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THE CHILD WITNESS IN TORT CASES: THE TRIALS AND TRIBULATIONS OF REPRESENTING CHILDREN

Chris A. Messerly†

Trib-u-la-tion; *n*: distress or suffering resulting from oppression, persecution or affliction also: a trying experience.*

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I. INTRODUCTION

A child's testimony may provide some therapeutic value for the child,¹ but, at the same time it is unquestionably traumatic for a child.² The vast majority of the literature on this subject is in the context of child abuse or other criminal actions. Very little has been said to guide the civil trial lawyer in dealing with the child witness. The psychological harm to a child testifying in a tort ac-

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* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2441 (1993).

1. See, e.g., Desmond K. Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647-48 (1988). Dr. Runyan argues that the opportunity for a child victim to tell a court about abusive acts may be empowering. See *id.* Dr. Runyan also advocates that the legal interview may also serve as a public affirmation that the child was not responsible for the events which transpired and may thus minimize self blame. See *id.*

2. See NANCY W. PERRY & LAWRENCE S. WRIGHTSMAN, *THE CHILD WITNESS* 155 (2d ed. 1991); see also Jacqueline Y. Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 NEW ENG. L. REV. 643, 647-48, 656 (1981-82).

tion, however, is comparable to that suffered by a child who testifies against a criminal defendant.³ Witnessing the death or injury of a loved one by a tortfeasor is essentially the same as witnessing a violent crime. In both cases, a testifying child is required to relive a devastatingly unpleasant experience. This is particularly true for young children who may lack the ability to repress traumatic events,⁴ as compared to adolescents and adults who unconsciously repress such events.⁵

Thus, it is pertinent to ask, should a child client testify? Is it an option to have the child testify? If so, under what conditions? What deference should be given to a child client's wishes? What steps can be taken to reduce the potential trauma to the child? Do alternatives exist to the child's live testimony?

II. TO TESTIFY OR NOT TO TESTIFY, THAT IS THE QUESTION

The following hypothetical illustrates the dilemma in many cases where a child witness may testify: A mother and father drive their eight-year-old boy, Mario, to a hockey game. A truck runs a red light and crashes into the side of the car. Mario breaks his femur and his father suffers a significant head injury. Mario tearfully testifies at his deposition that he saw the truck coming at the last second and tells how he crawled over the seat after the crash to try to "wake up" his dad, "but, he wouldn't wake up." It is likely that Mario's testimony would compel the jury to award significantly higher damages than without his testimony. It is also clear, how-

3. See Parker, *supra* note 2, at 656. Parker notes that children are often called upon as witnesses in civil cases. Even testifying in non-violent cases such as divorce cases poses a possible mental health risk to the child involved. See *id.* at 661. During the trial, a child witness may find some protection in the form of a sensitive, thoughtful judge. See *id.* at 648. Nonetheless, the child still goes unprotected during pre-trial. See *id.* Children can be further protected, however, through the assignment of Child Hearing Officer at the early stages of an investigation. See *id.* at 654.

4. See *id.* at 646. Studies involving child witnesses, specifically child sexual abuse witnesses, demonstrate that the testimonial situation is made more complex because the child most likely knows the offender. See *id.* These same studies have shown "that the child suffers more severe psychological damage from testifying against a person he knows than against a stranger." *Id.*

5. See Lenore C. Terr, *The Child as a Witness*, in CHILD PSYCHIATRY AND THE LAW 207, 213 (1980). Children lack the ability to employ the defense of "denial" during a trauma. See *id.* Even though the child may not understand who did it, or in what order it occurred, all the incidents are remembered. See *id.* Children do not typically suffer from amnesia after trauma. This generally makes them better witnesses than adults who often "employ massive denial when traumatized." *Id.*

ever, that retelling the story is a terrible experience for Mario. This observation is borne out by Mario's psychologist. In fact, Mario states: "I never want to talk about it again." Unfortunately trial is set to begin in two weeks. What should be done? How should the parents (or the guardian ad litem⁶) represent Mario's best interests (e.g., maximize his recovery of damages to provide for his future)?

A. *Obeying the Child*

It is questionable whether counsel is permitted to have Mario testify at trial. Although Mario is only eight years old, he is the attorney's client, even if his parents retained the counsel for him, and he has essentially instructed counsel not to call him as a witness.⁷ In determining whether counsel should respect the wishes of Mario, or proceed with the child's testimony, rule 1.14(a) of the Minnesota Rules of Professional Conduct (identical to the Model Rules of Professional Conduct) provide some guidance. Specifically the rule reads:

When a client's ability to make adequately considered decisions in connection with the representation is impaired,

6. While the child is on the stand, the trial court judge is the primary defender of the child's best interest. In protecting those interests, it is the duty of the trial court judge to: "(1) select a competent person to serve as guardian ad litem; (2) select a person with no adverse interests to the minor; and (3) to insure that the person so selected is adequately instructed on the proper performance of his or her duties." *Shainwald v. Shainwald*, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990) (citing S.C. R. CIV. PRO. 17(d) requirements for qualifications of guardian ad litem). Generally, it is recognized that the guardian ad litem's responsibility is to advocate for the child's best interests, not for the child's contrary stated opinions. *See id.* *See also Proposed Standards for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 376 (Fall 1995). In this proposal, a guardian ad litem is defined as an officer of the court appointed to protect the child's interests "without being bound by the child's expressed preferences." *Id.* (emphasis added). The comment further suggests that the child's advocate, while not bound to follow any express preference, should take into consideration the child's opinion in determining what those best interests are. *See id.* at 377.

