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The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment

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The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment

JOHN E.B. MYERS*

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Children testify in legal proceedings with increasing frequency. It is not uncommon for children as young as three and four to take the witness stand. When the individual on the stand is a child whose head is barely visible above the rail of the witness box, and whose feet dangle a foot or more from the floor, the trial lawyer faces unique challenges. This article provides practical information on techniques for direct examination, cross-examination, and impeachment of young witnesses.

I. DIRECT EXAMINATION

A. *Direct Examination—Getting Underway*

The direct examiner's primary responsibility with all witnesses, whether children or adults, is to "get the story into the record." The experienced trial lawyer knows that this goal often is easier said than done. Many self-assured and intelligent adult witnesses find it difficult to relate what they know. When the witness is a six-year-old, the difficulties are multiplied many times. No child should be placed on the stand unless the child has been prepared for the experience, and unless the attorney is reasonably confident the child will be able to testify effectively.

Before beginning the direct examination, the attorney is well-advised to imagine what runs through a child's mind as he or she climbs up to the witness stand. To a young child the courtroom is a huge and foreboding place filled largely with strangers. The robed judge sits high atop a throne. Even though the child has been told that the judge is a "nice" person, the sheer presence of the court may be intimidating. In a criminal case, the defendant is seated at counsel table, just a few feet away. If the defendant has injured the child, or threatened harm if the child testifies, the child's fear of the defendant can be overpowering. The embarrassment and stage fright which accompany speaking in public causes anxiety for most witnesses, but when the witness is a young child, the anxiety may be significantly amplified. All in all, testifying is not a pleasant experience.

Bearing in mind the anxiety and fear experienced by most child witnesses, the direct examiner's first task is to place the child at ease. Advance attention should be given to the seemingly simple matter of getting the child from his or her seat inside or outside the courtroom to the witness stand. Unless the child knows exactly where to go, and has the confidence to make the journey alone, someone should assist the child. What could be worse than dragging a frightened child away from her or his parent and forcing the youngster to march the endless distance to the witness box. It's a little like asking a five-year-old to walk from the car to the doctor's office for a shot while the parent waits in the car.

Once the child is safely on the stand and under oath, the examiner should open the direct examination with simple questions designed to place the child at ease. For example, counsel might begin by asking a series of questions which the child can answer easily and without embarrassment. The success of getting the right answers, and doing a good job in response to the attorney's questions gives the child self-confidence.

Questions must be phrased in language the child understands. Use of legal terminology and other big words should be assiduously avoided. This is not to say that the examiner resorts to childlike language. Rather, a conscious effort is made to propound questions in language that is familiar to the child. Eschewing lawyer talk, however, is easier said than done. Words which are completely foreign to a child and to many adults are second nature to the attorney, and it strikes many lawyers as odd when a witness fails to understand such "simple" terms as "alleged," "document," "case," or "on or about." Until counsel gains experience examining children, conscious effort is needed to avoid legalese.

Courts differ on the matter of where the attorney stands when examining a witness. Some jurisdictions require counsel to remain at the podium, while others permit the examiner to move about. If the attorney has some freedom of movement, consideration should be given to the position that will make testifying easiest for the child. If the child is afraid of the defendant, the examiner may take a position that makes it possible for the child to look at the attorney, and avoid seeing the defendant. There is no requirement that a witness look at the defendant, and positioning oneself as far away as possible from the defendant should not be objectionable. Counsel might even consider standing between the defendant and the child. Such a tactic raises serious questions about the defendant's

right to confront accusatory witnesses, however, and probably is improper.

B. Supporting the Child's Competence

There is no minimum age below which children are automatically disqualified from serving as witnesses.¹ In many jurisdictions, however, younger children must undergo a preliminary examination by the court regarding their testimonial capacity before they may testify. If the judge determines that a child is competent, the examination proceeds in the usual fashion. In jurisdictions following the approach of the Federal Rules of Evidence, many children are presumed to be competent, and a preliminary examination is unnecessary.

Despite the fact that a child witness has been declared competent, counsel may harbor doubts about the jury's confidence in the child's testimonial capacity. When the attorney has such doubts, it may be worthwhile to utilize a portion of the direct examination to ask questions designed to demonstrate the child's competence. For example, the attorney may ask questions which illustrate that the child can perceive, remember, and relate facts accurately, and that the child understands the difference between the truth and a lie. Occasionally, it may be appropriate to ask a preliminary question which contains an inaccuracy. If the child corrects counsel on the inaccurate information, the jury sees that the child is intelligent and perceptive.² Questions designed to support a child's competence may come at the beginning of the direct examination, or may be scattered throughout the examination.

The party against whom the child's testimony is offered may object to questions which are designed to bolster the child's competence. Counsel may argue that competence has already been decided and that bolstering is improper in the absence of some form of impeachment. Of course, the danger in such an objection is that by arguing that competence has already been established, the lawyer

1. See Myers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287 (1985-86).

2. If counsel deems it necessary to ask questions which contain factual inaccuracies, it is obvious that the questions obviously should relate to preliminary, uncontested, and unimportant matters. It would be highly improper and unethical for an attorney to intentionally pose inaccurate questions relating to contested matters in such a way that the jury may be misled.

may unwittingly reinforce the child's competence in the eyes of the jury.

C. Recess to Reduce Anxiety or Stress

Testifying is a traumatic event for nearly all witnesses, and children are no exception. Due to their immaturity, however, many children find testifying an unusually frightening event. In addition to the anxiety caused by testifying, younger children have a short attention span. Asking a five-year-old to sit still in an uncomfortable chair and answer questions for an hour is asking for trouble. It is often appropriate to call brief recesses to give the child a break. The trial judge has ample discretion to call such recesses. Furthermore, several states have statutes expressly providing that the examination may be interrupted to provide the child relief from the pressure of the courtroom.³ Counsel might consider discussing the matter of recesses with the court and opposing counsel in advance of trial.

While periodic recesses during direct examination raise few problems beyond those associated with inconvenience and delay, the interruption of cross-examination is another matter. Of course, it is often during cross-examination that the child is most uncomfortable and in need of rest. The trial court has authority to recess the proceedings at reasonable intervals. In some cases, however, breaking into the cross-examination in order to afford respite to a child witness may interfere with a defendant's sixth amendment right to confront accusatory witnesses. In such a case a defendant may argue that excessive interference with the right to develop a line of cross-examination trammels the confrontation right. Indeed, the cross-examiner's very purpose may be to force the child to experience anxiety, discomfort or uncertainty about the child's direct testimony in an effort to gain an admission that the facts might be otherwise. As long as the cross-examiner does not badger or harass the child, such examination is probably proper. The need to protect the child must be balanced against the right of the defendant to vigorously

3. See, e.g., CAL. PENAL CODE § 868.8 (West Supp. 1987). This statute states that in certain sex offense cases involving victims under the age of eleven, the court shall take special precautions to provide for the comfort and support of the minor and to protect the minor from coercion, intimidation, or undue influence as a witness, including, but not limited to, any of the following: "(a) In the court's discretion, the witness may be allowed reasonable periods of relief from examination and cross-examination during which he or she may retire from the courtroom. . . ." *Id.*

cross-examine the witness. In general, the greater the importance of the child's testimony for the state, the greater the need to thoroughly cross-examine. In the final analysis, the matter should be left to the sound discretion of the judge.⁴

D. While the Child is Not on the Stand

Seldom do young witnesses sit in the courtroom while they wait to testify. Usually they bide their time in the hall or in a witness room. An increasing number of prosecutors provide specially equipped rooms for children, where they can play or watch television while they wait. A special room, outfitted with toys, games, and child size furniture provides a safe haven for children. Rather than spend the time prior to testifying worrying about what is to come, children can pass the time in a low stress environment. Not only does time pass more quickly, but children take the stand refreshed and ready to work.

During breaks in a child's testimony, the youngster should be taken outside for a walk or to a private room where the child will not interact with the jury. If a child witness room is available, an adult can accompany the child to that location. The child should not be permitted to play in the presence of the jury because such behavior may improperly ingratiate the child to the jurors or engender sympathy for the child.⁵

An attorney calling a child as a witness must decide whether to accompany the child during recesses. By accompanying the child, the attorney can help the youngster relax. The temptation is strong, however, to use recesses to prepare children for the remainder of

4. If counsel feels strongly that the court is improperly interfering with the cross-examination, the attorney faces a very difficult dilemma. Should counsel object to the frequent recesses? The objection may not sit well with the court. Of equal importance, if the objection is made before the jury, the jurors may become convinced that the examiner is an ogre who likes making children unhappy. Perhaps the best course is to ask for an in-chambers and on the record conference to discuss the problem from the defense perspective. By asking that the conference be made part of the record, the matter is preserved for appeal.

5. See *State v. Feet*, 481 So. 2d 667, 674-75 (La. Ct. App. 1985). Defendant in this sex abuse case moved for a mistrial because the "victim disregarded the court's order and openly played in the presence of the jurors during a lunch recess." The defendant argued that "the victim should not have been in the presence of the jurors and that it would be only natural for them to feel sympathy for her." The trial and appellate courts held that the child's activity did not prejudice the defendant. *Id.* at 675. Despite the court's rejection of defendant's argument in *Feet*, however, the proponent of a child's testimony is well-advised to avoid potential problems by ensuring that the child rests outside the presence of the jury.

their examination. This is particularly so if the direct examination is not going well, and the temptation may be overpowering if the recess is called during cross-examination.

Using a recess to prepare a child for further examination may be unwise. A recess is called to provide a child an opportunity to relax. If counsel insists on working during the break, the child may not benefit from the recess. Additionally, the attorney must be careful not to exert improper influence on a child during a recess.⁶ The responsibility to avoid improper coaching is particularly acute when the attorney is a prosecutor and the child is a prosecution witness.⁷ A cross-examiner may capitalize on counsel's efforts during a recess

6. See *People v. Pendleton*, 75 Ill. App. 3d 580, 394 N.E.2d 496, 506-07 (1979). In the *Pendleton* case the prosecutor met with the adult prosecutrix in a rape case during a weekend recess. Prior to the recess the victim's examination was going badly. When trial resumed on Monday, however, the witness performed flawlessly. The prosecutor did not inform the court or opposing counsel that she interviewed the victim during the recess. Under the facts of this case, the appellate court held that the prosecutor's conduct amounted to serious misconduct. The court stated:

It is not improper for an attorney to refresh a witness' memory *before* he takes the stand. Reviewing testimony with a witness makes for better direct examination, facilitates the trial and lessens the possibility of irrelevant and perhaps prejudicial interpolations. The attorney must be careful, however, to respect "the important ethical distinction between discussing testimony and seeking improperly to influence it."

As a general rule, an attorney may also consult with a witness, regarding his testimony, even after the witness is placed on the stand, *provided* a legitimate need arises for such a discussion. The attorney, for example, may require additional information made relevant by the days' testimony, or he may find it necessary to inquire along lines not fully explored earlier. However, such discussions (after a witness has taken the stand and is still subject to examination) pose a tantalizing potential for misconduct, they are to be strictly scrutinized.

Id. (citations and footnote omitted).

7. See *Carsey v. United States*, 392 F.2d 810, 812 (D.C. Cir. 1967).

Both the prosecutor and defense counsel are charged with conducting themselves in accordance with the objective of a fair trial. It seems likely that this objective may be more easily imperiled by misconduct of the prosecutor than of the defense, since the jury may have a special confidence in the prosecutor as a public official who does not represent a biased party but an impartial sovereign whose "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. (footnote omitted); *Buchanan v. State*, 554 P.2d 1153, 1160-62 (Alaska 1976) (Nine-year-old victim in a sexual abuse case. The trial court arranged for an in-court lineup. The day before the lineup, the prosecutor presented the child with a photo lineup including the defendant. The child identified the defendant during the lineup. The prosecutor did not inform opposing counsel or the court that the child saw a picture of the defendant the day before the lineup. Defendant moved for a mistrial. The supreme court held that the trial judge did not err in denying the motion. The supreme court concluded, however, that the prosecutor acted improperly, and remanded the case for the imposition of discipline.); *People v. Pendleton*, 75 Ill. App. 3d 580, 394 N.E.2d 496 (1979); C. WOLFRAM, *MODERN LEGAL ETHICS* § 12.4.3, at 647-49 (1986) ("Prosecutors, because of the power of their office, must be particularly alert to the dangers of improper influence on prosecution witnesses . . .").

by asking the child whether the opposing attorney told the child how to respond to questions or what to say. To avoid the potential problems discussed above, counsel may decide that the better practice is to ask a nonattorney support person to remain with the child during recesses.

