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Questioning of Child Witnesses
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I. Children are presumptively competent as witnesses, and should not be disqualified by age-inappropriate competence questions.

There is no minimum age requirement to testify as a witness in California courts. Children, like other witnesses, are presumed competent to testify unless it is demonstrated that they are "incapable of understanding the duty of a witness to tell the truth." Ca. Evid. Code § 700; see *In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1299.

Child witnesses are often asked confusing, age-inappropriate questions in an attempt to assess their competence, which creates a risk that they may be erroneously disqualified from testifying when they could have provided accurate and relevant testimony.

Children often have a good understanding of the meaning of "truth" and "lie" and the importance of telling the truth, even though they are incapable of defining these terms or explaining the difference between them (Lyon & Saywitz, 1999). Also, children should not be asked hypothetical questions in which the hypothetical speaker is the adult questioner or the child. For example, if an adult asks "if I said the sky was green, would that be the truth or a lie?" some children

will be reluctant to call the adult a liar (Lyon, 2002). Similarly, if an adult says "if you said the sky was green, what would happen to you?" some children will fail to answer, because they view hypothetical questions as suggestions and do not want to lie (Lyon, Saywitz, Kaplan, & Dorado, 2001).

It is not necessary for the child to answer questions about the meaning and morality of truth in order to assess the child's competency. In *Katrina L.*, counsel asked the child "Now you can tell the judge the truth, okay?" and the child responded "Okay." The judge deferred ruling on the child's competency until the completion of her testimony, as courts are allowed to do. See Cal. Evid. Code § 701(b) ("In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness").

Instead of age-inappropriate competence questions, counsel should request and bench officers should allow alternative approaches supported by developmental research. Children respond well to pictures that depict children making true and false statements about easy to identify objects (in order to assess their understanding of "the truth" and "a lie"), and to pictures that depict two children talking to an authority figure in which one child is said to lie and the other is said to tell the truth (in order to assess their understanding that one of the children will "get in trouble"). For sample pictures, see the Lyon-Saywitz Oath-Taking Competency Task, available at no cost from the authors.

II. Child witnesses should be given an age-appropriate oath.

Section 765 of the California Rule of Evidence requires that children under 14 be addressed in age-appropriate language. Section 710 specifically allows the court to substitute a "promise to tell the truth" for an oath if the child is under 10 or has a "substantial cognitive impairment."

Children recognize the significance of promises by grade school, and even younger children understand that when one says one "will" do something, one is likely to do it (Lyon, 2000). Research with both abused and non-abused children has found that eliciting a promise to tell the truth increases children's honesty (Lyon, 2000; Lyon & Dorado, 2006; Talwar, Lee, Bala, & Lindsay, 2002, 2004).

The promise must be worded carefully, however. It is a good idea to mention both "promise" and "will," because children understand the meaning of "will" before they understand the meaning of "promise." Following up with "Are you going to tell me any lies?" will ensure that the child is not simply saying yes to questions she does not understand (because the appropriate answer is "no"). Also, this question is less confusing than asking the child to "promise not to tell any lies" (Lyon, 2000).

Model Oath for Child Witnesses (Ca. Evid. Code § 710)

It's really important that you tell us the truth.
Do you promise that you will tell us the truth?
Will you tell us any lies?

III. Child witnesses in dependency cases who are reluctant to testify and/or at risk of emotional harm should be allowed to testify in chambers.

Under *Ca. Welf. & Inst. Code § 350(b),* dependency court bench officers have clear authority to make accommodations to help child witnesses testify without unnecessary trauma or intimidation*:*

> § 350(b) The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents, if the minor's parent or parents are represented by counsel, the counsel is present and any of the following circumstances exist:
>
> (1) The court determines that testimony in chambers is necessary to ensure truthful testimony.
> (2) The minor is likely to be intimidated by a formal courtroom setting.
> (3) The minor is afraid to testify in front of his or her parent or parents.
>
> … The testimony of a minor also may be taken in chambers and outside the presence of the guardian or guardians of a minor under the circumstances specified in this subdivision.

In *In re Katrina L.* (1988) 200 Cal.App.3d 1288, 1297-1298, the court of appeals held that in-chambers testimony of child was proper under §350(b), even though the child did not explicitly say that she was afraid to testify; the juvenile court properly relied on statements in social worker's report in determining that there was a basis for in chambers testimony. *See also In re Mary S.* (1986) 186 Cal.App.3d 414, 422-423 (even prior to enactment of § 350(b), it was not an abuse of discretion for juvenile court to have children testify in chambers without parents present; parents' due process rights were adequately protected by presence of counsel).