7. Most authorities recognize that an attorney-client relationship is established with the child, carrying with it the commensurate responsibilities associated with clients. *See Hickox v. Holleman*, 502 So. 2d 626, 634 (Miss. 1987) (establishing attorney-client relationship where a child sued his attorney for legal malpractice based on the mishandling of a medical negligence case); *see also Cook v. Connolly*, 366 N.W.2d 287, 288 (Minn. 1985) (demonstrating manifestation of attorney-client relationship between child and lawyer); *Provencal v. Provencal*, 451 A.2d 374, 376 (N.H. 1982) (finding attorney-client relationship existing between child and attorney guardian ad litem); *In re Angelina*, 622 N.Y.S.2d 336, 337 (N.Y. App. Div. 1995) (finding attorney-client relationship existing between child and attorney).

whether because of minority, mental disability or for some other reason, *the lawyer shall, as reasonably possible, maintain a normal client-lawyer relationship with the client.*⁸

The phrase, "as reasonably possible" appears to provide the trial lawyer with significant discretion in deciding whether to call the child to testify at trial. But, consider a New Jersey court's deference to the wishes of a client with the mental capacity of a child six-to-eight years of age⁹ in *In re M.R.*¹⁰ This case involved the custody of a 21-year-old woman with Down's Syndrome who had an IQ comparable to that of a six-to-eight year old child.¹¹ A psychologist opined that M.R. was capable of understanding and expressing the choice of where she wanted to live.¹² M.R. wished to live with her father.¹³ M.R.'s lawyer submitted a report to the court arguing that great deference should be given to M.R.'s choice. During oral argument, however, her appointed counsel acknowledged that both the father's *and* mother's homes would serve M.R.'s interests.¹⁴ The trial court, finding that among other things, both parent's homes provided a "loving environment," awarded custody to M.R.'s mother.¹⁵

8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14 (1987) (emphasis added); accord MINNESOTA RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.14 (1997).

9. See *In re M.R.*, 638 A.2d 1274, 1276 (N.J. 1994). In this case, the New Jersey Supreme Court held that the trial court should have placed the burden of proving the woman's specific incapacity on the mother challenging the woman's capacity. See *id.* The court further held that the primary duty of counsel for developmentally disabled persons is to protect that person's rights. See *id.*

10. See *id.* at 1285. The court, noting comments made regarding Rule 1.14 of the MODEL RULES OF PROFESSIONAL CONDUCT, determined that a developmentally disabled client could participate in legal decision-making with proper advice and assistance from counsel.

11. See *id.* at 1276. M.R. functioned educationally at a second or third grade level, and was not considered capable of making logical adult choices. See *id.* at 1276-77.

12. See *id.* at 1276. After interviewing M.R., Dr. Deborah Dawson with the Guardianship Evaluation Project of the Center for Applied Psychology at Rutgers University, determined "[t]he choice of where to live is [a] very specific [one] . . . that [M.R.] is able to understand." *Id.*

13. See *id.* at 1278. M.R. felt, as did her psychologist, that living with her father would allow her more freedom. Dr. Dawson stated M.R. would suffer a "significant blow" to her self esteem should her choice be denied. *Id.*

14. See *id.* at 1283. While differing in their methods, each parent recognized M.R.'s interest in becoming more independent. M.R.'s father allowed for greater social interaction and involvement. M.R.'s mother balanced personal freedom with rules and structure. See *id.* at 1279.

15. See *id.* at 1278. The trial court found M.R. associated her mother's home with school, work and rules, while she associated her father's home with "happier

In appealing his case to the New Jersey Supreme Court, M.R.'s father argued that his daughter's attorney breached standards of professional conduct by failing to zealously advocate his client's position.¹⁶ The court, agreeing with the father, focused on the distinctions between the roles and duties of an appointed counsel and those of a guardian ad litem ("GAL").¹⁷ The court recognized that the attorney and the GAL frequently differ on their position as to the incompetent's preferences or interests, their approaches by which they forward those preferences or interests, and finally, in their method of carrying out the incompetent's preferences or interests.¹⁸

An attorney representing a disabled person should maintain "as much as possible, a normal attorney-client relationship with that person."¹⁹ Continuing to define the attorney's role in relation to an incompetent or minor and identifying the problems associated in mixing a "best interest determination" with that role, the

times" such as "boys, babies and boyfriends." *Id.* In awarding guardianship of M.R. to her mother, the trial court determined that her father had failed to meet the burden of showing that "M.R. had the specific capacity to express" whom she wished to live with. *Id.* The New Jersey Supreme Court, in reversing in part and remanding in part the lower court's decision, found that the trial court had erred by placing the burden on M.R.'s father. *See id.* at 1280. Instead, the court determined that "M.R.'s mother will bear the burden of proving by clear and convincing evidence that M.R. is not competent to make that choice." *Id.* at 1282.

16. *See id.* at 1282. The court attempted to answer whether an "appointed counsel for an incompetent is to zealously advocate the incompetent's position or simply to inform the court of counsel's perception of the incompetent's best interests." *Id.*

17. *See id.* at 1283. The role of a court appointed counsel is to provide services to the child in the form of legal advocacy. The role of a court appointed guardian ad litem is to provide services to the court in the form of independent fact finding and investigation as to what is in the child's best interest. *See id.*

18. *See id.* at 1284. Two New Jersey state judiciary committee reports found great differences in the roles provided to an incompetent or minor by an attorney as opposed to a guardian ad litem. Major differences included: an attorney represents the incompetent's wishes, where the guardian ad litem forwards the incompetent's best interests; where a representing attorney works and communicates through other counsel, a guardian ad litem may communicate directly through parties; and where an attorney must be a zealous advocate, the guardian ad litem merely files a report with the court outlining his or her findings regarding the incompetent's best interests. *See id.*

19. *Id.* This notion is fostered by the MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.2, 1.3 and 1.4, which provides that the lawyer is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes. That role, however, does not extend to advocating decisions that are patently absurd or that pose an undue risk of harm to the client. *See id.* at 1284-85.

court stated:

Advocacy diluted by excessive concern for the client's best interests would raise troubling questions for lawyers in the adversarial system. If a lawyer determines that the client needs help in determining action in the client's best interests, the lawyer is more likely to provide only procedural formality rather than vigorous representation. The lawyer who undertakes to act according to the best interest standard may be forced to make decisions concerning the client's mental capacity that the lawyer is unqualified to make.²⁰

