United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), offers the following definition in its bulletin on child forensic interviewing best practices: "A forensic interview of a child is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence. This interview is conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process."[12]

Just as there is no single agreed upon definition for what constitutes a "forensic interview," there are no uniform training requirements for becoming a certified forensic interviewer; moreover, the training that is available is not limited to any particular professional field.[13] Accordingly, the field of forensic interviewers includes police officers, social workers, psychologists, and psychiatrists, among others.

3. Best Practices

There are many forensic interviewing courses administered at both the state and federal level that teach different interviewing techniques.[14] In 2015, representatives of major forensic interviewing programs gathered in

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[10] The trial of Peggy McMartin and her son, Ray Buckey, lasted six years and cost taxpayers approximately $15 million. Goodman & Bottoms, *supra* note 9 at 97. "Although the jury had mixed feelings about whether abuse had occurred, they agreed that the original interviews were so poorly conducted that conviction was not possible." *Id.*

[11] Victor I. Vieth, *The Forensic Interview at Trial: Guidelines for the Admission and Scope of Expert Witness Testimony Concerning an Investigative Interview in a Case of Child Abuse*, 36 WM. MITCHELL L. REV. 186, 188 (2009).

[12] Newlin et al., *supra* note 3, at 3.

[13] *Id.*

[14] Vieth, *supra* note 11, at 195.

order to address the multitude of forensic interviewing techniques and the related training required.[15] Subsequently, the OJJDP disseminated a bulletin with contributions from these representatives setting forth best practices of those conducting forensic interviews of children in cases of alleged abuse or exposure to violence.[16]

Returning to our hypothetical scenario, you are now ready to watch Vicky's electronically recorded forensic interview.[17] Keep the following guidance in mind as you proceed:[18] a "forensic interview is an interview with children used to gather information, not conduct therapy."[19] As such, the overall tone of the interview should be oriented towards gathering facts, not "helping" Vicky. As the interview goes on and you learn more details, evaluate whether Vicky's interviewer adhered to the best practices.

a. Interview Setting

You hit play. Vicky is sitting alone in the room. The walls are pale-blue and decorated with paintings of what seem to be talking animals. Vicky is playing with toys as the interviewer enters and introduces himself.

Although interview rooms will naturally vary in size, shape, and color, in accordance with best practices, only non-fantasy artwork should be

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[15] *Id.*

[16] Newlin, et al., *supra* note 3, at 2.

[17] "Electronic recordings are the most complete and accurate way to document forensic interviews" and are used in "90 percent of Children's Advocacy Centers (CACs) nationally." Newlin, et al., *supra* note 3 at 6. If the video of the interview is not included in your case file, request a copy immediately. If the interview was not recorded at all, you must highlight the lack of the "most complete and accurate" documentation of the interview at every opportunity (for example, in opening statement, during cross-examination of the forensic interviewer and direct examination of your expert witness, if you have one, and while making closing argument). *Id.*

[18] Counsel should also keep the checklist, assembled earlier, available to use in assessing whether the potential "taint" from individuals Vicky spoke with before the official investigation began may have influenced her responses during the forensic interview. If so, did the forensic interviewer employ tools to identify and mitigate the impact of these external influences on her report?

[19] State v. Hilton, 746 So.2d 1027, 1033 (La. Ct. App. 2000). Further, "therapists may be interested in bringing to fruition intrapsychic conflicts that may or may not be reality-based." Walker, *supra* note 1 at 152.

displayed on the walls.[20] Further, "materials that encourage play or fantasy are uniformly discouraged."[21]

Comparing this best practice with Vicky's interview, look more closely at the setting where Vicky's interview took place. Are the animals depicted in the paintings "talking"? To the extent you cannot see the paintings clearly, you should ask the forensic interviewer for these details in a pretrial interview, through discovery, or during cross-examination. If the animals are "talking," the paintings would qualify as fantasy artwork and run afoul of this best practice. You also saw Vicky playing with toys immediately before the interviewer entered the room. This too is counter to best practices. The presence of fantasy artwork and toys may undermine the fact-finding purpose of the interview because it could cause Vicky to view the interview as play-time.[22]

b. Rapport Building and Preliminary Instructions

You press play again. After asking preliminary questions about what Vicky does for fun and her favorite foods and colors, the interviewer begins to ask questions about the alleged abuse.