E. Use of Leading Questions on Direct Examination

The traditional practice in all jurisdictions is to restrict the use of leading questions on direct examination.⁸ The Federal Rules of Evidence continue this practice.⁹ There are several exceptions to the rule against the use of leading questions on direct. Trial judges frequently permit leading questions in the following areas: (1) preliminary matters such as the witness's name, address, occupation, and relationship to the events or parties,¹⁰ (2) undisputed matters,¹¹ (3) to introduce a topic for further inquiry,¹² (4) to rekindle the

8. For a discussion of leading questions see generally M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 611.10, at 530-33 (2d ed. 1986); 3 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 339, at 459-62 (1979); C. McCORMICK, McCORMICK ON EVIDENCE § 6, at 11-13 (E. Cleary ed. 1984); 3 J. WEINSTEIN & M. BERGER, J. WEINSTEIN'S EVIDENCE ¶ 611[05], at 611-56 to -62 (1985) [hereinafter cited as J. WEINSTEIN]. See also 3 J. WIGMORE, WIGMORE ON EVIDENCE § 769, at 154-55 (Chadbourn ed. 1970). The author writes:

On the direct examination, *i.e.*, by the counsel of the party in whose favor the witness is called, the most important peculiarity of the interrogational system is that it may be misused by *suggestive questions* to supply a false memory for the witness—that is, to suggest desired answers not in truth based upon a real recollection. The problem is to discriminate between the forms of questions which will too probably have that effect and those which will not. Questions may legitimately suggest to the witness the *topic* of the answer; they may be necessary for this purpose where the witness is not aware of it but its terms remain dormant in his memory until by the mention of some detail the associated details are revived and independently remembered. Questions, on the other hand, which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory, are illegitimate.

Id.

The essential notion, then, of an improper (commonly called a leading) question is that of a question which *suggests the specific answer desired*.

9. FED. R. EVID. 611(c). Rule 611(c) states:

Leading questions should not be used on direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Id.

10. See FED. R. EVID. 611(c), advisory committee's note (Leading questions proper on "undisputed preliminary matters."); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 339, at 466; C. McCORMICK, *supra* note 8, § 6, at 12-13; 3 J. WEINSTEIN, *supra* note 8, ¶ 611[05], at 611-59; 3 J. WIGMORE, *supra* note 8, § 775, at 168-69.

11. See C. McCORMICK, *supra* note 8, § 6, at 13.

12. *Id.* § 6, at 13.

memory of a witness whose recollection is apparently exhausted,¹³ and (5) if a witness proves hostile, biased, or unwilling.¹⁴

Courts frequently permit leading questions during the direct examination of children who experience difficulty testifying due to fear, timidity, embarrassment, confusion, or reluctance.¹⁵ Several

13. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 339, at 466 ("when the memory of the witness seems, but may not be exhausted, the questioner may be allowed to try to refresh it by suggesting things which awaken a more detailed recollection."); 3 J. WIGMORE, *supra* note 8, § 777, at 169 ("Where the witness is unable without extraneous aid to revive his memory on the desired point—i.e., where he understands what he is desired to speak about, but cannot recollect what he knows—here his recollection, being exhausted, may be aided by a question suggesting the answer.").

14. See C. McCORMICK, *supra* note 8, § 6, at 12; 3 J. WIGMORE, *supra* note 8, § 774, at 167-68 ("This situation includes not only the case of witnesses hostile, biased, or interested, by their sympathies with the opponent's cause, but also of witnesses *unwilling* for any other reason to tell all they may know . . .").

15. See, e.g., *United States v. Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983) (Fifteen and seventeen-year-old rape victims. Leading questions proper where victims "were hesitant to answer questions." The defendant has "threatened to kill them if they told what had occurred."); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (Nine-year-old sexual assault victim. Proper to permit leading questions on direct of child who was reluctant to testify.); *United States v. Littlewind*, 551 F.2d 244, 245 (8th Cir. 1977) (Thirteen and fourteen-year-old victims of rape. Leading questions proper when children were hesitant to testify.); *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968) ("the appellant contends that reversible error resulted from the trial court's permitting leading questions to Lulu Faye. As the court pointed out, she was a reluctant witness, only fifteen years of age. The transcript shows that she was nervous and upset. The district court properly exercised discretion in allowing leading questions."); *Antelope v. United States*, 185 F.2d 174, 175 (10th Cir. 1950) ("The prosecuting witness here was a young, timid Indian girl. She was in strange surroundings. The questions, of necessity, were embarrassing to her. She testified in a timid, halting manner. Under these circumstances, it was necessary to ask her some leading questions to elicit from her the material facts."); *Scantling v. State*, 271 Ark. 678, 680-81, 609 S.W.2d 925, 926-27 (1981) (Eleven-year-old victim of rape. Proper to permit leading questions when child witness is nervous or upset.); *Scott v. United States*, 412 A.2d 364, 371 (D.C. Ct. App. 1980) ("While it is often necessary to use leading questions in the case of a young witness, age is not determinative."); *Begley v. State*, 483 So. 2d 70, 72 (Fla. Dist. Ct. App. 1986) (Five-year-old victim. "The use of leading questions to a child of tender years is also within the sound discretion of the trial judge."); *State v. Carthan*, 377 So. 2d 308, 314-15 (La. 1979) (Ten-year-old victim of sexual assault. After describing what occurred prior to the assault, the child was unable to go further. The prosecutor then asked, "Did he ask you to pull your pants down?" The child was timid and embarrassed. Held: The trial court did not err in permitting the leading question.); *State v. Kahey*, 436 So. 2d 475, 493 (La. 1983) (Eleven-year-old witness. The rule against leading "is relaxed, as a matter of necessity, even during the direct examination of certain witness such as children . . ."); *State v. Bolton*, 408 So. 2d 250, 256 (La. 1982) (Ten-year-old victim. Use of leading questions with minor child is within trial court's discretion.); *People v. Garland*, 152 Mich. App. 301, 309-10, 393 N.W.2d 896, 899 (Ct. App. 1986) (Seven-year-old victim of sexual abuse. The child was mentally retarded. "Given the witness's age, mental abilities and the nature of the offense, we are not persuaded that the use of leading questions was improper."); *Dehring v. Northern Mich. Exploration Co.*, 104 Mich. App. 300, 304 N.W.2d 560 (Ct. App. 1981) (Not error to permit leading questions of a hearing impaired adult.); *Bailey v. Bailey*, 184 Mont. 418, 603 P.2d 259 (1979) (Contested child custody litigation incident to divorce. The trial court did not err when it asked leading questions of a child during an in-chambers interview.); *State v. Leigh*, 580 S.W.2d 536, 541

decisions suggest that in sex offense cases leading may be appropriate due to the embarrassing nature of the questions.¹⁶ The better practice usually is to require the examiner to begin with nonleading questions, and to permit limited use of leading questions if the child is unable to proceed.¹⁷ Initial authorization to lead a child should

(Mo. Ct. App. 1979) (Court may allow leading questions on the direct examination of a timid or fearful child.); *Barcus v. State*, 92 Nev. 289, 550 P.2d 411 (1976) (Eight and nine-year-old victims of sex abuse. Not error to permit state to use leading questions.); *State v. Orona*, 92 N.M. 450, 455, 589 P.2d 1041, 1046 (1979) ("Leading questions are often permissible when a witness is immature, timid or frightened."); *People v. Tyrrell*, 101 A.D.2d 946, 946-47, 475 N.Y.S.2d 937, 938 (App. Div. 1984); *State v. Hannah*, 316 N.C. 362, 341 S.E.2d 514, 515 (1986) ("It is settled law in this State that 'leading questions are necessary and permitted on direct examination when a witness has difficulty understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.'"); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55, 59 (1986) ("Counsel may be allowed to lead a witness on direct examination when the witness has difficulty in understanding the question because of immaturity or advanced age."); *State v. Jenkins*, 326 N.W.2d 67, 70 (N.D. 1982). *Jenkins* involved a nine-year-old victim of sexual assault. The court wrote:

Both the embarrassment and psychological trauma of a victim involved in a sex-related crime are compounded when the victim is a child. A child understandably may be hesitant or unwilling to volunteer specific testimony concerning the actual elements of a sexual offense. These factors are all circumstances which the trial court, in its discretion, may consider in determining whether or not to permit leading questions to be asked of a complaining witness in a sex-related crime.

Id.; *State v. Lewis*, 4 Ohio App. 3d 275, 448 N.E.2d 487 (1982) (Eight and ten-year-old victims of sex abuse. Not error to permit state to use leading questions.); *Vera v. State*, 709 S.W.2d 681 (Tex. Ct. App. 1986); *Uhl v. State*, 479 S.W.2d 55, 57 (Tex. Crim. App. 1972).

See also ALA. CODE § 15-25-1 (1985) (In criminal sex offense cases "the court may allow leading questions at trial by the prosecution or defense of any victim or witness in such case who is under the age of 10, if the court determines that the allowance of leading questions will further the interests of justice.").

See also C. McCORMICK, *supra* note 8, § 6, at 13.

Additional relaxations [of the rule against leading on direct] are grounded in necessity. Thus, the judge, when need appears, will ordinarily permit leading questions to children . . . It is recognized, especially as to children, that in these cases, the danger of false suggestion is at its highest, but it is better to face that danger than to abandon altogether the effort to bring out what the witness knows.

Id.; 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 339, at 462-63 ("the questioner is usually allowed to put leading questions to a witness who is (i) very young, and therefore perhaps apprehensive, uncomprehending, or confused, (ii) timid, reticent, reluctant, or frightened, (iii) ignorant, uncomprehending, or unresponsive, or (iv) infirm."); 3 J. WEINSTEIN, *supra* note 8, ¶ 611[05], at 611-59; 3 J. WIGMORE, *supra* note 8, § 778, at 169-70.

16. See *Scantling v. State*, 271 Ark. 678, 680-81, 609 S.W.2d 925, 926-27 (1981); *Hamblin v. State*, 268 Ark. 497, 597 S.W.2d 589 (1980); *State v. Moore*, 377 A.2d 1365, 1366 (Me. 1977) (Eleven-year-old victim. "Children may be asked leading questions on direct examination in the trial court's sound discretion. . . . In embarrassing sex crimes, where a child would be hesitant to testify, leading questions may be particularly appropriate."); *State v. Hannah*, 316 N.C. 362, 341 S.E.2d 514, 515 (1986) ("It is settled law in this State that 'leading questions are necessary and permitted on direct examination when a witness has difficulty understanding the question because of immaturity, age, infirmity or ignorance or when the inquiry is into a subject of delicate nature such as sexual matters.'").

17. See *State v. Jenkins*, 326 N.W.2d 67, 70 (N.D. 1982) (An initial attempt was made to use nonleading questions.).

not be interpreted as *carte blanche* approval to conduct the remainder of the examination with such questions, and once the need for leading questions is removed, their use should cease. Furthermore, the trial judge should closely supervise the use of leading questions in order to prevent the examiner from asking improperly suggestive questions or from testifying in the child's stead.¹⁸

Many children are suggestible, and the danger of improper suggestion can be at its highest during the frightening experience of testifying.¹⁹ In a criminal case, for example, a child may feel that the prosecutor is a friend and protector. The child may want to please this important adult. What better way to help the prosecutor than to answer suggestive questions in a way that assists the prosecutor. The questioner may subtly or even unconsciously register approval or disappointment with a child's answers through body language or a slight smile. The child reacts to such cues by selecting the "correct" answer.²⁰ Needless to say, the conscientious prosecutor avoids improper influence over young witnesses, but the risk of unwarranted suggestion exists when leading questions are employed. The trial court must balance the legitimate need for leading questions "against the danger that they will supply the witness with a

18. See *State v. Orona*, 92 N.M. 450, 454, 589 P.2d 1041, 1045 (1979). In this sex abuse case the victim could not go forward with her testimony. The prosecutor was allowed to refresh her recollection with a prior written statement. Rather than allow the child to testify from her refreshed recollection, however, the prosecutor was permitted to ask a series of leading questions relating to the central acts alleged to constitute the crime. The New Mexico Supreme Court held that such use of leading questions was improper. The court wrote:

Developing testimony by the use of leading questions must be distinguished from substituting the words of the prosecutor for the testimony of the witness. Here, the trial court, in permitting every word describing the alleged offense to come from the prosecuting attorney rather than from the witness, abused its discretion in such a manner as to violate principles of fundamental fairness.

Id.

19. See *State v. Orona*, 92 N.M. 450, 455, 589 P.2d 1041, 1046 (1979).

Leading questions are often permissible when a witness is immature, timid or frightened. Although the age of a witness might justify the use of leading questions under some circumstances, the youth and inexperience of such a witness might also create a much greater danger from the use of suggestive questions than might otherwise be the case.

Id. (citations omitted). See also *Thompson v. State*, 468 So. 2d 852, 853-54 (Miss. 1985) (Use of leading questions may be proper with young witnesses. "However, we caution the continued leading questions on cogent points, many of which were answered by an affirmative nodding of the head, is hazardous procedure at best.")

20. This is not to say that children intentionally lie when they provide answers designed to please the questioner. A child may not have a clear memory of what happened. Thinking that the adult must know best, (children are no strangers to statements such as "grownups know best") the child goes along with the the version which the questioner seems to favor. For younger children, particularly those under age six, adults may be viewed as infallible.

false memory.”²¹ The judge possesses ample discretion to limit leading questions which may be unfairly prejudicial, misleading, or suggestive.²²

The determination to permit leading questions on direct is a matter uniquely suited to the discretion of the trial court.²³ Wigmore writes that the decision to permit leading questions on direct “must rest largely, if not entirely, in the hands of the trial court.”²⁴ The trial judge will not be reversed unless the party opposing the testimony establishes an abuse of discretion.²⁵

21. *Scott v. United States*, 412 A.2d 364, 371 (D.C. Ct. App. 1980) (“While it is often necessary to use leading questions in the case of a young witness, age is not determinative. The legitimate need for such questions must be balanced against the danger that they will supply the witness with a false memory.”).