Not every court agrees with the New Jersey court's decision. For example, in *In re J.P.B.*, the Iowa Supreme Court took a different and troubling view of the attorney-child client relationship.²¹ In *J.P.B.*, a mother, A.B., lost custody of her two children, J.B. and C.B., because of continuing concerns ranging from "housekeeping, hygiene, child supervision, and confused generational boundaries, to substantiated allegations of incest and other sexual abuse."²² The mother, herself, had been a victim of her father's sexual abuse.²³ At a hearing to decide whether the parent-child relationship between A.B. and her children should be terminated, a single

20. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and A Proposal for Reform*, 23 ARIZ. L. REV. 599, 635 (1981). Frolik argues that an attorney, attempting to act "according to the best interest standard may be forced to make decisions concerning the client's mental capacity that the attorney is unqualified to make." *Id.* at 635. Several jurisdictions, in situations involving incompetents, minors and wards, have held that the appointed attorney should zealously advocate the client's wishes. See *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (stating wards have the right to receive traditional adversarial representation from counsel); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1079 (E.D. Wis. 1972) (finding constitutional requirement of representative counsel not satisfied by appointment of guardian ad litem); *In re Link*, 713 S.W.2d 487, 496 (Mo. 1986) (holding appointed counsel must "act as an advocate" for proposed ward).

21. See *In re J.P.B.*, 419 N.W.2d 387, 389 (Iowa 1988) (holding that dual representation of the two children, only one of whom favored termination of the mother's parental rights, was not a conflict of interest preventing the attorney from seeking the best interests of the children).

22. See *id.* at 389. Allegations of sexual abuse included abuse of one of the children, C.B., by one of the mother's boyfriends. See *id.* The other child, J.B., described himself as an "unwitting participant in a variety of sexual acts" with his mother and other relatives to "which he referred to as 'the game.'" *Id.*

23. See *id.* The mother, A.B. had a history of "incestuous behavior" with her father and other family members. The trial court examined "overwhelming" evidence manifesting A.B.'s unwillingness or inability to "separate herself and the children from the influence of a family plagued by a history of incestuous behavior," despite extensive professional counseling. *Id.*

court-appointed counsel represented both children.²⁴ J.B. wanted the relationship terminated, while C.B. did not. Likewise, A.B. did not wish to see her parent-child relationship terminated.²⁵ Both children testified at the hearing. Based on the evidence presented, the juvenile court found that neither child could be safely returned to their mother's custody.²⁶

In specifically discussing the relationship between a court appointed attorney and a child, the court stated:

We are mindful that in the ordinary lawyer-client relationship, the lawyer's role is not to *determine* the client's interest but to *advocate* the client's interest. . . . Such a duty may present an ethical dilemma in a juvenile proceeding where the objective is *always* the best interests of the child, not the child's personal objective. We are aware that the unsettled law in this area offers no clear direction to an attorney faced with such a predicament.²⁷

The American Bar Association (ABA) and the Institute for Judicial Administration (IJA), however, have rejected the position that a child's attorney should act "in the child's best interests."²⁸ The ABA/IJA standards state that "where the juvenile is capable of considered judgment on his or her own behalf, the determination of the client's interest in the proceedings should ultimately remain the client's responsibility."²⁹

24. See *id.* at 388-89. The juvenile court judge appointed an attorney for A.B., and an attorney for J.B. and C.B., as well as a guardian ad litem for J.B. and C.B. See *id.* at 388-89.

25. See *id.* at 388. The appellants did not claim that the evidence presented was insufficient to support the termination decree. The sole claim on appeal was the conflict of interest inherent in the attorney's representation of the children's opposing interests at trial. In short, the only issue before the court was whether the State could prove by clear and convincing evidence that the children could not be returned to their mother's custody without suffering harm. See *id.*

26. See *id.* at 391. The undisputed allegations of continuing sexual abuse by J.B. drove the decision that the children could not be safely returned to their mother. See *id.*

27. *Id.* (citing Horowitz & Davidson, *Tough Decisions for the Tender Years*, 10 FAM. ADVOC. 9 (Winter 1988)). The Iowa court also discussed a similar issue decided by the Montana Supreme Court in *In re Marriage of Rolfe*, 699 P.2d 79, 80 (Mont. 1985). The *Rolfe* Court, analyzing an attorney's role in regard to their child clients in divorce cases, stated, ". . . given the immaturity of the client . . . it is this Court's opinion that the best interests of the child, the paramount concern, . . . is best served by modifying the traditional lawyer-client relationship." *Id.*

28. See IJA/ABA JUVENILE JUSTICE STANDARDS PROJECT § 3.1, at 77 (1979) (defining the nature of the attorney-client relationship and the client's interests).

29. *Id.* The standard in cases involving child incompetence allows an attorney to work with the child client to help determine the child's best interests. See *id.* at

Many commentators agree that child clients are owed the same duties as their adult counterparts, and that their wishes and preferences should be followed.³⁰ At least one author, Mark Soler, believes child clients should receive the same professional treatment as adult clients.³¹ Soler states:

[I]f the child's attorney does not advocate the child's position *as the child sees it*, the child really has no independent voice. Ultimately, it is the court that is charged with determining the child's best interests, and attorneys *qua* attorneys have no greater experience than anybody else to make an independent decision about what is best for the child. An attorney arguing in opposition to the position expressed by his or her client acts contrary to the traditional foundational duties defining the attorney-client relationship. In what sense does the attorney represent the child if he or she does not represent what the child expressly wants?³²

The American Bar Association Family Law Section clearly defines the child's attorney as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."³³ Most commentators also agree, however, that the uniform standards in place today for attorneys representing children are woefully inadequate.³⁴ The complexity of the issues in-

81. See also *Proposed Standards of Practice for Lawyers who represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 376 (Fall 1995):

The child's attorney should decide whether to call the child as a witness. The decision should include consideration of the child's need or desire to testify, any repercussions of testifying, the necessity of the child's direct testimony, the availability of other evidence or hearsay exceptions which may be substituted for direct testimony and withstand possible cross-examination. *Ultimately, the child's attorney is bound by the child's direction concerning testifying.*

(emphasis added.)