All interview models acknowledge that building rapport is important for both the child and the interviewer."[23] While it is important for the child to trust the interviewer, the interviewer should provide the child with guidance for how the substantive interview is going to be conducted and not simply engage in friendly banter.[24] For example, the interviewer should instruct the child: (1) that the interviewer was not present during

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[20] Newlin, et al., *supra* note 3, at 6. The use of child-sized furniture and painting with "warm" colors is acceptable. *Id.* What about markers and paper? There is no uniform consensus with respect to making markers and paper available to the child. *Id.* If these supplies are provided, counsel need to know if the child used them and what he or she drew, information that may be obtained through pretrial interviews or requested in discovery. Do the drawings look like fantasy? If so, counsel must explore how that initial foray into make-believe may have affected the rest of the interview, particularly if the interviewer fails to instruct the child to only talk about things that really happened (another best practice discussed more substantively later).

[21] *Id.* Because the goal of the forensic interview is to gather facts, best practices discourage the use of materials that encourage play or fantasy as doing so could confuse the child.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 8.

the alleged abuse and does not know the answers to the questions he is asking; (2) that it is permissible for the child to respond "I don't know" or "I don't understand that question"; and (3) that the child should only talk about things that really happened.[25] Further, while there is a split in the practice about how to encourage children to tell the truth, research indicates that children "may be less likely to make false statements if they have promised to tell the truth before the substantive phase of the interview."[26]

In our hypothetical, Vicky's interviewer attempted to engage in rapport building by asking her about her favorite foods and colors. While there is nothing wrong with doing so, the interviewer failed to provide Vicky with any preliminary instructions set forth above, nor did he ask Vicky to promise to tell the truth during the interview. While failure to solicit such a promise from Vicky may not conflict with the best practices, Vicky's interviewer should, given the findings of the research, be able to explain why he did not have Vicky promise to tell the truth prior to beginning the substantive portion of the interview.[27]

c. Use of Open-Ended and Non-Suggestive Questions

After noting your observations, you continue to watch the interview. The interviewer asks Vicky to tell him what happened with your client. When Vicky says she does not know, the interviewer asks whether your client ever touched her in her "private areas."

Forensic interviewers should use open-ended questions that encourage the child to provide information.[28] Preferred construction of questions include: "What are you here to talk to me about today?" as an example of an appropriate non-leading question to ask after the rapport-building phase

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[25] Newlin, et al., *supra* note 3 at 8. This goes back to the protocol about interview settings. The conditions and settings under which the interview takes place will influence a child's understanding of the purpose of the interview, which naturally will shape how the child responds to questioning. Accordingly, in addition to not displaying fantasy artwork on the walls or providing toys for the child to play with, the interviewer should inform the child to only discuss events that actually occurred.

[26] *Id.* Some states require children to take a "developmentally appropriate oath" before the interview begins while others simply "encourage" truth telling in an effort to assess competency. *Id.*

[27] *Id.*

[28] *Id.* at 9.

of the interview.[29] If the child's response concerns the alleged abuse, the interviewer should perhaps ask this follow-up open-ended question: "Tell me everything and don't leave anything out."[30]

Here, the interviewer asked Vicky to tell him what happened with your client. As such, he, not Vicky, is the first person to introduce your client into the conversation. Another deviation from best practices is that it came through a leading question asked at the very beginning of the interview. While asking such a direct question may be appropriate later in the interview after Vicky has provided information about your client, specific questions should be reserved for either clarifying previous responses or expanding upon previous answers, rather than introducing wholly new topics or individuals.[31]

d. Concluding the Interview

After carefully documenting these discrepancies, you press play again. Vicky describes the alleged abuse in specific detail. At one point, the interviewer hands Vicky two unclothed dolls and asks her to use them to demonstrate the alleged abuse. While using the dolls, Vicky describes additional acts of abuse that she had not mentioned before. The interview goes on and after Vicky answers the last question, the interviewer tells Vicky she "did great" and leaves the room.