22. See FED. R. EVID. 403, 611.

23. See *State v. Jerousek*, 121 Ariz. 420, 590 P.2d 1366, 1372 (1979) (en banc) (“it is within the court’s discretion to allow leading questions during the direct examination of minor witnesses.”); *State v. Jones*, 204 Kan. 719, 727, 466 P.2d 283, 291 (1970) (“Whether leading questions should be permitted in any particular case rests in a large measure in the discretion of the trial court.”); *State v. Moore*, 377 A.2d 1365, 1366 (Me. 1977) (“children may be asked leading questions on direct examination in the trial court’s sound discretion.”); *Commonwealth v. Baran*, 21 Mass. App. Ct. 989, 490 N.E.2d 479, 481 (1986) (“it is within the discretion of a judge at the trial, under particular circumstances, to permit a leading question to be put to one’s own witness, as . . . where the witness is a child of tender years, whose attention can be called to the matter required, only by a pointed or leading question.”); *Cabello v. State*, 471 So. 2d 332, 340 (Miss. 1985) (Proper to ask leading questions of young witness who was testifying against his father in a murder trial. The child was understandably hesitant to testify.); *State v. Brown*, 220 Neb. 849, 850-52, 374 N.W.2d 28, 30 (1985) (Adult witness. The court discusses the propriety of using leading questions when the witness is physically handicapped.); *In re R.R.*, 79 N.J. 97, 114-15, 398 A.2d 76, 84 (1979) (“a court may in its discretion allow counsel to use leading questions in order to elicit testimony from an infant.”); *Barcus v. State*, 92 Nev. 289, 291, 550 P.2d 411, 412 (1976) (Witnesses were eight and nine years old. “Whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal.”); *State v. Hannah*, 316 N.C. 362, 341 S.E.2d 514, 515 (1986) (“it is within the discretion of the trial judge to permit leading questions in proper instances, and such discretionary action is reversible on appeal only upon a showing of abuse of discretion.”); *State v. Weisenstein*, 367 N.W.2d 201, 205 (S.D. 1985) (Five-year-old witness. Use of leading questions was within trial court’s discretion.); *State v. Brown*, 285 N.W.2d 843, 845 (S.D. 1979) (“It is settled law that permitting the use of leading questions is within the discretion of the trial court. This is a broad discretion when the witness is a young person.”); *State v. Canida*, 4 Wash. App. 275, 279, 480 P.2d 800, 803 (1971) (“The use of leading questions during the direct examination of a child witness is a matter within the sound discretion of the trial court.”); *Rhodes v. State*, 462 P.2d 722, 723 (Wyo. 1969) (“wide latitude is accorded to a trial court in this area . . .”) (footnote omitted).

24. 3 J. WIGMORE, *supra* note 8, § 770, at 157 (original emphasis removed). See also 3 J. WEINSTEIN, *supra* note 8, ¶ 611[05], at 611-57 (“the matter falls within the area of trial court discretion . . .”).

25. See *Scantling v. State*, 271 Ark. 678, 680-81, 609 S.W.2d 925, 926-27 (1981); *Hamblin v. State*, 268 Ark. 497, 501-02, 597 S.W.2d 589, 592 (1980) (“In cases involving very young females, who are alleged to have been victims of crimes of this nature, this court will not disturb the action of the trial judge in permitting leading questions to be

F. *Refreshing Recollection*

When a child witness is unable to remember relevant facts, it may be necessary to refresh the child's recollection.²⁶ Before the witness's memory may be refreshed, however, the examiner must attempt to elicit the child's testimony through the normal process of examination. Refreshment is proper only when examination reveals that the child's memory is exhausted.²⁷ Absent such a showing there is no need to refresh recollection.²⁸

Once the examiner demonstrates that the child cannot remember relevant information, nearly any means may be used to refresh

asked by the prosecution, if it appeared to him to be necessary to elicit the truth, unless his discretion has been abused."); *State v. Jones*, 204 Kan. 719, 727, 466 P.2d 283, 291 (1970) ("Whether leading questions should be permitted in any particular case rests in a large measure in the discretion of the trial court. Unless it appears that there has been an abuse in the exercise of this power of discretion, a judgment based on such evidence will not be disturbed."); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55, 59 (1986) ("Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion."); *State v. Weinstein*, 367 N.W.2d 201, 205 (S.D. 1985) ("The allowance of leading questions by the trial court will not be disturbed where it is not apparent that this discretion has been abused or shown to have resulted in prejudice to the party complaining."); *Hernandez v. State*, 643 S.W.2d 397, 400 (Tex. Crim. App. 1982) (en banc), *cert. denied*, 462 U.S. 1144 (1983).

26. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 515, where the authors write:

Refreshing recollection is a last-ditch means to secure for the trier of fact information known to the witness but apparently lost to conscious memory, and hence lying beyond reach of ordinary direct or cross examination. When the conscious memory of the witness seems exhausted, the questioner is ordinarily allowed to seek to refresh it by questions suggesting matter which may serve this purpose.

Id. See also C. McCORMICK, *supra* note 8, § 9, at 17-22; 3 J. WIGMORE, *supra* note 8, §§ 758-65, at 125-45; 3 J. WEINSTEIN, *supra* note 8, ¶ 612[01], at 612-7 to -17.

27. See *State v. Orona*, 92 N.M. 450, 454, 589 P.2d 1041, 1045 (1979) ("The witness's memory on the subject must be exhausted."); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 517; 3 J. WEINSTEIN, *supra* note 8, ¶ 612[01], at 612-9 ("No means of arousing recollection may be used until the witness has satisfied the trial judge that he lacks effective present recollection." (footnote omitted)).

28. Professor E. Imwinkelried describes the foundation for present recollection refreshed as follows:

1. The witness states that he or she cannot recall a fact or event.
2. The witness states that a certain writing or object could help refresh his or her memory. Most jurisdictions do not require this showing as a formal element of the foundation, but many trial attorneys think that it is good practice to have the witness first mention the writing or object.
3. The proponent tenders the writing or object to the witness.
4. The proponent asks the witness to silently read the writing or study the object.
5. The witness states that viewing the document or object refreshes his or her memory.
6. The witness then testifies from revived memory.

E. IMWINKELRIED, *EVIDENTIARY FOUNDATIONS* 179-80 (1980).

recollection.²⁹ "Anything may in fact revive a memory: a song, a scent, a photograph, an allusion, even a past statement known to be false."³⁰ Perhaps the most common technique is to jog the witness's memory with leading questions. In other cases, a writing is used to refresh recollection.³¹ The writing need not be admissible in evidence.³² It may be prepared by a third person,³³ and it may be a copy rather than the original.³⁴ Most courts hold that it is unnecessary for the document to be created at or near the time of the event in question.³⁵ The witness's prior testimony may be used to refresh.³⁶ A photograph may be used to trigger memory.³⁷ With child witnesses, the trial judge may permit counsel to use a picture previously drawn by the child to refresh memory. So too, a child may be permitted to use a doll or dolls to kindle recollection. If a child has difficulty remembering dates, the court may permit the child to refresh recollection by referring to a calendar.³⁸ The trial judge has broad discretion to allow any reasonable means to refresh recollection.

A witness whose memory is refreshed testifies from present recollection of past events. There is a danger, however, that a witness's

29. See *State v. Orona*, 92 N.M. 450, 454, 589 P.2d 1041, 1045 (1979) (Child may refresh recollection from a statement given to the police.); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 515.

When the conscious memory of the witness seems exhausted, the questioner is ordinarily allowed to seek to refresh it by questions suggesting matters which may serve this purpose. Anything at all may do—an object, a sound, a gesture, "a song, a scent, a photograph, an allusion, even a past statement known to be false."

Id.; 3 J. WEINSTEIN, *supra* note 8, ¶ 612[01], at 612-10.

30. *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946), *cert. denied*, 329 U.S. 806 (1947).

31. See *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979) (Proper to permit child victim to refresh recollection from police report.).

32. See *20th Century Wear, Inc. v. Sanmark-Stardust, Inc.*, 747 F.2d 81, 93 n.17 (2d Cir. 1984); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 515-16.

33. See *United States v. Conley*, 503 F.2d 520 (8th Cir. 1974).

34. See *Johnston v. Earle*, 313 F.2d 686, 688 (9th Cir. 1962), *cert. denied*, 373 U.S. 910 (1963); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 519.

35. See *State v. Ester*, 490 So. 2d 579, 585 (La. Ct. App. 1986) ("it is immaterial when and by whom the memoranda was created"). See also 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 518, where the authors write that sometimes "the questioner must show that any statement used to refresh memory . . . was made at or about the time of the events described. . . ." Most courts do not impose this requirement.

36. See *United States v. Thompson*, 708 F.2d 1294, 1299-302 (8th Cir. 1983).

37. See 3 J. WEINSTEIN, *supra* note 8, ¶ 612[01], at 612-10.

38. See *State v. Ester*, 490 So. 2d 579, 584-85 (La. Ct. App. 1986). In this incest case the thirteen-year-old victim could not remember the dates when he had sexual intercourse with his mother. The trial court permitted the child to refresh his memory by referring to a calendar on which the child had indicated the relevant dates.

testimony is nothing more than a repetition of information gleaned (for the first time) through the process of “refreshing recollection,” rather than testimony on the basis of actual memory of an event. This danger cannot be eliminated entirely. It can be ameliorated, however, by requiring the witness to state before testifying from refreshed recollection that her or his memory is indeed revived.³⁹

When counsel uses a document or other writing at trial to refresh a witness’s recollection, the opposing attorney usually has a right to inspect it.⁴⁰ In addition to inspecting the document, rule 612 of the Federal Rules of Evidence authorizes the opposing attorney to admit the document into evidence.⁴¹ Once the document is received in evidence, the question of its substantive force, if any, must be considered. On this point Judge Weinstein and Professor Berger write in part:

Clearly, the writing should not be given substantive effect in every instance. To allow otherwise would undermine the usual modes of introducing evidence and would permit by-passing of best evidence, authentication and hearsay rules in many instances. Rather, this provision must be understood as allowing the jury to examine the writing: (1) as a guide to assessing the credibility of the witness and (2), to the extent that it would otherwise have been admissible, for its normal evidential value.⁴²

Suppose a child refreshed her or his recollection with a document *prior* to trial. May counsel demand production of the document at

39. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 517.

40. See FED. R. EVID. 612, which states that:

Except as otherwise provided . . . , if a witness uses a writing to refresh his memory for the purpose of testifying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. . . .

Id. For detailed discussion of the right to opposing counsel to inspect and admit in evidence documents used to refresh recollection see 3 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 349-51, at 522-57; 3 J. WEINSTEIN, *supra* note 8, ¶¶ 612[01] to 612[05], at 612-7 to -47.

41. For discussion of this issue see 3 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 349-51, at 522-37.

42. 3 J. WEINSTEIN, *supra* note 8, ¶ 612[05], at 612-43. See also 3 J. WIGMORE, *supra* note 8, § 763, at 141, where Wigmore writes:

It follows from the nature of the purpose for which the paper is used . . . that it is in no strict sense evidence. In this respect it differs from a record of past recollection Nevertheless, though the witness’ party may not present it as evidence, the same reason of precaution which allows the opponent to examine it . . . allows the *opponent to call the jury’s attention* to its features, and also allows the jurymen, if they please, to examine it for the same end.

Id.

trial as an aid to cross-examination? Rule 612 provides that the court may exercise its discretion to permit opposing counsel to examine such documents,⁴³ and there are circumstances involving children when it is appropriate to permit such inspection. For example, a child's testimony may appear to be memorized rather than spontaneous. In such a case, opposing counsel may request production of prior statements of the child which may have been used to aid the child in preparation for trial. The document may substantiate a claim of rote memorization.

While the technique of refreshing recollection is an important aid to the proponent of a forgetful child witness, the procedure is subject to misuse. If the leading questions or the documents which are used to refresh memory could confuse or mislead the jury, it may be appropriate to excuse the jury during the process of refreshment. At a minimum, the court should limit the process so as to guard against unfair prejudice.⁴⁴

The case of *State v. Orona*⁴⁵ offers an instructive example of the improper use of the technique of refreshing memory. The case involved a prosecution for sexual assault. The young victim could not recall certain crucial facts. When the victim's memory was exhausted, the trial judge permitted the child to refresh her recollection from a statement she gave to the police not long after the alleged assault.⁴⁶ Without asking the child whether her memory was refreshed, the prosecutor proceeded to ask a series of highly leading questions which were based on the language of the statement. Through these leading questions the prosecutor painted a complete picture for the jury of the state's version of the offense. The victim did not offer meaningful testimony based on her refreshed recollection. Rather, she simply nodded her head in agreement with the

43. See FED. R. EVID. 612. For general discussion of this complex question, see 3 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 349-351, at 522-37; 3 J. WEINSTEIN, *supra* note 8, ¶¶ 612[02] to 612[05], at 612-17 to -47.

44. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 516, where the authors write:

Merely questioning the witness may put such a statement before the trier of fact so graphically as to give rise to a serious risk that it will be considered for its truth. This amounts to "prejudice" within the meaning of Rule 403—a kind of misuse of "evidence"—and the trial judge should disallow the effort to refresh recollection when the risk of this kind of prejudice becomes serious.

Id.

45. 92 N.M. 450, 589 P.2d 1041 (1979).