30. See *infra* notes 34-36 and accompanying text.

31. See MARK SOLER, REPRESENTING THE CHILD CLIENT 12 (1987).

32. *Id.*

33. *Proposed Standards of Practice for Lawyers who represent Children in Abuse and Neglect Cases*, *supra* note 29, at 378. The drafters comment that a child is a separate individual with potentially discrete and independent views, and that the attorney must advocate the child's independent articulated position. See *id.*

34. See, e.g., Ann M. Haralambie, *The Role of the Child's Attorney in Protecting the Child Throughout the Litigation Process*, 71 N.D. L. REV. 939, 944-47 (1995). Haralambie states that while the ABA/IJA proposed standards for child advocacy, "do a good job and should be adopted," they are not appropriate for all children. She opines that child advocates should receive "specialized multi-disciplinary training"

volved with child clients and witnesses make the creation of any single standard a difficult task.³⁵

So what is a child's lawyer to do regarding child testimony? Practically speaking, even without Rule 1.14, it may be nearly impossible to get the child to testify against his or her wishes. As with any client, counsel can try to convince the child to testify. Such a course of action, however, should be given careful consideration, as an attorney may be seen as an authority figure to a child, and may be able to wield greater persuasive powers than the attorney could with an adult client.³⁶ Also, even if the child is willing to testify, some studies suggest that jurors do not believe that children testify accurately.³⁷

which would "equip those attorneys with the responsibility of exercising increased discretion." *Id.* at 944-45.

35. *See id.* at 944-47; *see also* DONALD N. BERSOFF, CHILDREN AS PARTICIPANTS IN PSYCHOEDUCATION ASSESSMENT: CHILDREN'S COMPETENCY TO CONSENT 170 (2d ed. 1983) (discussing a child's capacity to make independent decisions); DAVID L. KERNS, THE PEDIATRIC PERSPECTIVE: FOUNDATIONS OF CHILD ADVOCACY 23 (3d ed. 1987) (analyzing the relationship between a child's age and his or her ability to make rational judgments).

36. *See Proposed Standards for Lawyers Who Represent Children in Abuse and Neglect Cases, supra* note 29, at 378. The drafters note that "the child's attorney should recognize that the child may be more susceptible to intimidation and manipulation than some adult clients." *Id.*

37. *See* Gail S. Goodman, et al., *When a Child Takes the Stand*, 11 LAW & HUM. BEHAV. 27 (1987). Goodman's group, citing multiple factors (increasing crimes against children, increasing crimes which children might witness, increasing likelihood that prosecutors will use a child as a key witness and an increase in state legislatures accommodating child witnesses) predicts an increase in the numbers of child witnesses. *See id.* at 28; *see also* M. A. STRAUS, ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 78 (1984); D. WHITCOMB, ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS, NATIONAL INSTITUTE FOR JUSTICE 94 (1985); J. BULKEY, AMERICAN BAR ASSOCIATION, PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES 17-18 (1985). Some studies have shown that less than 50% of any group asked believes that a child witness would respond accurately. It is believed that these views are based on the perception that child witnesses exhibit many of the characteristics that lower a witnesses' credibility (e.g. powerless speech style, low status, and lack of confidence). *See* Goodman, *supra*, at 28; *see also* K. A. Deffenbacher, *Eye-witness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, LAW & HUM. BEHAV. 4, 243-260 (1980); B. Erickson, et al., *Speech Style and Impression Formation in a Court Setting: The Effects of "Powerful" and "Powerless" Speech*, J. EXPERIMENTAL SOC. PSYCHOL. 14, 266-279 (1978). Goodman's study demonstrates that a child witness' credibility increases when testifying to a jury. Moreover, when a 6-to-10-year-old testifies, the statements of other adult witnesses who also testify increases in importance. *See* Goodman, *supra*, at 31-32, 35. *See also* Goodman, *Jurors' Reaction to Child Witnesses*, 40 J. SOC. ISSUES 139, 142 (1984) (asserting studies supporting the conclusion that jurors view children as less credible witnesses than adults). *But cf. supra* note 5.

III. IS THE CHILD COMPETENT TO TESTIFY?

Contrary to Mr. Wigmore and Mr. McCormick's suggestion that any child should be able to testify,³⁸ a witness, regardless of age, must be "competent" to testify.³⁹ According to Minnesota Statutes section 595.02, age alone does not determine competency. The statute states:

A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or relate truthfully the facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.⁴⁰

Consequently, even a five-year-old child may be competent to testify.⁴¹

In *State v. Lau*, the Minnesota Court of Appeals was asked to review a trial court's findings regarding the credibility and sufficiency of a five-year-old's testimony. The child, R.D., told her mother that her neighbor had sexually abused her.⁴² R.D. subsequently repeated her story to a social worker, the police, a psychologist, and an attorney.⁴³ At trial, the state produced a psychologist who testified that a young child such as R.D. is capable of accurately reporting sexual abuse. The defense's psychological expert stated that R.D. was incapable of testifying, but admitted that he "did not believe a child cannot tell the truth in the sense of ac-

38. See 2 WIGMORE ON EVIDENCE, § 509 (1979) (determining children should be allowed as witnesses). See also MCCORMICK, EVIDENCE, §§ 62, 140 (1972). McCormick finds no specific rule excluding a child of any particular age from testifying. Rather, the test is whether the witness has the intelligence to make a worthwhile witness and whether the witness can testify truthfully. See *id.*

39. See MINN. STAT. § 595.02, subd. 1 (1996) (requiring a "sufficient understanding" from every person qualified to testify).

40. See MINN. STAT. § 595.02, subd. 1(m) (1996); see also *State v. Mosby*, 450 N.W.2d 629, 633-35 (Minn. Ct. App. 1990) (finding a ten-year-old child capable of answering the prosecution's questions adequately); *State v. Morrison*, 437 N.W.2d 422 (Minn. Ct. App. 1989) (allowing five-year-old to testify as a witness).

41. See, e.g., *State v. Lau*, 409 N.W.2d 275, 277 (Minn. Ct. App. 1987); see generally, Annotation, *Competency of Young Child as a Witness in a Civil Case*, 81 A.L.R.2d 386 (1962).

42. See *Lau*, 409 N.W.2d at 276. The child, who went to her neighbor's trailer to bring him some candy, returned to her mother's house and described how the neighbor had touched her, took her pants down, and licked her "pee pee."