At the termination of a forensic interview, the interviewer should: (1) ask the child if there is anything else she needs the interviewer to know; (2) ask if there is anything else she wants to tell or ask the interviewer; and (3) thank the child for her "effort," not for the information provided.[32]

How does the interviewer's wrap-up compare with the above best practice? Here, the interviewer told Vicky she "did great." This is

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[29] *Id.*

[30] *Id.*, *supra* note 3, at 9.

[31] Goodman & Bottoms, *supra* note 9, at 108. Moreover, while there may be times outside of clarification or expansion where use of a prompt is appropriate such as with a child who is too scared or anxious to speak, the interviewer should "allow for silence or hesitation without moving to more focused prompts too quickly." Newlin, et al., *supra* note 3, at 9. Further, there is "broad consensus" that interviewers should be cautious about using externally derived information (that is, information that was gathered outside the interview or that the child has not provided). *Id.* at 10.

[32] Newlin, et al., *supra* note 3, at 10.

problematic because words of affirmation encourage consistency, not necessarily truth-telling.[33] Instead, the interviewer should have simply thanked Vicky for speaking with him. The interviewer also failed to give Vicky an opportunity to provide additional information. You note these discrepancies, along with the others, as potential areas to cross-examine the forensic interviewer should he testify.[34]

4. Interview Aids

One tool that is not included on the list of best practices are aids such as anatomically detailed drawings or dolls. "The goal of a forensic interview is to have the child verbally describe his or her experience."[35] To that extent, the use of interview aids remains controversial and the OJJDP concludes, "ongoing research is needed to shed further light on the influence of various types of media on children's verbal descriptions of remembered events."[36] Anatomical dolls in particular receive a lot of attention and are generally familiar to most practitioners. While the impact of use of anatomical dolls has on children's reports may need further research,[37] there are several potential problem areas of which defense counsel should be aware.

First, as noted above, the goal of a forensic interview is to have a child explain what happened in his or her own words. To the extent the use of any prop, anatomical doll or otherwise, is needed to spur the discussion, you already have an area that can be explored to your advantage during cross-examination of the forensic interviewer should he or she testify

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[33] Goodman & Bottoms, *supra* note 9, at 80. "It is a good idea to praise children for their effort . . . [i]t is not a good idea to praise them for the content of what they report, as this may cause them to 'report more of the same' whether they are certain about the information or not." *Id.*

[34] *See infra* Appendix A. Because the forensic interview could be offered into evidence under a variety of theories of admissibility (as residual hearsay or as a prior consistent statement, for example), it is critically important that counsel are prepared to attack the reliability of the interview. Appendix A provides a sample cross-examination of Vicky's forensic interviewer into several areas discussed in the hypothetical involving Vicky.

[35] Newlin, et al., *supra* note 3, at 7.

[36] *Id.* The frequency with which anatomical dolls are used in forensic interviews differs among jurisdictions as does the requirement to conduct a forensic interview at all. Accordingly, if presented with a case in which an anatomical doll is utilized, counsel should determine whether the usage was in accordance with the jurisdiction's practice. If not, this too is a ripe area to cross-examine the forensic interviewer should he or she testify.

[37] *Id.*

either at trial or during a motions hearing.[38] Second, if dolls were used, were they clothed? They should be—at least at the outset.[39]

Comparing Vicky's interview against this guidance, you first note that Vicky verbally described the alleged abuse in detail and, as such, the dolls were not needed to facilitate communication. Second, the dolls were unclothed and Vicky used them to simulate sexual acts she had not previously reported. Eliciting these two critical points on cross-examination will allow you to then argue in closing that the additional acts were simply the by-product of Vicky playing with the unclothed and unnecessary dolls, thus undermining her credibility.