46. The trial court acted properly in permitting the child to refresh her recollection. *Id.* at 454, 589 P.2d at 1045.

prosecutor's "testimony." Defense counsel strenuously argued that the witness's memory was refreshed and that she should therefore be afforded the opportunity to testify herself. In reversing the defendant's conviction the Arizona Supreme Court stated:

Refreshing a witness's recollection by memorandum or prior testimony is perfectly proper trial procedure and control of the same lies largely in the trial court's discretion. However, if a party can offer a previously given statement to substitute for a witness's testimony under the guise of "refreshing recollection," the whole adversary system of trial must be revised. The evil of this practice hardly merits discussion. The evil is no less when an attorney can read the statement in the presence of the jury and thereby substitute his spoken word for the written document.⁴⁷

The trial court erred by failing to limit the prosecutor's improper use of the child's statement to the police. The statement was highly prejudicial to the defendant, and should not have been presented to the jury through the "guise of 'refreshing recollection.'"

Trial courts have broad discretion to control the manner in which counsel seek to refresh the recollection of witnesses. With children, the trial judge must be especially careful to balance the need to refresh memory against the danger that the child will be improperly influenced by the questions or documents used to refresh. The decision in *State v. Hookfin*⁴⁸ illustrates the point. Prior to trial, a young sex abuse victim gave a taped interview in the office of defense counsel. During the interview the defendant and other interested parties were present. The youngster was obviously under considerable pressure to recant, which he did. At trial, however, the boy testified for the state. During cross-examination, the child did not testify as the defense expected, and the defendant sought permission to "refresh the child's recollection" with the tape recorded interview. The trial court denied this mode of memory refreshment, and the appellate court affirmed. The court wrote that:

[C]ertain safeguards should be retained in the process of refreshing recollection. Among those considerations is the safeguard that "the court is required to weigh the value of the memorandum for refreshing memory against the danger of undue and false suggestion, and must deny the use of such an aid if the danger of

47. *Id.* at 454-55, 589 P.2d at 1045-46 (quoting *Goings v. United States*, 377 F.2d 753, 759-60 (8th Cir. 1967), *cert. denied*, 393 U.S. 883 (1968)).

48. 476 So. 2d 481, 491-92 (La. Ct. App. 1985).

improper suggestion outweighs the possible value for actually refreshing the witness's memory."⁴⁹

As illustrated by the *Hookfin* case, the trial judge may limit the use of documents or questions which could be prejudicial or confusing to the witness or to the jury. Thus, while the general rule is that anything can be used to refresh recollection, in rare cases the court may deny the right to refresh with a particular technique.⁵⁰

The technique of refreshing recollection must be distinguished from the hearsay exception commonly called "recorded recollection." Under the latter principle, a hearsay document may be admitted as substantive evidence if a witness who at one time had knowledge of the events described in the document testifies that he "now has insufficient recollection to enable him to testify fully and accurately," and if the document is accurate and was "made or adopted by the witness when the matter was fresh in his memory."⁵¹ When a document is admitted under the hearsay exception for recorded recollection, the document itself is substantive evidence of the truth of its contents.⁵²

G. *Demonstrative Evidence as an Aid to Testimony*

Demonstrative evidence is "evidence addressed directly to the senses without the intervention of testimony."⁵³ McCormick gives depth to this definition when he writes that:

49. *Id.* at 492.

50. See 3 J. WEINSTEIN, *supra* note 8, ¶ 612[01], at 612-12.

51. FED. R. EVID. 803(5). Professor Imwinkelfied describes the foundation for past recollection recorded as follows:

1. The witness formerly gained personal knowledge of the fact or event recorded.
2. The witness subsequently prepared a record of the facts. . . .
3. The witness prepared the record while the events were still fresh in his or her memory.
4. The witness can vouch that when he or she prepared the record, the record was accurate. . . .
5. At trial, the witness cannot completely and accurately recall the facts even after reviewing the document. The early view was that the witness had to completely forget the event. Most modern courts are of the view that it is sufficient in [sic] the witness's memory is partial or hazy. In the words of Federal Rule 803(5), the witness cannot remember "fully and accurately."

E. IMWINKELRIED, *supra* note 28, at 177.

52. For an excellent discussion of the differences between present recollection revived and past recollection recorded, see *United States v. Riccardi*, 174 F.2d 883 (3d Cir.), *cert. denied*, 337 U.S. 941 (1949). See also 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 348, at 520-22.

53. BLACKS LAW DICTIONARY 519 (4th ed. 1968). For discussion of demonstrative evidence see C. MCCORMICK, *supra* note 8, § 212, at 663-69.

There is a type of evidence which consists of things, e.g., weapons, whiskey bottles, writings, and wearing apparel, as distinguished from the assertions of witnesses (or hearsay declarants) about things. Most broadly viewed, this type of evidence includes all phenomena which can convey a relevant firsthand sense impression to the trier of fact, as opposed to those which serve merely to report the secondhand sense impressions of others.⁵⁴

Within the generic class called demonstrative evidence, it is useful to distinguish between things which played an actual part in the matter being litigated (e.g., a gun) and things which “played no such part but [are] offered for illustrative or other purposes.”⁵⁵ The former category is often called “real” or “original” evidence. The instant discussion is limited to the latter class of demonstrative evidence, which is designed to illustrate or aid testimony. There are many uses for demonstrative evidence in litigation involving children. Professor Imwinkelried reminds us that “[t]he only limits on the use of demonstrative evidence are the trial judge’s discretion and the trial attorney’s imagination.”⁵⁶

As mentioned above, use of demonstrative evidence lies within the discretion of the trial judge.⁵⁷ Courts generally permit use of such evidence if it will help the child to testify or if it will assist the jury to understand the child’s testimony.⁵⁸ McCormick writes that “the theory justifying admission of these exhibits requires only that the item be sufficiently explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact.”⁵⁹ The party desiring to use demonstrative evidence is not required to show that the witness will be completely unable to testify without the assistance of the demonstrative aid. Rather, the test is

54. C. McCORMICK, *supra* note 8, § 212, at 663 (footnotes omitted).

55. *Id.* § 212, at 667.

56. E. IMWINKELRIED, *supra* note 28, at 78.

57. See *State v. Eggert*, 358 N.W.2d 156, 161 (Minn. Ct. App. 1984) (“In general, the use of models and other types of illustrative evidence is within the discretion of the trial court.” It was not an abuse of discretion to permit a young sex abuse victim to illustrate her testimony with dolls.); C. McCORMICK, *supra* note 8, § 212, at 668-69 (“Whether the admission of a particular exhibit will in fact be helpful, or will instead tend to confuse or mislead the trier, is a matter commonly viewed to be within the sound discretion of the trial court.”).

58. *State v. Eggert*, 358 N.W.2d 156, 161 (Minn. Ct. App. 1984) (“The test is whether or not the testimonial aid will likely assist the jury in understanding the witness’s testimony.”). See also *Newton v. State*, 456 N.E.2d 736, 741 (Ind. Ct. App. 1983) (“Demonstrative evidence is admissible if the term is sufficiently explanatory or illustrative of relevant testimony to be of potential help to the trier of fact.”).

59. C. McCORMICK, *supra* note 8, § 212, at 668.

whether the demonstrative evidence will assist the child in describing what happened so that the jury can better understand the child's testimony.⁶⁰

In sexual abuse litigation in criminal and juvenile court, young children often use anatomically correct dolls to illustrate their testimony.⁶¹ The trial judge has broad discretion to authorize the use of dolls, and the appellate decisions discussing the matter uphold trial level decisions that permit children to illustrate their testimony with the aid of dolls.⁶² Some states have enacted legislation expressly authorizing use of dolls during testimony. A recent Alabama statute provides that:

In any criminal proceeding and juvenile cases wherein the defendant is alleged to have had unlawful sexual contact or penetration with or on a child, the court shall permit the use of anatomically correct dolls or mannequins to assist an alleged victim or witness who is under the age of 10 in testifying on direct or cross-examination at trial, or in a videotaped deposition as provided in this chapter.⁶³

The dolls employed to aid testimony in sex offense cases are usually anatomically correct, although the fact that a doll is not completely anatomically correct does not mean that it cannot be used.⁶⁴ The test is whether the doll will aid the jury in understanding

60. See *State v. Eggert*, 358 N.W.2d 156, 161 (Minn. Ct. App. 1984). In *Eggert* a young sex abuse victim was permitted to illustrate her testimony with dolls. The defendant objected that the demonstrative evidence was unnecessary because the child was able to tell her story without the aid of dolls. The appellate court disagreed, stating:

Appellant's argument does not correctly state the true test of the use of testimonial aids. For instance, a doctor or engineer may be allowed to use artificial mockups of the human anatomy, cutaways, maps and diagrams, etc., even if the witness acknowledges that he does not *have* to have those things to testify. The test is whether or not the testimonial aid will likely assist the jury in understanding the witness's testimony.

Id.

61. The need for dolls to aid testimony is especially acute with the youngest children. See *Vera v. State*, 709 S.W.2d 681, 686 (Tex. Ct. App. 1986) ("The use of dolls is often critical when the complainant witness is very young.").

62. See *Cleaveland v. State*, 490 N.E.2d 1140, 1141 (Ind. Ct. App. 1986); *Commonwealth v. Trenholm*, 14 Mass. App. Ct. 1038, 442 N.E.2d 745, 746 (1982), *further review denied*, 457 N.E.2d 283 (1983); *State v. Eggert*, 358 N.W.2d 156, 161 (Minn. Ct. App. 1984); *State v. DeLeonardo*, 340 S.E.2d 350, 357 (N.C. 1986); *State v. Madden*, 15 Ohio App. 3d 130, 472 N.E.2d 1126, 1130 (Ohio Ct. App. 1984); *Bryant v. State*, 685 S.W.2d 472, 474 (Tex. Ct. App. 1985); *Vera v. State*, 709 S.W.2d 681, 686 (Tex. Ct. App. 1986); *Kehinde v. Commonwealth*, 1 Va. App. 342, 338 S.E.2d 356, 358 (1986).

63. ALA. CODE § 15-25-5 (1985).

64. See *Cleaveland v. State*, 490 N.E.2d 1140, 1141 (Ind. Ct. App. 1986). The courts writes that:

One of the victims, D.C., was eight years old at the time of the trial, and

the child's testimony. Before handing anatomical dolls to a child witness, counsel should state for the record that the dolls are anatomically correct.⁶⁵ This statement permits an appellate court to comprehend the child's testimony, and is important because the dolls, which are expensive, are not made a part of the trial record.

In addition to describing the dolls for the record, it is appropriate for counsel to ask the child to identify the dolls. The child might say, "This is a girl doll and this is a boy doll." As a follow up, counsel may ask the child to tell how he or she knows which is which. Counsel should also ask whether the dolls will help the child tell what happened. As the child illustrates the story with the dolls, counsel should clarify the record with such statements as, "May the record reflect that the witness has placed the penis of the male doll inside the vagina of the female doll while the male doll is lying on top of the female." Absent such clarification, an appellate court cannot recreate the child's testimony.

Dolls are particularly helpful with youngsters who are linguistically immature. Such children may not have the vocabulary to describe effectively the details of an occurrence. In particular, they may not know the proper terms for parts of the human body.⁶⁶ By

testified with the aid of two dolls, one representing a male and the other a female. Using the dolls, D.C. demonstrated that Cleaveland had pulled down her pants and underwear and put his hand between her legs, touching an area indicated in pink on the doll. Cleaveland argues that because the pink area between the doll's legs did not accurately represent the human vagina, D.C. should not have been allowed to use the doll during her testimony.

The trial court has discretion in allowing or prohibiting the use of demonstrative evidence. Such evidence may be admitted if it is sufficiently explanatory or illustrative of relevant testimony in explaining what occurred. The doll D.C. used had sufficient anatomical detail to help the jury. Cleaveland has not established that the doll's lack of an accurately depicted vagina in any way misrepresented D.C.'s testimony or misled the jury, or prejudiced him in any other way.

Id. (citations omitted).

65. See *Kehinde v. Commonwealth*, 1 Va. App. 342, 338 S.E.2d 356, 358 (1986), where the court expressed concern "that the record does not disclose whether the doll was anatomically correct."

66. See *State v. Madden*, 15 Ohio App. 3d 130, 472 N.E.2d 1126, 1130 (1984).

A review of the transcript reveals that Amy Sue League testified that appellant placed "his thing" on her and that he put it in between her legs. The girl did not know the correct name for appellant's "thing" nor could she give a description of it. A doll with anatomical details was then used to illustrate and clarify the girl's testimony. Based on the victim's obvious lack of knowledge of the correct terms for human reproductive organs, there was no abuse of discretion in allowing the use of dolls to clarify the girl's testimony.

Id.; *State v. Lee*, 9 Ohio App. 3d 282, 459 N.E.2d 910, 912 (1983) ("The record indicates that the witness was unable to relate to the jury the events using the appropriate sexual or physiological terminology. The dolls were used to clarify the witness' explanation and to insure a common understanding between the witness and jury as to the events which took place.").

using anatomically correct dolls, the children can show what they cannot tell. Such demonstrative evidence may be very helpful, indeed indispensable, to the jury.