Other special accommodations for child witness are also permissible, and courts and counsel should use alternative means of taking a child's testimony if necessary to ensure the child's well-being and prevent intimidation. *See, e.g., In re Amber S.* (1993) 15 Cal.App.4th 1260, 1266 (juvenile court did not abuse

discretion by having children testify by closed-circuit television; court's inherent powers to protect and promote best interests of children included the power to "utilize a new form of procedure if necessary to achieve that objective').

IV. All questioning on direct and cross examination of child witnesses must be age-appropriate.

The trial court has an obligation to ensure that the questioning of children is age-appropriate. Ca. Evid. Code § 765 (b) requires that when the witness is under the age of 14 or has a "substantial cognitive impairment," the court must "take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness." Section 765 also protects children and other witnesses against questions that are unduly repetitive, that harass or embarrass the witness, and which are not "effective for the ascertainment of truth."

Similarly, Ca. Welf. & Inst. Code § 350(a) provides that: "The judge of the juvenile court shall control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the [child]. Except where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor …"

Section 765 contemplates close monitoring of child questioning. Section 765 justified a family court judge's decision to entirely disallow cross-examination of children in an acrimonious custody dispute and conduct the questioning from the bench. *In re Marriage of Okum* (1987), 195 Cal.App.3d 176. Section 765 is equally applicable in dependency court. The holding of *Okum* and the proposition that § 765 justifies "severely curtail[ing] the examination of child witnesses" was cited with approval in *In re Jennifer J*. (1992), 8 Cal.App.4th 1080, 1088 n.7. Thus, although the parties in dependency court are entitled to call and cross-examine child witnesses, they are subject to the restrictions of Evid. Code § 765 and the court's control of the proceedings as authorized by Welf. & Inst. Code § 350(a).

V. Child witnesses should be given instructions on the role of a witness

The statutory requirements discussed above -- to ensure age-appropriate questioning of child witnesses in all cases, Evid. Code § 765, and to conduct dependency proceedings "in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor." Welf. & Inst. Code § 350(a) -- provide authority for counsel and/or the bench officer to provide special instructions before questioning a child witnesses.

Young children are accustomed to speaking to authoritative adults (teachers, parents) who already know the answers to the questions they ask children (e.g. “What is two plus two?”). Given a strongly worded question, they may agree, not because of what they believe, but because of their desire to please the interviewer or reluctance to appear ignorant. On the other hand, children who have been abused but who are afraid to testify may need non-leading encouragement to do so. Researchers have developed instructions that will reduce children’s tendency to defer to authoritative interviewers, increase children’s willingness to say “I don’t know” or “I don’t understand,” and increase children’s willingness to disclose negative experiences.

A. DON’T KNOW instruction

Children are often reluctant to answer “I don’t know,” particularly when asked yes/no questions (e.g., Poole & Lindsay, 2001). A number of studies have found that instructing children that “I don’t know” answers are acceptable reduces children’s suggestibility to misleading questions (Endres, Poggenpohl, & Erben, 1999; Gee, Gregory, & Pipe, 1999; Saywitz & Moan-Hardie, 1994; Walker & Lunning, 1998; Warren, Hulse-Trotter, & Tubbs, 1991).

However, to be effective, several steps are necessary. It is not sufficient to merely tell the child that it is acceptable to say “I don’t know.” This is unlikely to affect the child’s responding. It is important to give the child an example of a question that he or she doesn’t know the answer to. After reinforcing the child for saying “I don’t know,” it is also important to give the child an example of a question that he or she does know the answer to. By reinforcing both types of responses, counsel can ensure that the child will not over-rely on “I don’t know.”

Model “I don’t know’ instruction:

If someone asks you a question and you don’t know the answer, then just say, “I don’t know.”
So if I ask you “What is my dog’s name?” what do you say?
[child answers]
OK, because you don’t know.
But what if I ask you “Do you have a dog?”
[child answers]
OK, because you do know.

B. DON’T UNDERSTAND instruction

Children rarely spontaneously ask for clarification of questions they do not understand (Carter, Bottoms, & Levine, 1996; Perry et al., 1995; Saywitz, Snyder & Nathanson, 1999). Children are less adept than adults at monitoring their

comprehension. Also, even if they recognize incomprehension, they are more reluctant to say they do not understand.