III. Competency

After examining the pretrial investigation for potential taint and assessing the forensic interview against the best practices, counsel should next assess whether the child is competent to testify.[40] With the exception of the military judge and members, every person who has personal knowledge of a matter or is testifying as an expert witness and takes an oath promising to tell the truth is competent to testify.[41] Additionally, whether the witness understands the difference between truth and falsehood and the moral importance of telling the truth, goes to the weight

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[38] Several experts have opined that props should be used with "great caution" and "only as a last resort." Walker, *supra* note 1, at 11. When they are used, they should only be used to encourage the child to expand upon information that has already been provided. *Id.* Further, preschool-aged children are particularly susceptible to the misleading effects of not only leading questions generally, but also to the suggestive use of anatomical dolls. Goodman & Bottoms, *supra* note 9 at 98.

[39] Goodman & Bottoms, *supra* note 9, at 54. " [These dolls] seem to have no clothes so you can't play school with them, set them up for tea, or even undress them to take a bath. There is one main thing you can see on these dolls—their sex . . . there is just about one game to play with these dolls—sex." *Id.*

[40] Because assessing competency will require evaluating a child's ability to recall and communicate, counsel should request expert assistance in this area. Moreover, while counsel may be able to flag competency issues while comparing the interview against the best practices, counsel should keep the two inquires distinct (at least analytically) to avoid conflating the different standards that apply to each.

[41] MCM, *supra* note 6, MIL. R. EVID. 601 ("Every person is competent to be a witness unless these rules provide otherwise."); *Id. at* MIL. R. EVID. 602 (describing the need for personal knowledge); *Id. at* MIL. R. EVID. 603 ("Before testifying, a witness must give an oath or affirmation to testify truthfully. . . . in a form designed to impress that duty on the witness' conscience."); *Id. at* MIL. R. EVID. 605 (military judge not competent to testify), *Id. at* MIL. R. EVID. 606 (members not competent to testify); *Id. at* MIL. R. EVID. 702 (expert testimony).

of the testimony and not its competency.[42] The latter principle is important to keep in mind as trial counsel often attempt to establish the child's ability to understand truth from falsehood by using demonstrative aids consisting of truth-telling tasks before the child testifies (and, consequently, prior to any attack by the defense suggesting otherwise). Since children are presumed competent to testify, counsel should consider objecting to these exercises as improper bolstering. Further, although the Court of Appeals for the Armed Forces has found that age, by itself, is not a sufficient basis for challenging a witness's competence, there are other ways it can be attacked.[43]

Let's watch the interview again. This time, ask yourself: Is Vicky able to answer the precise questions she is asked? Does she appear to be delivering rehearsed responses? Was anyone watching the interview outside the room? Does Vicky ever leave the room?[44]

After watching the video, you notice the majority of Vicky's answers appear rehearsed since they are not responsive to the precise questions the interviewer asked. Additionally, you overhear the interviewer mention that Vicky's mom was watching through a two-way mirror and notice that Vicky took several breaks during which time she left the room. At this point, you do not know whether Vicky's mom is telling Vicky what to say or is simply trying to help Vicky remember what Vicky previously had said occurred. However, based on the above, one theory you should explore with your expert is whether Vicky's testimony is not based on her own personal knowledge, but rather from what she has been told by her mother. If so, you may have a valid basis to challenge Vicky's competency to testify for lack of personal knowledge.[45] To the extent the

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[42] *Id. at* MIL. R. EVID. 601 analysis, at A22-53.

[43] United States v. Morgan, 31 M.J. 43, 47 (C.A.A.F. 1990) ("We have never suggested that children might be incompetent to testify based on some general inability to understand an oath or affirmation to tell the truth.").

[44] Charles H. Rose III, MASTERING TRIAL ADVOCACY 246 (2014) (discussing child competency generally and providing foundational questions to establish competency, if challenged); Walker, *supra* note 1, at 5 (noting that children have a difficult time distinguishing between information that is based on personal experience from information obtained from parents or other sources).

[45] MCM, *supra* note 6, MIL. R. EVID. 601; MIL. R. EVID. 602. If competency is challenged, the trial counsel will attempt to establish a foundation for the child's ability to testify. For an example of questions the trial counsel may use to rehabilitate the witness, *see* Rose, *supra* note 44, at 246. Moreover, if a valid basis to challenge competency exists, counsel should consider which makes better strategic sense: filing a pre-trial motion or challenging competency at trial. One risk in filing a pretrial motion is

interview also raises concerns about Vicky's general ability to understand and respond to questions, you should raise those issues as well. Having crafted a plan to keep Vicky from testifying, you should continue to prepare for her cross-examination in the event the court determines she is, in fact, competent.