If sexual penetration is an issue, anatomically correct dolls may be used to help a child illustrate how penetration occurred. Dolls are particularly helpful on this issue because many children are less than effective in describing penetration. They say such things as, "He put it in me," "He put it between my legs," "He touched my bottom," or "His popcicle hurt my peepee."⁶⁷ It is hardly reasonable to expect the average seven-year-old to calmly recite, "The accused penetrated my vagina with his penis," and if the child did use such words, most adults would suspect coaching. Accepting the fact that kids use child-like language to describe events, including penetration, it is important to assist the jury in understanding precisely what the child means. Anatomically correct dolls are well suited to this end. The child can testify orally using her or his own descriptive terms, and can illustrate what those terms mean by showing the fact finder what happened.⁶⁸

It is appropriate to use dolls in preparing children to testify.⁶⁹ In *State v. Eggert*,⁷⁰ the Minnesota Court of Appeals addressed the issue of preparation with dolls in a sex abuse case. The court wrote that:

Appellant additionally argued that allowing the victim pre-trial practice with the dolls was prejudicial. We find that contention without merit. The child had described the incidents to adults several times before there was any use of the dolls, not only to her parents but to the child psychologist and the pediatrician.

67. See *State v. Madden*, 15 Ohio App. 3d 130, 472 N.E.2d 1126, 1130 (Ohio Ct. App. 1984) (The victim "testified that appellant placed 'his thing' on her and that he put it in between her legs. The girl did not know the correct name for appellant's 'thing' nor could she give a description of it.").

68. See *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350, 352-53 (1986) (Male sex abuse victim permitted to illustrate anal penetration with dolls.); *Bryant v. State*, 685 S.W.2d 472, 474 (Tex. Ct. App. 1985) (Five-year-old sex abuse victim permitted to illustrate how the defendant touched her vagina by using dolls.).

69. See *Newton v. State*, 456 N.E.2d 736, 741 (Ind. Ct. App. 1983).

[Defendant] further argues the pretrial use of the dolls impinged upon his right to counsel and his right to cross-examination. He analogizes the witness' out of court experience with the dolls to hypnotically enhance testimony His argument is based on his assumption the witness was able to remember details at trial she was previously unable to remember at her deposition as a result of her practice with the dolls.

Although we find Newton's argument creative it is rejected.

Id.

70. See *State v. Eggert*, 358 N.W.2d 156 (Minn. Ct. App. 1984).

There is no indication that the child's testimony was improperly reinforced by the use of the dolls at trial. It is accepted and ethical trial procedure for either side in a civil or criminal case to display to a potential witness a testimonial aid that he or she may be asked to use during the testimony.⁷¹

Needless to say, caution must be exercised to ensure that pretrial preparation with dolls does not degenerate into a coaching session in which the adult uses the dolls to show the child what happened. The cross-examiner may delve into this possibility, and if improper coaching is disclosed, the effect on the child's testimony can be devastating.⁷²

Dolls are not the only types of demonstrative evidence used with child witnesses. Much the same explanatory effect can be achieved through use of diagrams of the human body. *Pittman v. State*⁷³ provides an example. In this sex offense case, the prosecutor presented the thirteen-year-old victim with an anatomically correct diagram representing her body. The child circled the mouth and hand on the diagram, and testified that these were the parts of her body which the defendant wanted her to use to touch him. Following this, the child was given an anatomically correct diagram representing an adult male. She was asked to circle the part of the diagram that defendant made her touch. In response, she circled the male sex organ. It is not difficult to imagine the impact of such illustrated testimony on the jury. The defendant objected to use of the diagrams, but the Georgia Court of Appeals rejected the objection, and held that the trial court acted within its discretion in permitting the demonstrative evidence.

In addition to dolls and diagrams, it may be proper in some cases to permit a child witness to draw a picture of an event.⁷⁴ Obviously, such a picture may be out of scale or otherwise inaccurate. Inaccuracy should not render this evidence inadmissible, however, unless the opponent can demonstrate that the picture is prejudicial or of no help to the jury. Counsel has the right to cross-examine the

71. *Id.* at 161.

72. See *Newton v. State*, 456 N.E.2d 735, 742 (Ind. Ct. App. 1983) (The court held that it was proper to use dolls in pretrial preparation. It noted, however, that "the fact the witness did practice is a factor properly considered in determining her credibility."). See also *infra* section (III)(S) (discussion of cross-examinations of a witness who used a doll on direct).

73. 178 Ga. App. 693, 344 S.E.2d 511, 512 (1986).

74. See *State v. Eggert*, 358 N.W.2d 156, 161 (Minn. Ct. App. 1984) (The child was "allowed to draw a picture of the alleged actions which were shown to the jury.").

child about the picture in an effort to undercut its accuracy. In the final analysis, the use of in-court drawings by a child witness should be left to the sound discretion of the judge.

H. Explaining Delay

Victims of sexual abuse often delay in reporting the assault.⁷⁵ Delays of weeks and months are common. It is understandable that the victim of an outrageous and degrading sexual offense might wish to keep the event secret. The desire to be secretive may be particularly strong when the victim is a child. If the perpetrator is a member of the household, the need for secrecy is obvious. The victim may have been threatened with dire consequences if the truth comes out. In extrafamily abuse cases the child may be too embarrassed to disclose what happened, or may feel that the event was his or her fault, or that "telling" will make parents angry. Thus, there are many reasons why children hide the truth, and as Victor Hugo observed long ago, "No one ever keeps a secret so well as a child."⁷⁶

In sex abuse litigation, defendants utilize cross-examination to capitalize on delays in reporting. The cross-examiner seeks to convince the jury that if the abuse really occurred, the child would have said something sooner. The delay in reporting undermines the credibility of the witness, and raises the possibility that an adult with an axe to grind against the defendant concocted the entire story and implanted it in the child's mind.

If a substantial period of time elapsed between an alleged event and its disclosure, the proponent of the child's testimony may blunt anticipated cross-examination by asking the child to explain the reasons for delay. Such questions are probably relevant and within the bounds of proper direct examination. While the opponent could conceivably object to this testimony as improper bolstering, such an objection is unlikely to succeed.

In addition to using the child's testimony to explain delay in reporting, counsel may consider offering expert testimony on the reasons for delay. The psychological literature supports the conclusion that many sex abuse victims delay reporting, and several courts have approved the limited use of such expert testimony.⁷⁷

75. See generally Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149 (1985-86).

76. V. HUGO, *LES MISERABLES* (1862).

77. See *State v. Petrich*, 101 Wash. 2d 566, 683 P.2d 173 (1984) (en banc).

I. Establishing Dates and Times

Young children have difficulty with the concept of time.⁷⁸ The year, date or time-of-day when an event occurred may have no meaning or importance to a child. It is often hopeless, for example, to ask a youngster below age seven to recall specific dates and times. If the date or time of an event is crucial to the litigation,⁷⁹ counsel is well advised to establish these facts through the testimony of an adult witness such as a parent or a police officer. The adult testifies prior to the child, and pinpoints dates and times which the child cannot supply. When the chronological stage is set, the child's testimony supplies the vital details of the event. Establishing dates and times in advance makes the child's testimony appear stronger and more complete than if the youngster has to struggle to supply temporal details.

If counsel must rely on a child to supply dates and times, careful preparation is in order. If the child is unable to remember the needed information, it may be proper to refresh the child's recollection by allowing the child to review a calendar or a statement in which the child discussed the relevant dates.⁸⁰

A child who cannot recall specific dates or times may be able to respond to questions which tie chronological or temporal events to things that are important to the child. For example, a child may be able to say that an event occurred before or after Christmas, Hanukkah, or Halloween. So too, a child may remember whether something happened during cartoons or during nap time.

J. Preparing for Cross-Examination Which Insinuates Coaching

In cross-examining child witnesses, attorneys sometimes hope to raise the spectre of coaching. The cross-examiner intimates to the jury that the child is suggestible, and that the prosecutor or another adult coached the youngster to tell the story related on direct examination. Ironically, in order to convince the jury that the child

78. For discussion of children's difficulty with the concept of time, see generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* 40-49 (1979).

79. Under most child abuse statutes the time of the attack or molestation is not an element of the offense. Therefore, it is usually not necessary for the state to prove the time of occurrence with precision. Nor is it essential that an indictment or information set forth times with great precision.

80. For discussion of the technique of refreshing recollection see *supra* section (I)(F).

should not be believed because the child is too susceptible to suggestion, the cross-examiner usually plys the child with highly suggestive leading questions. The proponent of the child's testimony may want to demystify this process for the fact finder during argument.

In preparing witnesses for cross-examination, one of the first things fledgling trial attorneys learn is to help witnesses respond to the question: "And you were told what to say on your direct testimony, weren't you?" The answer, of course, is, "Yes, I was told to tell the truth." This technique is effective with children, and should be employed in most cases. The skillful cross-examiner avoids the trap of asking such a question, and takes a more subtle approach to raising the possibility of coaching, but it warms the cockles of the proponent's heart when, on rare occasions, a child witness responds, "Yes, I was told what to say. My lawyer told me to tell the truth."

II. SUPPORTING A CHILD'S TESTIMONY

A. *The Use of Syndromes to Bolster the Credibility of Child Witnesses and as Circumstantial Evidence of Abuse*

Child abuse is often extraordinarily difficult to prove, and many meritorious cases do not proceed through the legal system. In the context of physical abuse, the state encounters two primary evidentiary difficulties. First, it must prove that injury occurred and that the injury was nonaccidental. Second, the state must link the defendant to the injury. In sexual abuse cases, proof problems are often exacerbated by lack of physical evidence.⁸¹ Successful prosecution frequently turns on the ability of the child to take the stand and establish the fact of abuse and the identity of the abuser.

The frequent paucity of direct evidence in abuse cases led to judicial reliance on syndromes as substitutes for direct evidence. The medical term "syndrome" is defined as "a concurrence of symptoms" or "[t]he aggregate of signs and symptoms associated with any morbid process, and constituting the picture of the dis-

81. White, Strom, Santilli & Halpin, *Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls*, 10 CHILD ABUSE & NEGLECT 519, 520 (1986) ("Regardless of age, positive physical trauma is found in no more than one-third of all suspected female child sexual abuse victims and one-half of the male victims.").

ease.”⁸² Syndromes supply circumstantial evidence of abuse and/or the identity of the abuser. In some cases, evidence that a child suffers from a syndrome may bolster the child’s testimony or explain a child’s unwillingness to testify.

B. Battered Child Syndrome

The most widely recognized and accepted syndrome is the battered child syndrome, which was described in 1962 by Dr. C. Henry Kempe and his colleagues.⁸³ In his seminal article describing the typical battered child, Doctor Kempe wrote as follows:

The battered child syndrome may occur at any age, but, in general the affected children are younger than 3 years. In some instances the clinical manifestations are limited to those resulting from a single episode of trauma, but more often the child’s general health is below par, and he shows evidence of neglect including poor skin hygiene, multiple soft tissue injuries, and malnutrition. One

82. *STEDMAN’S MEDICAL DICTIONARY* 1382 (5th Unab. Law. ed. 1982).

83. Two other syndromes deserve discussion, although they are confined to footnote because they do not deal with child witnesses. Psychological research discloses that a substantial number of parents who abuse their children share certain character traits. In *State v. Loebach*, 310 N.W.2d 58 (Minn. 1981), the court summarized the constellation of symptoms commonly found in such parents. “[A]busing parents frequently experience role reversal and often expect their children to care for them [T]hey often exhibit . . . characteristics such as low empathy, a short fuse, . . . strict authoritarianism, uncommunicativeness, low self-esteem, isolation and lack of trust.” Furthermore, many such adults were physically or sexually abused by parents displaying similar symptoms. See Berger, *The Child Abusing Family*, 8 AM. J. FAM. THERAPY 53, 55 (1980); Jayaratne, *Child Abusers as Parents and Children: A Review*, 22 SOC. WORK 5 (1977). Adults possessing such traits may be at an increased risk of becoming child abusers. Writers coined the phrase “battering parent syndrome” to describe the symptoms outlined above.

In the legal context, if an individual charged with abuse displays personality traits falling within the battering parent syndrome, arguably there is an increased likelihood that the person committed the alleged abuse. Prosecutors have occasionally sought admission of testimony designed to establish that a defendant’s personality fits the battering parent syndrome. See, e.g., *Sanders v. State*, 251 Ga. 70, 303 S.E.2d 13 (1983); *State v. Loebach*, 310 N.W.2d 58 (Minn. 1981); *State v. Goblirsch*, 309 Minn. 401, 246 N.W.2d 12 (1976); *State v. Loss*, 295 Minn. 271, 204 N.W.2d 404 (1973). The purpose of such evidence is to convince the trier that because the defendant fits the profile of a battering parent, he or she is probably guilty. Courts have refused to admit evidence of the battering parent syndrome because it contravenes the rule against character evidence, is highly prejudicial, and is of marginal relevance. While an occasional court has stated that if further research confirms the validity of the battering parent syndrome, such evidence may be admissible. *Sanders v. State*, 251 Ga. 70, 73 n.3, 303 S.E.2d 13, 16 n.3 (1983); *State v. Loebach*, 310 N.W.2d 58, 64 (Minn. 1981), the decisions prohibiting its use seem correct. See Note, *The Battering Parent Syndrome: Inexpert Testimony as Character Evidence*, 17 U. MICH. J.L. REF. 653 (1984) (forceful argument against the validity of the battering parent syndrome).