Telling children that it is permissible to say they do not understand and that doing so will lead the attorney to reword the question reduces the likelihood that grade school children will attempt to answer incomprehensible questions (Saywitz, Snyder, & Nathanson, 1999). This instruction even has some effect with preschool children (Peters & Nunez, 1999).

Many preschool children will not know the meaning of "understanding," making the instruction "tell me if you don't understand" ineffective. Also, as for the "I don't know" instruction, children should be both given an example of a question they do not understand so that they can practice signaling their incomprehension, and also given a question they do understand.

Model 'I don't understand' instruction:

If someone asks you a question and you don't know what they mean or what they're saying, you can say, "I don't know what you mean." They will ask it a different way.

So if I ask you "What is your gender?" what do you say?
[child answers]
That's because "gender" is a hard word. So I would say, "Are you a boy or a girl?"
[child answers]

C. YOU'RE WRONG instruction

Children are often reluctant to correct adults' mistakes (Walker & Hunt, 1998). Children are less likely to acquiesce to misleading questions if they are taught that they can correct the questioner (Gee, Gregory, and Pipe, 1999; Saywitz & Moan-Hardie, 1994; Warren, Hulse-Trotter, & Tubbs,1991)

Model instruction:

Sometimes we make mistakes or say the wrong thing. When we do, you can say it is wrong.

So if I say, "You are thirty years old, aren't you?" what do you say?
[child answers]

OK, so how old are you?

D. IGNORANT INTERVIEWER instruction

It also is helpful to tell the child that the judge and attorneys in the courtroom do not know what happened to the child. Children often assume that authoritative adults are knowledgeable, even though they did not witness the events at issue (Saywitz & Nathanson, 1993). Children are more suggestible when they believe the person questioning them already knows what happened. (Ceci, Ross, & Toglia, 1987; Kwock & Winer, 1986; Lampinen & Smith, 1995; Toglia, Ross, Ceci, & Hembrooke, 1992). Informing children that one doesn't know has been shown to reduce suggestibility to misleading questions (Mulder & Vrij, 1996).

Model instruction:

We don't know what's happened to you.
We won't be able to tell you the answers to our questions.

VI. Children should be asked open-ended rapport-building questions at the beginning of their testimony.

Asking children open-ended rapport-building questions about innocuous topics at the beginning of the testimony improves their ability to answer substantive questions. Sternberg and her colleagues (1997) found that when interviewers questioning children about abuse used open-ended prompts in the rapport-building phase of the interview, children provided longer and richer responses to the first substantive question, and longer responses to open questions throughout the interview than when the rapport questions were closed ended (such as yes/no and forced-choice questions) (see also Roberts, Lamb, and Sternberg, 2004, replicating this result in the laboratory and demonstrating that children's accuracy is not affected).

There is no valid basis for objections to preliminary questioning of child witnesses about innocuous topics. As discussed above, the trial court has an obligation to take special steps to ensure age-appropriate questioning and minimize child witnesses' potential "embarrassment" under Ca. Evid. Code § 765, and to conduct dependency proceedings "in an informal nonadversary atmosphere with a view to obtaining the maximum cooperation of the minor" under Ca. Welf. & Inst. Code § 350(a). *See State v. Hanna* (Ohio App. 5 Dist. 2003) 2003 WL 22843592 (unpublished) at 2 (approving "series of questions concerning whether [child witness] had pets, what kind of dog she had, what she liked to do in her spare time, who she played softball for, what kind of music she liked, what kind of subjects she liked in school, and what kind of food she

preferred" that "were asked to help [the child] feel comfortable on the stand, before delving into the sexual conduct at issue in the case").

Also, preliminary questions are relevant in that they assist the court in assessing the competency and credibility of the child witness. *See State v. Brewer* 549 P.2d 188, 195 ("It is commonly accepted that a person may be examined about his background, occupation and the like for the purpose of aiding the jury to evaluate his testimony and credibility").

Model Preliminary Questions:

First, I'd like you to tell me about things you LIKE to do.

Follow up with TELL ME MORE questions.
(e.g., "You said you like to play soccer. Tell me more about soccer.")

Now tell me about the things you DON'T LIKE to do.
(Follow up with TELL ME MORE questions.)

Now tell me about your last birthday. Tell me everything that happened.

FOLLOW UP with WHAT HAPPENED NEXT questions.
(e.g., "You said you played in the park. What did you do next?")