IV. Confronting the Child Witness

A. Confrontation

1. Introduction

The Sixth Amendment to the Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[46] A primary interest secured by the Confrontation Clause is the right to cross-examine, which the Supreme Court has called, "[T]he principal means by which the believability of a witness and the truth of his testimony are tested."[47] Further, while the right to cross-examine is not absolute and the trial judge has the authority to preclude or restrict repetitive or harassing questions, cross-examination has historically included the right to challenge a witness's perceptions and memory and to impeach his credibility.[48] The Confrontation Clause, which applies to members of the armed forces during the trial,[49] has

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that, if successful, the government will have more time to prepare (and give notice of its intent) to introduce the statement as residual hearsay under M.R.E. 807 than had the motion been granted during trial.

[46] U.S. CONST. amend. VI.

[47] Davis v. Alaska, 410 U.S. 308, 316 (1974).

[48] *Id.* In a subsequent case, the Supreme Court identified several grounds upon which a trial judge could appropriately limit cross-examination, including concerns about harassment, prejudice, confusion of the issues, witness safety, or for interrogation that is repetitive or only marginally relevant. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986); *see* MCM, supra note 6, MIL. R. EVID. 611 (granting the military judge the ability to limit cross-examination on similar grounds).

[49] Article 32, UCMJ, is not a "critical stage" of the trial and, thus, the accused enjoys only the right of cross-examination, not confrontation. United States v. Bramel, 29 M.J. 958, 964 (A.C.M.R. 1990). While Article 32, UCMJ, has undergone substantial revisions since *Bramel* was decided, there is no reason to think any of the changes would affect its rationale. Indeed, the recent changes limiting the scope of the hearing and affording alleged victims the option of testifying further indicates the Article 32 hearing is not a "critical stage" of the trial as the court in *Bramel* found.

unique applications when the witness is a child.[50]

2. Limits on Face-to-Face Confrontation (Remote and Screened Testimony)

Recognizing that it is more difficult to lie about a person while in his presence than "behind his back," the Supreme Court has acknowledged that witnesses are less likely to wrongfully implicate an innocent person during face-to-face confrontation.[51] Further, the Court noted that the symbolic importance of face-to-face confrontation between the accused and his accuser is so engrained in human nature that it is regarded as "essential to a fair trial."[52] Accordingly, there is a "preference" for face-to-face confrontation.[53] The right to face-to-face confrontation is not absolute, however, and must occasionally give way to considerations of public policy.[54] One such public policy consideration concerns the protection of minor victims of sex crimes from further trauma and embarrassment, an issue the Supreme Court addressed in *Maryland v. Craig*.

In *Maryland v. Craig*, the Supreme Court considered the issue of whether the Confrontation Clause "categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed-circuit television."[55] The case centered around a Maryland statute that permitted judges to receive, via one-way closed-circuit television[56] the testimony of child

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[50] United States v. Jacoby, 29 C.M.R. 244, 246-47 (C.M.A 1960) ("[I]t is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."); United States v. Easton, 71 M.J. 168, 174 (C.A.A.F. 2012) (citing United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004)) for the position that, "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable.").

[51] Maryland v. Craig, 497 U.S. 836, 846 (1990).

[52] *Id.* at 847.

[53] *Id.* at 849.

[54] *Id.* at 850.

[55] *Id.* at 840.