Attempts to prove spousal abuse through expert testimony describing the so-called “battered spouse syndrome” have been successful in some jurisdictions. See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981); *State v. Baker*, 120 N.H. 773, 424 A.2d 171 (1980).

often obtains a history of previous episodes suggestive of parental neglect or trauma. A marked discrepancy between clinical findings and historical data as supplied by the parents is a major diagnostic feature of the battered-child syndrome. Subdural hematoma, with or without fracture of the skull . . . is an extremely frequent finding even in the absence of fractures of the long bones. The characteristic distribution of these multiple fractures and the observation that the lesions are in different stages of healing are of additional value in making the diagnosis.⁸⁴

Courts routinely approve expert testimony regarding the battered child syndrome.⁸⁵ Judges are comfortable with the syndrome because it is based on signs and symptoms which are verifiable by physical examination, X-ray, and other *objective* medical techniques. The primary function of the syndrome is to establish that injury occurred through nonaccidental means.⁸⁶

In addition to allowing expert testimony on the matter of non-accidental injury, many courts permit the expert to opine that such injury probably was caused by an individual "caring" for the child.⁸⁷ In *People v. Jackson*,⁸⁸ the California Court of Appeal wrote that [t]he additional finding that the injuries were probably occasioned by someone who is ostensibly caring for the child is simply a conclusion based upon logic and reason. Only someone regularly

84. Kempe, Silverman, Steele, Droegmuller & Silver, *The Battered-Child Syndrome*, 181 J. A.M.A. 17 (1962).

85. See, e.g., *Eslava v. State*, 473 So. 2d 1143, 1147 (Ala. Ct. App. 1985) (murder prosecution); *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); *Bell v. Commonwealth*, 684 S.W.2d 282 (Ky. Ct. App. 1984); *State v. Durfee*, 322 N.W.2d 778 (Minn. 1982); *Schleret v. State*, 311 N.W.2d 843 (Minn. 1981); *People v. Henson*, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); *State v. Byrd*, 309 N.C. 132, 305 S.E.2d 724 (1983); *State v. Byrd*, 300 S.E.2d 49 (N.C. Ct. App. 1983) (In prosecution for murder of 25-day-old child it was proper to admit evidence that defendant's other child suffered from battered child syndrome); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978); *State v. Holland*, 346 N.W.2d 302 (1984); *State v. Best*, 89 S.D. 227, 232 N.W.2d 447 (1975); *Huerta v. State*, 635 S.W.2d 847 (Tex. Ct. App. 1982) (Evidence of battered child syndrome properly admitted in murder case.); *State v. Mulder*, 29 Wash. App. 513, 629 P.2d 462 (1981); Annotation, *Admissibility of Expert Medical Testimony on Battered Child Syndrome*, 98 A.L.R.3d 306 (1980).

86. See *People v. Jackson*, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971) ("the 'battered child syndrome' simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means").

87. Some courts do not permit expert testimony to the effect that the injuries probably were caused by someone caring for the child. See, e.g., *State v. Dumlao*, 3 Conn. App. 607, 491 A.2d 404, 410 (1985) ("The expert witness should not be permitted to testify whether 'the battered child syndrome' from which this victim suffered was in fact caused by any particular person or class of persons engaging in any particular activity or class of activities."); *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978).

88. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971).

“caring” for a child has the continuing opportunity to inflict these types of injuries; an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months.⁸⁹

Proof of the battered child syndrome overcomes one of the primary evidentiary hurdles encountered in abuse cases and provides a partial solution to the other. First, proof that a child suffers from the syndrome supports a finding of nonaccidental injury.⁹⁰ Second, expert testimony that injury was probably caused by a person with regular access to the child narrows the class of potential offenders to a group including the defendant. Expert testimony describing the battered child syndrome paints a “picture” of abuse and points a finger at the “artist.”

C. *Munchausen Syndrome by Proxy*

Munchausen syndrome is described as “the fabrication by an itinerant malingerer of a clinically convincing simulation of disease.”⁹¹ The term Munchausen syndrome by proxy was coined to describe cases in which a parent with Munchausen syndrome uses a child as the vehicle for presentation of the fabricated disease. In the case of *People v. Phillips*,⁹² the California Court of Appeal approved admission of expert psychiatric testimony describing the syndrome in order to establish parent’s motive to poison her young child.

D. *The Sexually Abused Child Syndrome*⁹³

The majority of sexual abuse victims experience adverse psychological consequences from their abuse.⁹⁴ The constellation of psychological symptoms shared by many sexually abused children is

89. *Id.* at 507, 95 Cal. Rptr. at 921.

90. The most common defense in physical abuse cases is that the injury was accidental.

91. STEDMAN’S MEDICAL DICTIONARY 1391 (5th Unab. Law. ed. 1982).

92. 122 Cal. App. 3d 69, 175 Cal. Rptr. 703 (1981). See also *In re Colin R.*, 63 Md. App. 684, 493 A.2d 1083 (1985).

93. This constellation of symptoms is sometimes called the child abuse accommodation syndrome. See Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

For analysis of the sexually abused child syndrome see Note, *The Unreliability of Expert Testimony on the Typical Characteristics of Sexual Abuse Victims*, 74 GEO. L.J. 429 (1985); Comment, *The Admissibility of “Child Sexual Abuse Accommodation Syndrome” in California Criminal Courts*, 17 PAC. L.J. 1361 (1986).

94. For discussion of the side effects of sexual abuse see the authorities collected in Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. FAM. L. 149, 172-74 (1985-86).

increasingly described with the phrase "sexually abused child syndrome." Naturally, the reaction of each victim depends on a combination of factors, including the child's age, the circumstances and duration of the abuse, the relation of the abuser to the child, and the child's ego strength and developmental maturity.

While many sexual abuse victims share certain common symptoms, the social science literature reveals that there is tremendous variability among victims. One writer comments that:

It is impossible to make a general statement about the effects of sexual abuse on children. Children react differently to different situations depending on a number of variables that may be operating at the time of the occurrence. Children who are sexually abused are not special children with special characteristics; they are not victims of one particular offense, nor do they sustain identical injuries. Their role in the abusive situation, their disclosure of the incident, their relationship to the perpetrator, and their reactions, both long- and short-term, all differ.⁹⁵

Another author writes that:

No two children or families will react in exactly the same way to the presence of child sexual abuse. Also, because they are under

95. Rosenfeld, *The Clinical Management of Incest and Sexual Abuse of Children*, 22 *TRAUMA* 3:2 (Oct. 1980). See also Schultz, *The Child as a Sex Victim: Socio-Legal Perspectives*, in IV. *VICTIMOLOGY: A NEW FOCUS* 177, 179 (I. Drapkin & E. Viano eds. 1975), where the author writes:

Psycho-social after-effects of the sexual offense against the child are not so readily assessed as the physical. Possible negative or traumatic effects are related to the amount of violence employed by the offender, the type and depth of the child's relationship to the offender, and the family, society, and significant others' reaction to the offense. Immediate reaction in the child may range from simple fright, much like when a child encounters something new and unpleasant, to vomiting and hysteria and panic.

Id. See also Stevens & Berliner, *Special Techniques for Child Witnesses*, in *THE SEXUAL VICTIMOLOGY OF YOUTH* 246, 251 (L. Schultz ed. 1980) ("the specific emotional consequences of sexual abuse cannot presently be predicted . . .").

See also Martin & Beezeley, *Personality of Abused Children*, in *THE ABUSED CHILD: A MULTIDISCIPLINARY APPROACH TO DEVELOPMENTAL ISSUES AND TREATMENT* 105, 107 (H. Martin & C. Kempe ed. 1976), where the authors describe physically abused children in these words:

There is no one classical or typical personality or profile for abused children. One does repeatedly see certain traits in many abused children which are quite striking, such as hypervigilance, anxiety and diminished self-esteem. But all abused children are not alike. Some are cooperative; some are oppositional. Some are apathetic; some are hyperactive. Some are quite charming; others can be quite unpleasant. . . . [Abused] children are chameleon in their adaptation to various people and settings Their behavior at home, at school and in the examining room shows greater fluctuation than does the behavior of other children. One must not generalize about such children from only one data base.

Id.

a great deal of stress, their reactions and behavioral signs—whether conscious or unconscious—are subject to misinterpretation. Generalizations about the effects of any kind of interpersonal crisis often do a disservice to all individuals involved.⁹⁶

Despite the variability of responses to sexual abuse, many experts believe that most victims share a constellation of similar symptoms. In other words, there *may* be a “typical” sexually abused child. A review of the psychological literature and the developing case law reveals that sexually abused children may demonstrate some of the following behaviors:

- Secrecy
- A feeling of helplessness
- A sense of being trapped by the situation
- Accommodation to the abuse
- Nightmares (especially nightmares with an assaultive content)
- Sleep disturbance
- Loss of appetite
- Regressive behavior
- Pseudo-mature behavior
- Withdrawal
- Acting out
- Difficulty recalling details such as dates and times
- Fear of men
- Fear of further abuse
- Depression and anxiety
- Embarrassment at peer’s knowledge of the abuse
- A negative view of sex
- A poor relationship between mother and daughter
- Running away from home
- Doubt that the nonabusing parent is strong enough to protect the child
- Confusion
- Conflicting versions of events
- Inarticulate descriptions
- Drawings by the child which contain enlarged sexual organs, or in the case of male genitalia, an erection and/or ejaculation
- Knowledge of sexual matters which a child of the particular age would not possess unless the child had been exposed to information about sex or to sex acts

96. MacFarlane, *Sexual Abuse of Children*, in *THE VICTIMIZATION OF WOMEN* 81, 97 (J. Chapman & M. Gates eds. 1978).

- Use of sexual words which a child of the particular age would have no knowledge unless the child had been exposed to the words
- Use of anatomically correct dolls in ways that are inexplicable in a child of the particular age unless the child has experienced sexual contact (e.g., placing the penis of the male doll in the child's mouth and sucking)
- Delay in reporting abuse
- Recantation

The last two behaviors—delay and recantation—require further discussion. Children with symptoms fitting the sexually abused child syndrome frequently hesitate to reveal their abuse.⁹⁷ This is not surprising since many victims are threatened with dire consequences if the truth comes out. Even without threats, many children hesitate to disclose the truth because they fear they will not be believed, or they are embarrassed, or they do not want to harm the abuser. Thus, substantial delay between abuse and disclosure is common.

When abuse finally comes to light, the victim may divulge sufficient details to warrant legal action. The child's statements may be spontaneous declarations to parents, teachers, or medical professionals, statements to investigating law enforcement officers, or testimony before a grand jury or at a preliminary hearing. During the interval between making these statements and trial, however, powerful forces may work to convince the child to change the facts or to recant. Such forces are particularly strong in intrafamilial abuse cases, where the defendant, with or without the cooperation of the nonabusing parent, attempts to convince the child to change or deny prior allegations. Tremendous opportunity exists to instill fear, guilt, and ambivalence, and it is not surprising that many children recant or refuse to testify consistently with their prior statements.

The pressure to recant is described by Doctor Roland Summit in his article on the sexually abused child syndrome:

Whatever a child says about sexual abuse, she is likely to reverse it. Beneath the anger of impulsive disclosure remains the ambivalence of guilt and the martyred obligation to preserve the family. In the chaotic aftermath of disclosure, the child discovers that the

97. Most sexual abuse is never disclosed. One study revealed that only two percent of intrafamily and six percent of extrafamily abuse was reported to authorities. See Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133 (1983).

bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. The family is fragmented, and all the children are placed in custody. The father is threatened with disgrace and imprisonment. The girl is blamed for causing the whole mess, and everyone seems to treat her like a freak. She is interrogated about all the tawdry details and encouraged to incriminate her father, yet the father remains unchallenged, remaining at home in the security of the family. She is held in custody with no apparent hope of returning home if the dependency petition is sustained.

The message from the mother is very clear, often explicit. "Why do you insist on telling those awful stories about your father? If you send him to prison, we won't be a family anymore. We'll end up on welfare with no place to stay. Is that what you want to do to us?" Once again, the child bears the responsibility of either preserving or destroying the family. The role reversal continues with the "bad" choice being to tell the truth and the "good" choice being to capitulate and restore a lie for the sake of the family.

Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the "normal" course and retract her complaint.⁹⁸

When a child victim delays reporting abuse, changes the story, recants, or expresses resistance to testifying, the door opens for the defense to undermine the child's testimony. Defense counsel may emphasize the delay between the alleged abuse and the first report, raising questions about whether the abuse occurred. Furthermore, if a child's testimony differs from prior statements, or if the child recants altogether, the defense may seek to convince the jury that the inconsistencies render the child unbelievable. At the least, the defendant will argue that the child's recollection is faulty. Finally, cross-examination may be used to bring out the child's ambivalence and reticence to testify.

Efforts by the prosecution to counter such attacks on child witnesses led to utilization of expert testimony describing the sexually abused child syndrome. This evidence serves two vital prosecution interests: It constitutes evidence that a child has been sexually abused, and it bolsters the credibility of young witnesses by explaining that their unusual behaviors, some of which appear to be at

98. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 188 (1983) (emphasis in original).

odds with allegations of abuse, are actually indicative of maltreatment. A growing number of decisions permit the state to use expert testimony to accomplish the first of these goals. Courts are much more cautious, however, about permitting expert testimony concerning the credibility of child witnesses.

1. *Use of the Sexually Abused Child Syndrome to Prove that Abuse Occurred*

An increasing number of courts permit limited use of expert testimony to describe the "typical" symptoms demonstrated by sexually abused children.⁹⁹ This testimony is admitted as substantive evidence that abuse occurred.¹⁰⁰ In the leading case of *State v. Myers*,¹⁰¹ for example, the Minnesota Supreme Court permitted expert testimony which "described the traits and characteristics typically found in sexually abused children."¹⁰² Furthermore, the expert was permitted to state that the alleged victim exhibited these traits and characteristics. Similarly, the California Court of Appeal upheld the admissibility of such testimony in *In re Cheryl H.*,¹⁰³ where the court wrote that:

Expert opinion testimony about whether a child has been sexually abused is similar to the "battered child syndrome" already approved by California courts.