43. See *id.* At one of the later interviews, R.D. maintained a consistent story, stating her neighbor "kissed her on the 'boobies' and licked her between the legs." See *id.*

curately describing events.”⁴⁴ The judge, who conducted an in-camera interview with R.D. to determine competence, allowed R.D. to testify. The neighbor was convicted of sexual abuse in the second degree.⁴⁵ Upon appellate review, it was determined that R.D. “was able to understand the oath, . . . capable of narrating the facts to which her testimony related . . . demonstrated an ability to recall and relate facts . . . and understood the difference between the truth and a lie.”⁴⁶

While a basic understanding of child development aids in determining a child’s competency to testify,⁴⁷ more sophisticated measures are required for the direct examination of a young child. Such an examination should begin with a brief line of questioning to convince the judge and jury that the child is competent to testify (and to preempt any attempt by opposing counsel to interrupt the direct examination by requesting to voir dire the child on the issue of competency).⁴⁸

44. *Id.* at 276, 277. The defense expert, concerned that R.D. had low cognitive ability, was interviewed improperly in front of too many adults and a had prior knowledge of sexual abuse, believed R.D. was incapable of testifying truthfully. *See id.* at 277.

45. *See Lau*, 409 N.W.2d at 276. The appellate court, affirming the lower court’s findings, found that R.D.’s testimony was corroborated by her prior statements and by her appearance at the interview immediately following the incident. *See id.*

46. *Id.* The appellate court, holding that competency determinations are within the determination of the trial court, found no abuse of that discretion. *See id.* at 278.

47. A good analysis of child development and trial testimony can be found in Barry Nurcombe, *The Child as a Witness: Competency and Credibility*, J. AM. ACAD. CHILD PSYCH. 473 (1986).

48. *See* John R. Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 715-720 (1987). Historically, child witness competency was determined by the child’s ability to swear to and understand the witness’ oath. The modern approach relies on a four-part test, including: 1) capacity to accurately perceive and record events; 2) personal knowledge of the event to be testified to; 3) an express understanding of the difference between the truth and a lie and the duty to tell the truth; and 4) the ability to express thoughts clearly and understandably. *See id.* *See also* Gail S. Goodman, *Children’s Testimony in Historical Perspective*, 40 J. SOC. ISSUES 9, 12-13; Robin W. Morey, Comment, *The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U. MIAMI L. REV. 245, 247, 251 (1985). A brief line of questioning to show competence can be as simple as:

1. What is your name?
2. How old are you?
3. Do you go to school? Where? What grade are you in?
4. Do you have a mom and dad? Do you have any sisters or brothers?
5. Will you tell a true story or a wrong story today?

Ultimately, the decision whether a child is competent to testify rests within the sound discretion of the trial court.⁴⁹ In Minnesota, when the child witness' competency to testify is in question, the judge may allow the child's statements into the record if she believes the child's testimony is credible and reliable.⁵⁰ In these cases, it is better for the court to give the child the benefit of doubt, and "err on the side of determining the child to be competent" to testify as a witness.⁵¹

IV. PREPARING THE CHILD TO MEET DARTH VADER

Much of a child's fear and apprehension of live trial testimony may stem from the child's misperception about what really goes on at trial. Television dramas portraying attorneys' vituperative diatribes and abrasive cross-examinations may play some role in striking terror in the hearts of witnesses of all ages, particularly children. Even if a child has not developed such fears from television, a courtroom filled with strangers is intimidating. For example, because of the judge's black robe, the child may believe that the judge is Darth Vader or the Wicked Witch of the West.⁵² A child may even believe that going to court means the same as going to jail.

6. If you told a wrong story, do you know what would happen?

See generally Christiansen, *supra*, at 715-720.

49. *See State v. Norgaard*, 272 Minn. 48, 136 N.W.2d 628, 630 (1965) (finding the trial court is in the best position to determine whether a child of tender years is capable of reciting the facts and relating them truthfully).

50. *See State v. Lanam*, 459 N.W.2d 656, 659-62 (Minn. 1990). *Lanam* involved the sexual abuse of a three-year-old girl. The child made spontaneous statements regarding the abuse, and when questioned, consistently described the abuse and the abuser. At trial, the child was declared incompetent to testify, but her statements were admitted under MINN. STAT. § 595.02 subd. (3). *See id.* at 657-58. In Minnesota, even though a child witness is deemed incompetent to testify, the trial court may allow into evidence the child's out of court statement if it is credible.

51. *See id.* at 660 (finding that while it is the jury's province to sort out inconsistencies and determine credibility, it is the court's province to determine competency).

52. *See State v. Phelps*, 696 P.2d 447, 453 (Mont. 1985). In *Phelps*, a five-year-old boy testified against a man who allegedly sexually abused him. *See id.* During his testimony, the child stated he thought he was in a police station and that the judge, who was wearing a robe, was a karate expert. *See id.* In reviewing the case, the Montana Supreme Court held that inconsistencies in the child's perception of where he was at the time of testimony did not affect his competency as a witness. *See id.* The child's competence, rather, "is determined by capacity of expression and appreciation of the duty to tell the truth." *Id.*

If a child is called as a witness, it is imperative that counsel adequately prepare the child to testify. Studies show that properly preparing a child and providing adequate support during the experience can reduce the trauma of a trial.⁵³ This preparation can be done by first explaining to the child the purpose of the testimony. The child should know that the jury, six people from the community, are chosen to decide what is fair, and that they need to know the truth about what happened and how it has changed the child's family. To adequately prepare, counsel should conduct a mock direct examination. Furthermore, to ensure competent representation, counsel should have an understanding of the fundamental characteristics of children.⁵⁴

Young, preschool-aged children, typically three-to-six years old, often present special problems in terms of their communication and comprehension ability.⁵⁵ Children this age also tend to use and interpret language very literally⁵⁶ and do not handle abstractions well.⁵⁷ Similarly, school-aged children (those roughly seven-to-ten years old), while possessed of their own unique charac-

53. See Nancy M. P. King, et al., *Going to Court: The Experience of Child Victims of Intrafamilial Sexual Abuse*, 13 J. HEALTH POL., POL'Y & L., 705, 712-14 (1988).