[56] This procedure allowed the child witness, prosecutor, and defense counsel to move to a separate room while the judge, jury, and defendant remained in the courtroom. The child witness was then examined and cross-examined in the separate room, while a video monitor recorded and displayed the testimony in the courtroom. The child witness was unable to see the defendant, who was permitted to remain in electronic communication with defense counsel. *Id.* at 841.

witnesses who were alleged to be the victims of child abuse. As a prerequisite to hearing testimony in this manner, the statute required the trial judge to determine that testimony by the child victim in the courtroom would result in the child suffering "serious emotional distress such that the child cannot reasonably communicate."[57] Craig objected to this procedure as a violation of the Confrontation Clause.[58]

The Court upheld Maryland's statute, reasoning that the state's interest in the psychological well-being of child abuse victims "may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accuser's in court."[59] In doing so, the Court distinguished the statutory procedure in *Craig* from the one the Court invalidated just two years earlier in *Coy v. Iowa* that allowed the placement of a screen between child witnesses and the defendant based solely on a generalized presumption of trauma associated with children testifying in front of their alleged abuser.[60] In *Craig*, the state presented expert testimony that the victims would experience "serious emotional distress" from testifying in front of the defendant (as opposed to by the courtroom generally).[61]

Military Rule of Evidence (MRE) 611(d) is the service equivalent of Maryland's statutory scheme. It allows a child victim or witness to testify from outside the courtroom where the military judge makes the following three findings on the record:

> (1) that it is necessary to protect the welfare of the particular child witness;
> (2) that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and
> (3) that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis.[62]

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[57] *Id.* (citing MD. CTS. & JUD. PROC. CODE. ANN. § 9-102(a)(1)(ii) (1989)).
[58] *Craig*, 497 U.S at 842.
[59] *Id.* at 853.
[60] Coy v. Iowa, 487 U.S. 1012, 1021 (1988).
[61] Additionally, the Court noted that despite the absence of face-to-face confrontation, the procedure, overall, satisfied the remaining elements of confrontation: oath, cross-examination, and observation of demeanor by the trier of fact. *Craig*, 497 U.S. at 857.
[62] MCM, *supra* note 6, MIL. R. EVID. 611(d)(3). Additionally, "de minimis" has been interpreted to mean more than "mere nervousness or excitement or some reluctance to testify." United States v. McCollum, 58 M.J. 323 (C.A.A.F. 2003) (citing *Craig*, 497 U.S. at 856). Further, while alleged victims may testify from places other than the courtroom, courts have overturned cases where the accused (as opposed to the witness)

Returning to our hypothetical scenario, imagine the trial counsel files a motion with the judge requesting a screen be placed between her and the accused based upon studies showing that children experience trauma when compelled to confront their abusers in person.

Your response to the motion should cite *Coy*, arguing that such generalized notions of trauma are insufficient to overcome your client's constitutional right to confront his accuser and that approving such a request would also violate the procedures set forth in MRE 611(d). Specifically, the government failed to demonstrate how the screen was needed to protect Vicky's welfare, how any harm Vicky might have experienced was caused by your client's presence (as opposed to from testifying generally), and that even if Vicky would have experienced harm caused by your client's presence, that any such harm was more than de minimus.

Assume you prevail on the motion, and the trial counsel files another motion attaching an affidavit from a psychologist who avers that Vicky has post-traumatic stress disorder from the alleged abuse that will cause her severe anxiety if compelled to testify in the intense courtroom setting of a court-martial. In order to trump your client's constitutional right to confront his accuser, both *Maryland v. Craig* and MRE 611(d) require the military judge to find that any trauma Vicky is expected to experience would be caused by the presence of your client, and not by the experience of testifying generally. In the above scenario, the expert's affidavit fails to establish this evidentiary burden and the military judge should deny the motion.[63]

Having prevailed on these motions, suppose you then receive notice that Vicky may not testify at all (or if she does, she may not be able to communicate due to fear or anxiety) in which case the trial counsel would offer Vicky's forensic interview into evidence under the residual hearsay exception. Upon receipt of any such notice, you should consider filing a motion in limine arguing the statements Vicky made during the forensic

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has been removed absent a finding he was disruptive. *See* United States v. Daulton, 45 M.J. 212 (C.A.A.F. 1996) (finding the accused's confrontation rights were violated where the military judge excluded him from the courtroom while his daughter testified even though the accused watched the testimony via close circuit television because he could not observe the alleged victim, nor could the members observe him, and he could not communicate with counsel except through the bailiff).