VII. Children should be asked to provide a narrative of the alleged abuse whenever possible.

Although children are often reluctant to disclose abuse, children who appear in legal proceedings are disproportionately those who have disclosed abuse and who are willing to talk about abuse. Research has determined that if children are willing to disclose abuse, most will do so in response to open-ended questions. Hence, "tell me why you are here" will elicit abuse reports in approximately half of children disclosing abuse (Lyon, 2005). Moreover, invitations, in which the questioner repeats a portion of what the child says and asks the child to "tell me more," reliably elicit more information per question than yes/no and other closed-ended questions (Sternberg et al., 2002).

There is nothing in the California Rules of Evidence that forbids narrative testimony. *Cf. State v. Abril* 76 P.3d 644, 648 n. 1 (N.M. Ct. App. 2003) ("There is no per se rule against narrative testimony"). "Truth can be promoted because a witness who testifies in the form of a narrative has not been prompted by specific questions suggesting which facts are important. Time can be saved since the cumbersome back and forth of numerous questions and answers is

economically replaced with a single question and answer." *Wright and Gold, 28 Fed. Prac. & Proc. Evid. § 6164.*

The potential disadvantages of the narrative question are that the witness may make statements that are irrelevant or prejudicial. *Id.* However, these risks are slight in a dependency proceeding in which a child is questioned about abuse. First, virtually everything the child reports will be admissible, since the child's responses will enable the court to assess the child's competence and credibility. The child's reports of the statements of the perpetrator will generally be admissible as party admissions or as non-hearsay statements that explain the child's actions. Second, since there is no jury, there is less risk of prejudice, and the court can ignore irrelevant evidence.

Model questions to elicit narrative testimony

Initial questions:
1. Tell us why you came to talk to us.
2. It's really important for us to know why you came to talk to us.
3. We heard you talked to a [person to whom the child has disclosed]. Tell us what you talked about.
5. We heard that someone might have bothered you. Tell us everything about that.
6. We heard that someone may have done something to you that wasn't right. Tell us everything about that.

Followup questions:
Tell me more (e.g. "You said he hurt you. Tell us more about that.")
What happened next (e.g. "You said he shut the door. What happened next?")

VIII. Specific types of age-inappropriate questions

A. Closed-ended questions

Examination of child witnesses cannot be entirely confined to open-ended questions eliciting narrative testimony. Counsel may need to ask more specific questions to clarify the child's testimony or elicit additional details. However, the use of closed-ended or leading questions may inhibit the child from giving detailed testimony, and even distort the accuracy of the child's testimony.

Simple yes/no questions are not highly suggestive, but can be problematic if a child has a response-bias (a tendency to answer all questions "yes" or "no"), or is reluctant to say "I don't know." There is good evidence that young children are reluctant to answer "I don't know" to yes/no questions (Poole & Lindsay, 2001; Walker & Lunning, 1998). Moreover, children's responses to yes/no questions are less accurate than their responses to open-ended questions (Baker-Ward, Gordon, Ornstein, Larus, & Clubb, 1993).

In situations where a child witness appears to have a response bias or is answering at random (e.g. answers “yes” to any questions she does not know the answer to, or guesses which answer the attorney wants to hear), counsel should object under Evid. Code § 765(b) and ask that the judge or counsel repeat the instruction that it is okay to say “I don’t know,” or “I don’t understand.”

Yes/no questions can readily be converted into leading questions (compare “Did he tell you to keep a secret?” to “Didn’t he tell you to keep a secret?” or “He told you to keep a secret, didn’t he?”) Although these forms of questioning are generally permissible during cross-examination, they may be objectionable under Evid. Code § 765(b) due to the special vulnerability of child witnesses to suggestive questioning. A large amount of research over the past ten years has documented the suggestibility of young children to leading questioning (Ceci, Bruck, & Battin, 2000; Saywitz & Lyon, 2002).

Another type of question commonly asked of child witnesses is the forced-choice question. (e.g., “Was his shirt red or blue?”). Because of their reluctance to answer “I don’t know,” or contradict the authority of the questioner, young children may often feel compelled to choose one of the options even if they don’t know the correct answer, and even if neither answer is correct. When children do choose randomly, they tend to choose the last option (Walker & Lunning, 1998). Even apart from Evid. Code § 765(b), forced-questions should be disallowed under the familiar objection that the question assumes facts not in evidence (e.g. that the shirt was either red or blue). Bench officers and counsel should be especially alert to the use of such questions with child witnesses.