Child beating and sexual molestation of a child differ primarily in the location and cause of the injuries. If expert opinion testimony is admissible to establish that the facial and bodily injuries exhibited by a child are the result of an ongoing pattern of child beating, then that same sort of testimony should be available to assist a trier of fact who is attempting to determine whether certain vaginal injuries were caused by sexual abuse rather than some innocent accident.

99. As indicated in *supra* section (II)(D), the argument can be made that there is no such thing as a *typical* sexually abused child.

100. See, e.g., *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73, 74-75 (1986) (en banc); *People v. Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (1985) (not officially published); *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789, 800 (1984); *Allison v. State*, 179 Ga. App. 303, 346 S.E.2d 380, 385 (1986); *State v. Brotherton*, 384 N.W.2d 375 (Iowa 1986); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *State v. Pettit*, 66 Or. App. 575, 675 P.2d 183 (1984); *State v. Myers*, 359 N.W.2d 604 (Minn. 1984); *State v. Sandberg*, 392 N.W.2d 298 (Minn. Ct. App. 1986) (Police officer was qualified to give expert opinion about the reporting practices of sexually abused children.).

101. 359 N.W.2d 604 (Minn. 1984).

102. *Id.* at 609.

103. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

Here, of course, it is not medical testimony about the physical characteristics of the injury which supports the diagnosis. Rather it is psychiatric testimony about the victim's post-injury behavior which leads to the conclusion she was sexually abused. But that behavior appears to be unique to children subjected to child abuse and as valid an indicia of such abuse as the physical characteristics used to diagnose "battered child syndrome."¹⁰⁴

The theoretical justification for admitting expert testimony describing the typical sexually abused child is that this evidence has a tendency to establish that the child was abused.¹⁰⁵ This type of evidence is a proper subject for expert testimony because the average juror is unfamiliar with the affect of sexual abuse on children.¹⁰⁶ In the *Myers* case, the court found that "[t]he nature . . . of sexual abuse of children places lay jurors at a disadvantage" in that the average juror is ill-equipped to understand the behavioral and emotional reactions experienced by sexually abused children.¹⁰⁷ Expert testimony assists the jury in resolving the factual questions presented in litigation.¹⁰⁸

A primary goal of expert testimony on the sexually abused child syndrome is to create a logical, emotional, and intellectual link between the alleged victim and the typical sexually abused child. In addition to this overriding goal, evidence relating to the sexually abused child syndrome may be admitted to explain symptoms that are ambiguous or that appear to be inconsistent with a finding of abuse. In *In re Cheryl H.*,¹⁰⁹ for example, the court approved expert testimony on the syndrome to explain ambiguous medical findings.

104. 153 Cal. App. 3d at 1116-17, 200 Cal. Rptr. at 800. A strong argument can be made against the court's comparison of the battered child syndrome and the sexually abused child syndrome. See Note, *supra* note 93, at 448-49 ("unlike sexual abuse syndrome, battered child syndrome encompasses a brief set of narrow, specific, predominantly physical symptoms").

105. See *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 502 A.2d 253, 256 (1985) ("The evidence does tend to make material facts more probable and advance the inquiry because the jury can infer that the gaps and inconsistencies in the victim's testimony stem from the psychological dynamics of incest rather than from any fabrication or fantasy."). See also FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.>").

106. See *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73, 74-75 (1986) (en banc) ("We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim.>").

107. For a persuasive argument that expert testimony on the sexually abused child syndrome is not helpful to the jury see Note, *supra* note 93, at 447-48.

108. 359 N.W.2d at 610.

109. 153 Cal App. 1098, 200 Cal. Rptr. 789 (1984).

The court wrote that the evidence "should be available to assist a trier of fact who is attempting to determine whether certain vaginal injuries were caused by sexual abuse rather than some innocent accident."¹¹⁰ Furthermore, evidence that a child suffers from the syndrome may be admissible to explain delay in reporting abuse,¹¹¹ recantation,¹¹² inconsistencies between versions of the event,¹¹³ difficulty in explaining dates, times, and details,¹¹⁴ or to indicate that sexually abused children are capable of accurately perceiving and describing sexual acts committed upon them.¹¹⁵

Section (II)(D) enumerates a number of the many symptoms or behaviors attributed to sexual abuse. The most casual examination of these symptoms reveals, however, that many of them are associated with other developmental and psychological problems of childhood and adolescence. For example, the fact that a child suffers from nightmares, loss of appetite, regression, and depression says very little, if anything, about sexual abuse. A myriad of other factors can cause these symptoms, and it would be improper for an expert to base an opinion relating to sexual abuse on such ambiguous symptoms alone.

Some of the symptoms attributed to sexual abuse are flatly inconsistent. For example, some sexually abused children regress to less mature levels of functioning, while others exhibit pseudo-mature behavior. Furthermore, one important symptom, recantation, is expressly inconsistent with a finding of abuse. While it is true that a recantation may be false, it also possible that it is true. Yet, the expert is permitted to say, in effect, that since a child withdrew the

110. 153 Cal. App. at 1117, 220 Cal. Rptr. at 800. *See also* *People v. Payan*, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126, 133 (1985) (The California Supreme Court ordered that the *Payan* case not be officially published).

111. *See, e.g., Smith v. State*, 100 Nev. 570, 688 P.2d 326 (1984); *State v. Haseltine*, 352 N.W.2d 673, 676 (Wis. Ct. App. 1984).

112. *See, e.g., State v. Middleton*, 294 Or. 427, 456, 657 P.2d 1215, 1220 (1983) (Not error to use evidence of syndrome to explain "this superficially bizarre behavior.").

113. *Commonwealth v. Baldwin*, 348 Pa. Super. 368, 502 A.2d 253, 256 (1985) ("The evidence does tend to make material facts more probable and advance the inquiry because the jury can infer that the gaps and inconsistencies in the victim's testimony stem from the psychological dynamics of incest rather than from any fabrication or fantasy.").

114. *State v. Pettit*, 66 Or. App. 575, 579, 675 P.2d 183, 185 (1984). One wonders whether evidence of the sexually abused child syndrome is very useful in explaining a child's difficulty with dates, times, and details. Children doubtless have such difficulties. In most cases, however, the difficulty is caused by developmental immaturity shared by all children, rather than by sexual abuse.

115. *State v. Paddilla*, 74 Or. App. 676, 679, 704 P.2d 524, 525 (1985) ("In cases involving sexual abuse of children, expert testimony as to the child's ability to perceive and relate events may help the jury to understand and evaluate the victim's testimony.").

allegation of abuse, she or he must be abused. As one commentator remarks, "There is something fundamentally strange about saying that since the child denies that the event occurred, it must have occurred."¹¹⁶ Certainly, if the only evidence of sexual abuse is a combination of highly ambiguous symptoms coupled with a recantation, a finding of sexually abused child syndrome should be regarded as of de minimus evidentiary value but of great potential prejudice.

While some of the symptoms of the "typical" sexually abused child are consistent with a number of other problems, other symptoms are tied specifically to sexual abuse. Examples of specific symptoms of abuse include use of anatomically correct dolls in a way that is inexplicable unless the child has experienced sexual contact, knowledge of sexual terms which a child would not possess unless the child has been exposed to the terms, and descriptions of sexual activity (fellatio, ejaculation, penetration, erection) which are beyond the ken of children of a particular age.¹¹⁷ Such symptoms share a nexus with sexual abuse that is specific and relatively unambiguous. When a diagnosis of sexually abused child syndrome is premised on symptoms which are closely tied to abuse, the degree of confidence in the diagnosis is much higher than when the symptoms are ambiguous.

The highest degree of confidence in a diagnosis of sexually abused child syndrome is achieved when there is a coalescence of three types of symptoms: (1) a central core of symptoms which are specifically related to sexual abuse, (2) physical symptoms evidencing abuse, and (3) symptoms which are not specifically tied to sexual abuse but which are commonly found in sexually abused children.

116. Note, *supra* note 93, at 446.

117. See *Sapien v. State*, 705 S.W.2d 214, 216-17 (Tex. Ct. App. 1985). In the *Sapien* case the defendant was convicted of sexually molesting his daughter, who was younger than 14. The child was vigorously cross-examined. The defense implied that she had been coached, and that she had lied about the assaults to get rid of the defendant, who was her father. Following the cross-examination, the state called an expert. The expert testified in part as follows:

Q: All right. And based on the information related to you, and if the additional information were added that the child can accurately describe seminal fluid and an erect penis, would that be certainly consistent with a child of this age having seen those things?

MR. POYNER: Your Honor, I'm going to object. He is trying to bolster his witness. Improper.

THE COURT: Overruled.

A: Yes, it would.

Id. The Court of Appeals upheld the admission of this testimony.

The three symptom groups described above were present in the case of *In re Cheryl H.*¹¹⁸ The child was three-years-old. Her youth made it very unlikely that she would have knowledge of sexual matters unless she had been exposed to sexual contact. The expert testified that during therapy, the child demonstrated conduct that was "typical of conduct exhibited by other young children who had been sexually abused."¹¹⁹ Cheryl placed a male doll on top of a female doll. She also "placed the penis of the male doll in her mouth and, 'glassy-eyed, staring ahead compulsively' sucked on it."¹²⁰ Cheryl told the expert that "daddy hurt my poopoo," and "daddy put his poopoo in my mouth."¹²¹ Cheryl used the word "poopoo" to describe genitalia. When the topic of her abuse was mentioned, "Cheryl sometimes clung to her mother or hid her face or went into a disassociated state."¹²² In addition to these symptoms, which are directly related to sexual abuse, the child had unexplained hymenal tears.¹²³ She also exhibited symptoms which were not directly tied to sexual abuse, but which are commonly found in abused children. For instance, Cheryl recoiled whenever the offender was mentioned, and she kept a female doll close to her and pushed a male doll away.

The combination of symptoms present in the *Cheryl H.* case justified a high degree of confidence in the expert's diagnosis of sexually abused child syndrome. Compare *Cheryl H.* with the testimony in *State v. Maule*,¹²⁴ where the expert identified the typical characteristics of sexually abused children to include:

[S]leep disruption of some kind, appetite disruption, nightmares fairly common sort of reaction; sometimes other behavior changes might be noted, particularly the child being withdrawn or perhaps having regressed in their behavior, acting like a younger child, being rather clingy to the mother, being afraid of being alone with a particular person, something like that.¹²⁵

The court in *Maule* was greatly troubled by this ambiguous laundry list of symptoms. The court rejected the expert opinion based on such symptoms, finding that the testimony was not supported by

118. 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984).

119. *Id.* at 1109-10, 200 Cal. Rptr. at 795.

120. *Id.* at 1110, 200 Cal. Rptr. at 795.

121. *Id.*

122. *Id.*

123. *Id.* at 1108, 200 Cal. Rptr. at 794.

124. 35 Wash. App. 287, 667 P.2d 96 (1983).

125. *Id.* at 289-90 n.1, 667 P.2d at 97 n.1.

adequate medical or scientific research, and was not based on the type of evidence reasonably relied upon by experts in the field.¹²⁶

Before acquiescing in expert testimony on the sexually abused child syndrome, counsel may ask the court to require the proponent of the evidence to provide an offer of proof outside the presence of the jury. The court can then analyze the kind and quality of symptoms on which the expert bases her or his opinion of sexual abuse. If the expert's opinion is based in large measure on ambiguous symptoms, including recantation, the court may well determine that the evidence lacks probative value, or that its potential for prejudice outweighs its evidentiary value. On the other hand, if the opinion is founded on a cluster of symptoms which have a nexus with sexual abuse, the evidence may be admitted. Obviously, there is no bright-line formula which is applicable in such cases. It is possible to say, however, that as the symptoms move away from a clear nexus with sexual abuse, the danger of prejudice increases, while the evidentiary value of the evidence declines.

2. *Use of the Sexually Abused Child Syndrome to Bolster the Credibility of the Victim*

In many child sexual abuse cases the credibility of the victim is critically important. The lack of physical evidence and eyewitnesses, which so often plagues these cases, causes the child's testimony to become the linchpin of the state's case. Yet, the child's credibility may be undermined by the very symptoms engendered by the abuse. For example, the child may delay in revealing what happened. When the truth finally comes out, the child may give inconsistent versions of the facts, or may recant altogether. The state has a pressing need to support the child's credibility. The prosecutor's dilemma is to find a way to acquaint the jury with the fact that the child's behavior, which at face value appears to be inconsistent with allegations of abuse, is actually the product of abuse.

One solution to the prosecutor's credibility dilemma lies in expert testimony on the sexually abused child syndrome. When an expert testifies that it is common for sexually abused children to delay reporting, to be ambivalent, and even to recant, the jury can understand the child's "superficially bizarre behavior."¹²⁷ With the

126. *Id.* at 295-96, 667 P.2d at 100.

127. *State v. Middleton*, 294 Or. 427, 436, 657 P.2d 1215, 1220 (1983).

aid of the expert's testimony, the jury is in a better position to evaluate the child's credibility. The courts generally permit expert testimony which has the indirect effect of bolstering the credibility of the child witness by explaining the "emotional antecedents" of the behavior.¹²⁸

Many behavioral scientists believe that young children, especially those age five and under, cannot fabricate incidents of sexual abuse.¹²⁹ Furthermore, in many instances, experts are prepared to testify that children exhibiting the symptoms of the sexually abused child syndrome are probably telling the truth when they describe their abuse. Prosecutors have attempted to introduce such testimony in an effort to support the credibility of child witnesses.