[63] For an application of the procedures set forth in MIL. R. EVID. 611(d), *see McCollum*, 58 M.J. at 331–34.

interview are unreliable and inadmissible under the Confrontation Clause, and outline the various instances in which the interviewer deviated from the forensic interviewing best practices in the multiple, significant ways you carefully noted during your review of the interview.[64]

The trial counsel is not yet finished with his pretrial motions. This time, counsel seeks the court's permission for Vicky to testify while holding her favorite doll. How should you handle this motion?

3. Unique Issues—Comfort Items

Remote testimony is just one of several accommodations for children testifying in the courtroom; other accommodations may include child-sized furniture, support persons, and comfort items. As a general matter, accommodations should not be given as a reward for providing testimony as that undermines the reliability of the witness's testimony.[65] Instead, they should be implemented on a case-by-case basis based upon the needs of the alleged victim as required by *Craig* and should not be used to garner sympathy from the finder of fact.[66]

In determining whether to allow an accommodation, courts typically balance the child's need for the accommodation against the prejudice to the accused.[67] Often courts will look to certain factors, including: "the age of the witness, the nature of the comfort item, whether the prosecutor encouraged or initiated the witness to hold a comfort item, the nature of the offense, the likely impact of testifying in court facing the defendant, and any cautionary instructions given to the jury."[68]

Returning to our scenario, you should first request the military judge make specific findings as to why Vicky needs the comfort item. Second,

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[64] Crawford v. Washington, 541 U.S. 36 (2004) (testimonial statements of witnesses absent from trial are admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the witness).

[65] Major Bradley M. Cowan, *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, ARMY LAW., Feb. 2013, at 1,7 (additionally, Major Cowan notes that a limiting instruction ordering the panel to disregard the comfort item may be appropriate).

[66] *Id.*

[67] Angela Nascondiglio, *The Cost of Comfort: Protecting a Criminal Defendant's Constitutional Rights When Child Witnesses Request Comfort Accommodations*, 61 N.Y.L. SCH. L. REV. 395, 400-01 (2016-2017).

[68] *Id.* at 401.

consider objecting on due process grounds, arguing the prejudice to your client's right to a fair trial by giving the alleged victim undue sympathy outweighs the expected benefit to Vicky. Further, if overruled, you should request a limiting instruction that advises the panel to disregard the presence of the comfort item. Having successfully handled all of the trial counsel's pretrial motions, you are now ready to develop the questions you will ask Vicky on cross-examination.

B. Execution—Crafting Developmentally Appropriate Questions

As the Supreme Court has noted, cross-examination is the "principal means" for determining the believability of a witness and testing the truth of his testimony.[69] It follows then that in cases where the testimony of the child may be the primary evidence against your client, a skillful cross-examination of the child witness is imperative and may even determine the outcome of the trial. Indeed, "[a]ll of the forensic interviewing models agree that considering the age and development of the child is essential."[70] In order to succeed, counsel must not only know the facts of the case, but also how to present questions to the child in an age and developmentally appropriate manner.

Additionally, cross-examination of a child should be done for a specific purpose[71] such as: to minimize the damage done on direct examination; to discredit the child's testimony due to bias, inconsistency or motive to fabricate; or to establish facts that support your theory of the case.[72] Taken together, counsel preparing to cross-examine a child witness must not only know what information they intend to elicit and

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[69] *Davis*, 410 U.S. at 316.

[70] As noted in the OJJDP's bulletin, while infants and toddlers can recall experiences, they do not associate those memories with verbal descriptions. Newlin, et al., *supra* note 3, at 4. As children age, their ability to verbally describe experiences improves. *Id.* Moreover, children's ability to recognize: (1) they understand a question; (2) possess stored information about it; and (3) can retrieve the relevant information (a process called "metacognition") also improves as children age. *Id.*

[71] Counsel must always evaluate the risks and benefits of conducting cross-examination of any witness. For child witnesses, this calculation is even more important. The benefit of cross-examining a child witness without a specific purpose for doing so is unlikely to outweigh the risk of having the child look sympathetic to the fact finder or, worse, credible.

[72] Steven Lubet, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 87-88 (3rd ed. 2004).

why, but also how to effectively elicit that information given the child's age and development.