An intermediate form of question that may be effective in eliciting details from child witnesses, while avoiding the dangers of closed-ended and leading questions, is “wh- questions” (what, where, when, who, why, and how). These questions range from general to specific. Compare “what was the man wearing?” (more general) with “what color were the man’s shoes?” (more specific). As wh- questions become more specific, two dangers increase. One danger is that the attorney’s assumptions about the event will distort the child’s testimony (e.g. the attorney assumes the man was wearing shoes). Another danger is that a child who does not remember and is inclined to guess will come up with a plausible but inaccurate response. Counsel and bench officers can guard against these dangers by keeping wh- questions as general as possible; avoiding questions that build in factual assumptions; and reminding the child that it is okay to say “I don’t know” or “I don’t remember.”

Using wh- questions is especially helpful in eliciting details that would not emerge from yes-or-no questions. Yes/no questions will elicit only yes/no answers, and child’s testimony will only be as good as the attorney’s ability to phrase the questions. If counsel ask wh- questions, children will often mention idiosyncratic factual details that increase the reliability of their testimony.

B. "How many" questions

It is generally inappropriate to ask a child "how many times" an event occurred, because of the likelihood that a child will not know how to answer, and may arbitrarily pick a number. Adults may not realize how difficult it is for a child with limited math and reasoning skills to estimate how many times something has occurred. The child either must imagine each event and mentally count, or multiply the frequency that the event occurred by the total time span over which the events occurred (Bradburn, 2000). Also, it may not be clear what to count, i.e. whether the child should count each specific act of abuse, or each time when a series of abusive acts happened.

If it is necessary to ask about multiple events, children will find it easier to answer whether something occurred one time or more than one time, and may be able to answer specific questions about the first time something occurred (because of the novelty of the event) or the last time (because of the recency of the event, and because the last time often spurred discovery of the abuse).

Model Questions (to replace 'how many times?')

Did it happen one time or more than one time?
Tell me what happened the last time.
Tell me what happened the first time.
Are there any other times you remember?

B. "What time" questions

Unless a child is looking at a clock or calendar during an event, subsequent recall of the time or date requires inferential skills (e.g. "it was shortly before New Year's, so it probably was December") (Friedman, 1993). Most children cannot make such inferences themselves, but it may be possible to establish the approximate date or time by asking about contemporaneous events. For example, to estimate time of day, one can ask where others were at the time of the incident (e.g. "my mother was at church"), or what the child had been doing (e.g. asleep at night, taking a nap after school). To estimate dates, one can ask where the child was living or staying.

Some temporal terms can be especially confusing for the young child. "Yesterday" and "today" are difficult for young children, in part because of their shifting meaning (today is tomorrow's yesterday). Moreover, the amount of time segmented by the words is unclear to many children; for a young child "yesterday" often refers to anything in the past, and "tomorrow" refers to anything in the future (Harner, 1982). Also, it is important not to assume that the child understands weeks and months, or that she can estimate time using these intervals.

Younger children will often describe events in the order in which they occurred, regardless of whether one asks about what happened "before" or "after." (Carni & French, 1984). Also, young children may assume the order in which events are mentioned in a sentence is the same as the chronological order in which the events occurred. For example, Richardson (1993) cites a sexual abuse case in which the child was asked "Before your father took you to the hospital, where were you?" Because of the form of the question, the child "where were you" by stating where she was after she went to the hospital. The best practice is to ask "what happened next" questions as much as possible. A child's apparent confusion regarding chronology may be attributable to the form of the questions rather than the child's failing memory.

Model questions (to replace questions about time and date)

Where did you live when …
What were you doing when…
Where was [another person] when…
What *happened next?*

Finally, it is important in questioning child witnesses to use names and specific nouns instead of pronouns, and specific nouns instead of deictics (i.e. "the broom" and "the garage" instead of "that" and "there"). Children often become confused or lose track of what a pronoun or deictic refers to. Walker (1999). Similarly, counsel and bench officers should generally avoid vocabulary that the child is unlikely to understand, and complex sentence structure.

Conclusion

Once one recognizes the many complexities inherent in questions, it is easy to feel overwhelmed. Fortunately, if one asks the child to provide as much narrative information as possible (using "tell me more" and "what happened next" questions), one also avoids the use of words and sentence structures that the child may provide difficult. If you follow the child's lead, rather than lead the child, you will allow the child to speak at his or her level of understanding.