54. See ANNE GRAFFAM WALKER, *HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE* 13 (2d ed. 1994) (providing a detailed and thorough analysis of the characteristics of children and offering linguistic advice for communicating with young children).

55. See *id.*

56. See *id.* A typical example: Asked if she could "read" an eye chart, the child responded, "No! It doesn't make words." *Id.*

57. See *id.* With regard to abstract thought, preschoolers are ill-equipped to discuss the difference between truth and lies. See *id.* Such children do better with concrete examples that ask them to *demonstrate* rather than *articulate* their awareness. See *id.* (emphasis added). Further, pre-schoolers may lack the ability to collect information into specific categories. See *id.* This makes it difficult for such children to respond to questions that ask them if "anything like this" happened before. See *id.* Children this age tend to use words representative of time, distance, kinship and size, long before they understand their meaning. See *id.* Preschoolers generally do not organize events in their minds in an adult way, often leaving out relevant settings, descriptions, chronology, and motivations in relating past events. See *id.* Young children also often tend to supply an answer to every question even if they have no knowledge of its answer. See *id.* One reason for this behavior is that from an early age, children are taught that questions and answers form an indivisible pair. See *id.* If a question is left unanswered, children perceive something to be wrong. See *id.* Children usually answer questions with "Yes" for a number of reasons. Children understand that "Yes" is a valued answer that indicates cooperation. They often perceive it to be the answer that the adult wants, particularly in response to a tag question in which the tag is negative (e.g., "You like it, *don't you?*"). *Id.*

teristics, generally, also have difficulty handling abstract concepts.⁵⁸ Further, school-aged children may still have difficulty processing complex questions and complex verb phrases.⁵⁹ Children this age will generally have problems with passives, the difference between “ask” and “tell,” pronoun reference and complex negation.⁶⁰

Adolescent children, ages eleven to eighteen, represent a distinct group that has their own individual characteristics relating to their ability to testify. While older, these children may not necessarily possess developed narrative or spatial skills.⁶¹ In fact, children at this age who are under-educated, under-parented or unattached may remain in the school-age stage.⁶²

When preparing to use a child as a witness, it is important to use simple words and sentence structure. During mock direct examination, employ simple, common, everyday words and phrases.⁶³ In addition, counsel should make a conscious effort to use questions and comments that keep the number of ideas to a minimum.⁶⁴ Moreover, the examiner should phrase questions positively and avoid negatives whenever possible.⁶⁵

Because children often believe that they should have an answer to every question, counsel must give particular attention to

58. *See id.*

59. *See* WALKER, *supra* note 54, at 13. Complex verb phrases may include, for instance, the past perfect tense, e.g., “Where was this *supposed to have happened?*” *Id.*

60. *See id.* Multiple negatives such as “You *don’t deny you did it*, do you?” will likely confuse the child and elicit an inappropriate answer. *Id.* Furthermore, school-aged children may have difficulty organizing the details of narratives, will be unequipped to deal with adult insincerity such as sarcasm and irony, and may still believe that adults in general speak the truth. *See id.*

61. *See id.* Adolescents may not understand time as both a historical and as a day-to-day concept that affects their lives. *See id.* at 28.

62. *See id.* at 29. Other possible difficulties that could impair an adolescent’s ability to testify include: difficulty with complex negation; confusion created by linguistic ambiguity such as is found in newspaper headlines, some ads, metaphors, idioms, proverbs, and jokes; or, confusion created by long, complex questions. *See id.*

63. *See id.* Words and phrases such as “attorney,” “court,” “deny,” “subsequent,” “take the witness stand,” and the like do not fall into that category.

64. *See id.* at 31. The younger the child, the smaller the number of ideas that should be expressed. In addition, limiting questions with one focus is also preferred. *See id.*

65. *See id.* at 17. It is also helpful to state names and places rather than their corresponding pronouns. Ask, “What did *Albert* say?” instead of “What did *he* say?” Ask, “Were there a lot of people in the *kitchen?*” instead of “Were there a lot of people *there?*” *Id.*

whether the child actually understands the question.⁶⁶ The child should be instructed to tell the judge if he or she doesn't understand a question. It may be a good idea for an attorney to ask a child a few convoluted questions during preparation to verify that the child understands this instruction.

Equally important to the mental preparation for cross examination is actual practice. To familiarize the child with a cross examination by opposing counsel, attorneys should ask a colleague with whom the child is not familiar to conduct a cross examination.

Next, call the judge's clerk and make arrangements for a courtroom tour at least a week before trial. Have the child sit in the witness chair and if possible, conduct a brief mock direct examination from the location where you will question the child at trial. Also conduct a cross-examination from the possible location where opposing counsel may sit or stand during questioning.

If possible, introduce the child to courtroom personnel. Ideally, meet the judge without the robe. If the judge is willing, have the judge sit on the bench in robe while the child is seated on the witness stand. Introduce the child to the judge's clerk and to the court reporter.

If the child has a mental health counselor or other such specialist, that person may be able to provide the attorney with helpful advice on how to minimize trauma to the child and how to effectively present the child's testimony. Also, attempt to avoid snack or nap times when calling the child to testify, and be prepared to take frequent breaks during the testimony.

If the child is still fearful of taking the stand, the attorney should ask the judge to allow the child to testify while seated on the lap of, or next to, a trusted adult. Several courts have allowed children to testify while seated on the lap of a family member⁶⁷ or attorney.⁶⁸ In addition, permitting the child to take a blanket, stuffed

66. Debra Whitcomb, *Child Victims as Witnesses*, in EDUCATION DEVELOPMENT CENTER 28 (1994). It is important to help the child identify and cope with questions they may not understand. See *id.* (citing K. SAYWITZ AND L. SNYDER, IMPROVING CHILDREN'S TESTIMONY WITH PREPARATION 111 (2d ed. 1992)).