1. Where to Begin

Counsel cannot assume the style and demeanor they employ when cross-examining an adult witness will be effective for cross-examining a child witness, although it could in certain cases. Instead, counsel's approach must be individually crafted based on the child and the case. How to begin the cross-examination will be driven in part by your natural courtroom demeanor, but also by whether you've had the opportunity to interview the child before and establish rapport.[73]

Counsel should also review the OJJDP's best practices for interviewing children and implement suggested techniques into their own examinations. For example, one way to begin the examination is to identify yourself and lay some ground rules such as explaining to the child that if she does not know the answer to a question or does not understand the question, she should say "I don't know" or "I don't understand the question."[74]

2. Transitioning to Substance

However you choose to begin, you will need to transition to the substance of the examination. To do so, one author suggests asking the child a series of questions the child could easily agree with before skillfully (and subtly) transitioning to asking substantive questions for which an affirmative response is also sought.[75]

While it is important to get the timing of the transition from introductory to substantive questions correct, it is, as mentioned above, critical that the questions be delivered in an age and developmentally appropriate manner. If you have secured an expert, he will serve as your primary advisor for developing appropriate questions. If you do not have the benefit of an expert, consider employing some of the strategies forensic

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[73] John E.B. Myers, *The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment*, 18 PAC. L. J. 801, 878-79 (1987).
[74] Newlin, et al., *supra* note 3, at 8.
[75] For a more in depth discussion about this technique, *see* Myers, *supra* note 73, at 880.

interviewers use to conduct developmentally and age-appropriate interviews of children such as: using the active voice; avoiding negatives and double negatives; asking one question at a time; using simple words; using the child's terms; and being mindful to signals the child does not understand your questions.[76] By using simple words and asking simple questions, you can greatly enhance your ability to craft an effective cross-examination.[77]

V. Conclusion

When confronting a child witness, counsel's approach must be substantially different from that used to confront an adult. Conducting an effective cross-examination of a child witness requires reviewing the pretrial investigation for potential taint; analyzing the forensic interview against best practices; assessing the child's competency to testify; responding appropriately to motions for accommodations; and using age and developmentally appropriate language during the examination itself. Employing the tools and strategies discussed in this article will provide any defense counsel with a rubric to zealously represent their client and successfully challenge a child witness.

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[76] Walker, *supra* note 1, at 9. Of course, counsel may, for strategic reasons, wish to deviate from this list.

[77] *See infra* Appendix B for a sample cross-examination of Vicky that utilizes some of these strategies.

Appendix A. Sample Cross-Examination of Vicky's Forensic Interviewer

Q. Agent Smith, you conducted the forensic interview of Vicky?

A. Yes.

Q. While waiting in the interview room, Vicky was playing with dolls?

A. Yes.

Q. The walls were decorated with pictures of unicorns and talking animals.

A. Yes.

Q. You are familiar with the forensic interviewing best practices?

A. Yes.

Q. Then you know play items and fantasy artwork are uniformly discouraged.

A. Yes, but Vicky knew the interview was not play time.

Q. You didn't tell her to only talk about things that really happened, did you?

A. No, not expressly.

Q. And you didn't make her promise to tell the truth before beginning the interview.

A. No, I didn't.

Appendix B. Sample Cross-Examination of Vicky

Q. Hi, Vicky. My name is Sam. Do you remember talking to me?

A. Yes.

Q. I am going to ask you a few questions. It's okay to say I don't know or I don't understand the question. Do you understand?

A. Yes.

Q. You've talked to a lot of grown-ups about what happened, right?

A. Yes.

Q. You don't always remember everything that happened, do you?

A. No.

Q. When you forget, sometimes the grown-ups will help you remember.

A. Yes.

Q. They'll tell you what you said before.

A. Yes.

Q. And that will help you remember?

A. Yes.

Q. The grown-ups like it when you remember, don't they?

A. Yes.

Q. When you remember, they'll tell you good job?

A. Yes.[78]

[78] *See* Myers, *supra* note 73, at 893-94 (using this line of cross-examination about remembering to show how adults can influence a child's testimony). Myers' article is a great tool for practitioners as it provides sample cross-examination questions into a variety of other areas as well.