67. See, e.g., *State v. Johnson*, 528 N.E.2d 567, 569 (Ohio Ct. App. 1986).

68. *State v. Rogers*, 692 P.2d 2, 5 (Mont. 1984). *Rogers* involved the physical and sexual abuse of a two-year-old girl. The child's four-year-old sister was found competent to testify to the facts surrounding the abuse. Further, the sister demonstrated to the court her ability to distinguish between the truth and a lie and the importance of speaking the truth in court. See *id.* at 3-4.

The defendant, having been convicted of felony assault and sexual intercourse without consent, "complained that allowing the sister to sit on the prose-

animal, or toy to the stand may make the child more comfortable.⁶⁹ Consider, however, whether the use of such a support item will distract the jury. Never forget that thorough and adequate preparation are essential prerequisites for reducing a child's trauma and for effective child testimony.

V. PRESENTING THE CHILD'S "TESTIMONY" WITHOUT CALLING THE CHILD TO TESTIFY

A child's testimony can be presented in ways other than live trial testimony. Despite a criminal defendant's Sixth Amendment right to confront a witness,⁷⁰ courts have exercised their discretion to accommodate a child's fear of the courtroom.⁷¹ For example, judges have allowed a child to testify by closed circuit television.⁷²

cutting attorney's lap while testifying was prejudicial." Specifically, the defendant argued "that it prevented [his defense attorney] from conducting an adequate cross-examination." *Id.* at 5. In affirming the conviction, the *Rogers* court stated that the defendant had not specifically established from the record that he was denied any right, or prejudiced in any manner. Furthermore, the Court found that, under Rule 611 of the MONT. R. EVID., the mode, order and control of any interrogation or examination was within the discretion of the trial court. Additionally, the trial court judge correctly determined that allowing the sister to testify from the lap of the prosecuting attorney "assisted in directing her attention to the questioning" and "provided comfort to her during a difficult and unfamiliar experience." *Id.* See also Crocca, Annotation, *Propriety and Prejudicial Effect of Third Party Accompanying or Rendering Support to Witness During Testimony*, 82 A.L.R. 1038 (1990).

69. See *Commonwealth v. Amirault*, 535 N.E.2d 193, 205-207 (Mass. 1989) (allowing a child witness in a sexual abuse case to testify from a child-sized table and chair, sit near a parent, and bring a toy into the court room).

70. The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and then be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S CONST. amend. VI. (emphasis added). The underlying policy behind the Sixth Amendment is "the right physically to face those who testify against the accused and the right to conduct cross-examination." *Cory v. Iowa*, 478 U.S.1012, 1017 (1988). Likewise, "it intends to ensure the integrity of the fact finding process." *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987).

71. See *State v. Lanam*, 459 N.W.2d 656, 659-60 (Minn. 1990) (finding young child witness not competent to testify but ruling her prior made statements were reliable and allowing them into the record); *State v. Peterson*, 530 N.W.2d 843, 844 (Minn. Ct. App. 1995) (protecting a child witness from the trauma of a face-to-face confrontation at trial by allowing the child to testify on videotape).

72. See *Maryland v. Craig*, 497 U.S. 836, 849-50 (1990) (holding a defendant's

Because civil defendants do not enjoy the same constitutional protection as do criminal defendants, courts have been even more willing to accommodate a child's testimony.⁷³

A good example of accommodating a child's testimony is found in *In re Brock*.⁷⁴ *Brock* sadly involves the tragic tale of a father sexually abusing his two young daughters.⁷⁵ The children were removed from their parent's custody and placed in foster care.⁷⁶ During the child protective hearings, the father's attorney was not allowed to cross-examine the children, who's testimony was presented by videotaped deposition.⁷⁷ The court, citing the possible additional trauma the children might suffer by testifying by personal appearance, overruled the father's objections regarding his inability to cross-examine the children.⁷⁸

right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured). See also *Lanam*, 459 N.W.2d at 660; *Peterson*, 530 N.W.2d at 844 (citing Minnesota's adoption of *Craig* and protecting child witnesses through various methods of testimony).

73. See *In re Adoption of J.S.P.L., J.J.L., & J.W.L. v. Wessman*, 532 N.W.2d 653, 661 (N.D. 1995) (finding incarcerated father had no absolute constitutional right to personally confront and cross-examine witnesses at proceeding to terminate parental rights and grant adoption petition); *In re Brock*, 499 N.W.2d 752, 757 (Mich. 1993) (holding rules applicable in a child protective proceeding differ substantially from those applicable in a criminal case); *State v. Naucke*, 829 S.W.2d 445, 450 (Mo. 1992) (determining testimony by personal appearance would cause the child to experience trauma, the court permitted an in camera videotaped recording of the child's deposition out of defendant's presence as a substitute).

74. 499 N.W.2d 752 (Mich. 1993).

75. See *id.* at 754. "Soft signs" of sexual abuse were first noticed by a neighbor and later by the Michigan Department of Social Services. Blood was found on the children's bed sheets. In addition, one child exhibited a red and swollen vagina and complained that her private parts hurt. Finally, one child spontaneously stated "Daddy put his finger in my pookey," referring to her vaginal and rectal areas. *Id.*

76. See *id.* at 755. After the children were temporarily placed in foster care, the adjudicative phase of the child protective hearing determined that the probate court had jurisdiction over the matter. Having found jurisdiction, the probate court determined the children should continue in foster care pending the termination of the dispositional phase. See *id.*

77. See *id.* The child implicated her father during the videotaped deposition. The videotape was shown to the jury. See *id.*

78. See *id.* at 755-56. During a special hearing regarding the older child's testimony, a clinical expert testified that the child, if made to testify by personal appearance, would suffer additional trauma which would complicate and detract from the child's psychological treatment. Specifically, the expert stated that the physical aspects of the court room, the number of adults present at the hearings

Showing a day-in-the-life video of the child also can be far more compelling than having the injured child testify. Such videos are generally admissible.⁷⁹ In my experience, the most successful day-in-the-life videos are those which are shorter than 15 minutes and are filmed with little, if any, editing.

If the child has a guardian ad litem, consider calling that person as a witness.⁸⁰ The guardian ad litem cannot only testify as to his or her observations of the child, but also to the guardian's duty, by virtue of court appointment, to properly invest and spend any money recovered by a child. This may allay any concerns the jury may have as to whether the child's parents would be free to spend the child's money without limitation.⁸¹

Certain evidentiary rules may also allow the attorney to convey the child's story to the jury without having the child testify.⁸² For

and the vocabulary used would all detract or prevent the child from testifying personally. *See id.* The expert also stated that confronting her parents and being asked questions during cross-examination would be traumatic and interfere with the child's treatment. *See id.* at 755.

79. *See Hahn v. Tri-Line Farmers Coop.*, 478 N.W.2d 515, 524-25 (Minn. Ct. App. 1991) (finding the admissibility of a "day in the life" videotape was within the broad discretion of the trial court); *see also Johnson v. Engen*, 386 N.W.2d 269, 270-71 (Minn. Ct. App. 1986) (holding a videotape is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading nature).

80. In my experience, no defendant has objected to calling the guardian ad litem as a witness. However, the defendant could possibly object by claiming that the guardian is not the actual party to the action. *See In re Cochems' Estate*, 242 P.2d 56, 58 (Cal. Ct. App. 1952) (finding that a guardian ad litem is not a party to an action, but merely a personal representative of record, against which a judgment may not be rendered for or against); *Cozine v. Bonnick*, 245 S.W.2d 935 (Ky. 1952) (recognizing a guardian ad litem is merely an agent of the child and court, not an actual party to the action). *See also Borowski v. Sargent*, 188 Minn. 102, 246 N.W. 540, 542 (1933) (child's action should be in the child's name "by the guardian," rather than in the name of the guardian on the child's behalf); *see also MINN. R. CIV. P. 17.01* (requiring that every action brought shall be in the name of the real party in interest); *MINN. R. CIV. P. 17.02* (allowing a duly appointed representative to sue or defend on behalf of an infant or incompetent persons). In addition, a guardian ad litem's adverse admissions may not bind the child or waive the child's substantial rights. *See State v. Larkin*, 110 F.2d 226, 227 (8th Cir. 1940).

81. If the child does have a guardian ad litem, and prevails at trial, counsel should also be aware of the taxation of costs implications with respect to the guardian. *See DuPont v. Southern Nat'l Bank*, 771 F.2d 874, 877 (5th Cir. 1985) (finding a guardian ad litem is an officer of the court appointed to serve the best interests of the child, and as an officer of the court, the expenses of a guardian ad litem are properly taxable as costs).

82. *See MINN. R. EVID. 803.* The relevant portion of the rule states:

The following are not excluded by the hearsay rule, even though the de-

example, the child may have told a mental health care professional about the horror of an injury. While such testimony from the health care provider may be inadmissible hearsay as to the truth of what the child observed, it may be admissible on the issue of the child's state of mind,⁸³ or as a statement for purposes of medical diagnosis or treatment.⁸⁴ At least one judge believes that a child's statements to a parent should be admitted because such statements are essentially the same as those made to a health care provider for purposes of diagnosis and treatment.⁸⁵ Likewise, a child's documented statements to health care providers may be admissible as statements in records of regularly conducted business activity.⁸⁶ A

clarant is available as a witness:

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

MINN. R. EVID. 803, subd. (2)-(4).

83. See MINN. R. EVID. 803(3). Rule 803(3) combines two important exceptions, state of mind and statement of present bodily condition, to the general hearsay rule. If statements regarding state of mind are to be considered admissible, the rule requires that state of mind be relevant to the issues in the lawsuit. State of mind may also be admitted to prove that the declarant subsequently acted in conformity with his state of mind. See *Scott v. Prudential Ins. Co.*, 203 Minn. 547, 552, 282 N.W.467, 470 (1938) (admitting prior statement to show conformity with state of mind).

84. See *State v. Larson*, 472 N.W.2d 120, 122 (Minn. 1991) (holding trial court properly admitted four-year-old child's statements to physician's assistant, child protection specialist, and psychologist under MINN. R. EVID., 803(4)); see also *State v. Serna*, 290 N.W.2d 446, 448 (Minn. 1980).

85. See BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, *ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN* 140-47 (1989).

86. See MINN. R. EVID. 803(6). The rule states:

(6) Records of Regularly Conducted Business Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthi-

child's statement "under the stress of excitement" caused by an event may likewise be admissible as a hearsay exception.⁸⁷ If the court believes that statements which would be admissible under one of the hearsay exceptions are untrustworthy, however, such statements may nonetheless be excluded.⁸⁸

VI. CONCLUSION

Preventing or minimizing the trauma often associated with a child witness testifying requires counsel to take additional measures in preparing for trial. After making the initial decision to have a child testify, counsel must carefully prepare and guide the child through direct and cross examination and should examine other alternatives to live testimony. Failure to consider such matters could result in the child suffering unnecessary trauma, and in the final analysis give less effective testimony.

ness. . . .

MINN. R. OF EVID. 803 (6). See *In re D.J.N.*, D.L.N., D.C.R., C.M.R., D.L.R. & D.R.R., 568 N.W.2d 170, 176 (Minn. Ct. App. 1997) (finding child protection and adoption files admissible under rule 803(6) of the Minnesota Rules of Evidence); *In re Martine*, 458 N.W.2d 700, 704 (Minn. Ct. App. 1990) (holding medical records admissible under business records exception to hearsay rule).

87. See MINN. R. EVID. 803(2). In order to qualify as an excited utterance three requirements must be met: 1) there must be a startling event or condition; 2) the statement must relate to the startling event or condition; and 3) the declarant must be under a sufficient aura of excitement caused by the event or condition to ensure the trustworthiness of the statement. See *id.* See also *In re Chuesberg*, 233 N.W.2d 887 (1975) (demonstrating that an excited utterance is not rendered inadmissible because it is an answer to a question). *Chuesberg* involved a young child witnessing the murder of his mother. See *id.* When asked who had committed the murder, the child stated "Jimmy did it" and "Jimmy stepped on my ma's face." See *id.* at 888. The trial court admitted the child's testimony under the excited utterance exception to the hearsay rule. The Supreme Court later affirmed, stating the lower court did not abuse its discretion in doing so. See *id.* at 889.

88. See *id.*