While courts are increasingly willing to admit expert testimony on the sexually abused child syndrome as evidence that abuse occurred, and as *indirect* evidence supporting the child's credibility, they are much less sanguine about permitting experts to state *directly* that children tell the truth about such matters, or that particular children are truthful. The more persuasive decisions reject expert testimony in the form of an opinion on the truthfulness of allegations of abuse or on the credibility of a particular child.¹³⁰ The

128. *Id.*

129. *See, e.g.,* Fallor, *Is the Child Victim of Sexual Abuse Telling the Truth*, 8 CHILD ABUSE & NEGLECT 473, 475 (1984) ("we know that children do not make up stories asserting they have been sexually molested. It is not in their interest to do so. Young children do not have the sexual knowledge necessary to fabricate an allegation. Clinicians and researchers in the field of sexual abuse are in agreement that false allegations by children are extremely rare."). *See also In re Cheryl H.*, 153 Cal. App. 3d 1098, 1110, 200 Cal. Rptr. 789, 795 (1984), where an expert testified that a three-year-old child had symptoms which brought her within the sexually abused child syndrome. The psychiatrist's diagnosis was based in large part on play therapy interviews with the child. Based on the conduct exhibited by the child during these interviews, the doctor opined that "based on her knowledge of the development of cognition in children [the victim] could not have been coached to respond the way she did during play therapy." *Id.*

130. *See State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73, 75-76 (1986); *People v. Payan*, 220 Cal. Rptr. 126 (1985) (The California Supreme Court ordered that the *Payan* case not be officially published.); *Tevlin v. People*, 715 P.2d 338 (Colo. 1986) (en banc); *People v. Koon*, 713 P.2d 410 (Colo. App. 1985); *State v. Butler*, 349 S.E.2d 684 (Ga. 1986) (Smith, J., dissenting); *State v. Brotherton*, 384 N.W.2d 375, 378-79 (Iowa 1986) (Three-year-old victim. Improper for expert to opine that the child would be unable to fantasize sexual activity. Such testimony is an indirect opinion that the child was telling the truth.); *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986) (Improper to admit expert testimony that "young children do not lie about sexual matters."); *State v. Jackson*, 293 Kan. 463, 721 P.2d 232, 236-38 (Kan. 1986) (Error to permit expert's to opine that child was telling the truth, and that the defendant was the offender.); *State v. Miller*, 377 N.W.2d 506, 507-08 (Minn. Ct. App. 1985) (It invaded the province of the jury for a psychologist to opine that the 12-year-old child's report was credible and that the psychologist believed the child.); *State v. Middleton*, 294 Or. 427, 438, 657 P.2d 1215, 1221 (1983) ("a witness, expert or otherwise,

Arizona Supreme Court's decision in *State v. Lindsey*¹³¹ typifies the preferred approach. The court approved expert testimony describing the typical reaction to sexually abused children even though the testimony had the indirect effect of supporting the child's credibility.¹³² The court went on to state emphatically, however, that:

[T]rial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness. Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration. Nor should experts be allowed to give similar opinion testimony, such as their belief in guilt or innocence. The law does not permit expert testimony on how the jury should decide the case.¹³³

The *Lindsey* court's rejection of direct expert testimony on credibility seems sound.¹³⁴ Notwithstanding the appeal of the *Lindsey* approach, however, an increasing number of decisions permit expert testimony which comments *directly* on credibility.

may not give an opinion on whether he believes the witness is telling the truth."); *State v. Munro*, 68 Or. App. 63, 66-67 680 P.2d 708, 709 (1984) (Sexual abuse prosecution. In this case the defendant sought unsuccessfully to introduce expert testimony that the six-year-old's mental problems would affect her ability to tell the truth.); *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673, 676 (1984) (An expert testified that the 16-year-old victim was an incest victim. Such testimony "goes too far." "The opinion that [defendant's] daughter was an incest victim is an opinion that she was telling the truth. . . . No witness, expert or otherwise, should be permitted to give as opinion that another mentally or physically competent witness is telling the truth."). See also *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (Improper to permit expert testimony that children could distinguish truth from falsehood and fact from fantasy.). But see *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982). The *Kim* case is discussed in the text.

131. 149 Ariz. 472, 720 P.2d 73 (1986) (en banc).

132. The court stated that:

[T]he trial court did not abuse its discretion in permitting Dr. Baker's testimony on general patterns of behavior. We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim. Children who have been the victims of sexual abuse or molestation may exhibit behavioral patterns (e.g. recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication, but which may be merely the result of immaturity, psychological stress, societal pressures or similar factors as well as of their interaction.

720 P.2d at 75 (citations omitted).

133. 720 P.2d at 76.

134. See *Butler v. State*, 349 S.E.2d 684 (Ga. 1986) (Smith, J., dissenting), where Justice Smith argues persuasively that an expert should not be permitted to give an opinion that a child witness is truthful.

Analysis of the decisions authorizing expert testimony on credibility should begin with the leading case of *State v. Middleton*,¹³⁵ decided in 1983. The defendant was convicted of raping his fourteen-year-old daughter. Following the rape, the victim told her story to a friend's mother, to a Children's Services Worker, and also to a doctor at the hospital. The following day, a police officer recorded her statement at the police station. Within the same week she wrote out her statement prior to testifying before the grand jury. These reports were all consistent.¹³⁶

Slightly more than a month later, "the child wrote a statement saying she had lied about the rape."¹³⁷ At the trial, however, the girl testified consistently with her earlier statements, and the defendant sought to impeach her testimony by introducing the recantation.

In an effort to strengthen the child's testimony and explain the recantation, the state offered the testimony of social workers who were qualified as experts. The social workers testified that the child displayed symptoms characteristic of rape victims. Defendant objected "to the evidence on the grounds that it would require a comment on the credibility of the victim,"¹³⁸ and that it was not proper evidence for expert opinion in that it was not helpful to the jury. The Oregon Supreme Court rejected the defendant's arguments and approved limited use of such testimony in child sexual assault cases. Because most jurors had "no experience with victims of child abuse,"¹³⁹ and would not understand the psychological dynamics which lead children to recant or behave in other seemingly abnormal ways, the court found such expert testimony to be proper. Expert testimony "might well help a jury make a more informed decision in evaluating the credibility of a testifying child."¹⁴⁰ In approving use of such testimony, the court wrote:

If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime had happened, the jury would have good reason to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been the victim of sexual abuse by a member of her family. The experts testified that in this

135. 294 Or. 427, 657 P.2d 1215 (1983).

136. *Id.* at 429, 657 P.2d at 1216.

137. *Id.*

138. *Id.* at 432, 657 P.2d at 1218.

139. *Id.* at 437, 657 P.2d at 1220.

140. *Id.*

situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just this victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the witness's credibility.¹⁴¹

Middleton is an important breakthrough for prosecutors. Under its authority the state can bolster the credibility of its chief witness, a bonus not often available to the proponent of testimony. Furthermore, the state can utilize the powerful testimony of "experts of the mind" to demonstrate that behavior which the defense argues undermines the child's testimony actually reinforces it. While the Oregon court stated that the expert cannot "give an opinion on whether he believes a witness is telling the truth,"¹⁴² expert testimony on the syndrome is likely to have precisely that effect, lending the imprimatur of expertise to the truthfulness of the child.

Approximately a year after *Middleton* was handed down, the Supreme Court of Minnesota decided *State v. Myers*.¹⁴³ Relying on the earlier decision, the *Myers* court approved expert testimony regarding the typical profile of the sexually abused child. The court found that "[t]he nature of the sexual abuse of children places lay jurors at a disadvantage"¹⁴⁴ in that the average jury is ill-equipped to understand the typical reactions of abused children.

Before it could approve expert testimony on the sexually abused child syndrome, the *Myers* court had to distinguish its 1982 decision in *State v. Saldana*,¹⁴⁵ which held that expert testimony regarding rape trauma syndrome could not be admitted in a rape trial involving an adult victim. In *Saldana* the court stated that expert testimony concerning "the typical reactions of a woman who has been raped does not assist the jury in determining whether or not the sexual act was consensual. [T]he testimony furnishes no assistance to jurors, who are as capable as the expert in assessing the credibility of the alleged adult rape victim."¹⁴⁶ While jurors are capable of

141. *Id.* at 435-36, 657 P.2d at 1219-20.

142. *Id.* at 438, 657 P.2d at 1221.

143. 359 N.W.2d 604 (Minn. 1984).

144. *Id.* at 610.

145. 324 N.W.2d 227 (Minn. 1982).

146. *State v. Myers*, 359 N.W.2d at 610.

evaluating the credibility of adult witnesses, and deciding matters of consent, the *Myers* court found that the sexual abuse of children is a different matter. The court wrote:

[W]hen the alleged victim of a sexual assault is a child . . . there is presented one of those "unusual cases" in which expert testimony concerning credibility of a witness should be received. In the case of a sexually abused child consent is irrelevant and jurors are often faced with determining the veracity of a young child who tells of a course of conduct carried on over an ill-defined time frame and who appears an uncertain or ambivalent accuser and who may even recant. Background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children and particularly of children as young as this complainant.¹⁴⁷

Thus, because of the legal differences between the sexual abuse of a child and the rape of an adult, and between the psychological characteristics of children and adults, expert testimony to bolster credibility is admissible in the one case but not the other. While the validity of the court's distinction is open to question, the decision to permit expert testimony which amounts to an indirect opinion on the credibility of the child is in line with the trend in the authorities.

In its *Middleton* decision, the Oregon Supreme Court held that "a witness, expert or otherwise, may not give an opinion on whether he believes a witness is telling the truth."¹⁴⁸ In *Myers*, the Minnesota court stepped beyond *Middleton*, and approved the expert's testimony that she believed the child's allegations were truthful.¹⁴⁹ The court stated that it would normally "reject expert opinion testimony regarding the truth or falsity of a witness' allegations about a crime, for the expert's status may lend an unwarranted 'stamp of scientific legitimacy' to the allegations,"¹⁵⁰ but that in the case at bench the defendant waived objection to this evidence by attempting to undermine the child's credibility. Thus, the expert was permitted to lend the imprimatur of her expertise to the child's allegations.

147. *Id.* The child was a seven-year-old.

148. *State v. Middleton*, 294 Or. at 438, 657 P.2d at 1221.

149. *State v. Myers*, 359 N.W.2d at 609. The expert "explained that it is extremely rare for children to fabricate tales of sexual abuse and stated that in her opinion the complainant knew the difference between truth and falsehood and was truthful in her allegations." *Id.*

150. *Id.* at 611.

A similar result was reached by the Supreme Court of Hawaii in the case of *State v. Kim*.¹⁵¹ The victim was a thirteen-year-old girl who was raped by her stepfather. During the trial the defendant sought to undermine his stepdaughter's credibility by catching her in a lie. "The trial court ruled that this effort at impeachment placed the complainant's credibility sufficiently at issue so as to allow [expert] testimony on the issue of credibility."¹⁵² The expert, who was a pediatrician and a child psychiatrist, testified that the child demonstrated symptoms typical of child sexual abuse victims, and went on to opine "that he 'found her story believable.'"¹⁵³ The supreme court held that the expert's testimony regarding the child's truthfulness was properly admitted. The court supported the ruling by stating:

Expert testimony respecting witness credibility is not, of course, appropriate to all situations. In most cases, the common experience of the jury should suffice as a basis for assessments of credibility. In such cases, even though an expert's assessment of credibility may arguably provide the jury with potentially useful information, the possibility that the jury might be unduly influenced by an expert's opinion would mitigate against admission. When, however, the nature of a witness' mental or physical condition is such that the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a witness, the testimony of an expert is far more likely to be of value, and thus more likely to be admissible when its probative value is measured against its prejudicial effects.¹⁵⁴

In *Myers* and *Kim*, attacks on the credibility of child witnesses opened the door to testimony designed to give direct, expert support to the credibility of the victims. The logic of these decisions may permit such expert testimony in the great majority of cases. Since one of the basic functions of cross-examination is to undermine credibility, prosecutors may be able to capitalize on the defendant's need to cross-examine by arguing that whenever interrogation touches on credibility, the state may use expert testimony expressly designed to enhance the credibility of its principal witness. This result would help prosecutors overcome the proof problems encountered in abuse litigation, but it would do so at a substantial cost. Permitting an

151. 64 Haw. 598, 645 P.2d 1330 (1982).

152. *Id.* at 600, 645 P.2d at 1333.

153. *Id.* at 608, 645 P.2d at 1338 (quoting from the doctor's trial testimony).

154. *Id.* at 607, 645 P.2d at 1337.

expert to state that in her or his opinion a child was truthful is particularly prejudicial to the defendant. Such testimony is likely to cause the jury to "abdicate its responsibility to ascertain the facts [by] relying upon the questionable premise that the expert is in a better position to make such a judgment."¹⁵⁵ Furthermore, the fear of opening the door to expert testimony on credibility may discourage effective cross-examination.¹⁵⁶

Because of the potential for unfair prejudice inherent in expert testimony on credibility, courts should usually refuse to admit testimony which is directly tied to credibility. Clearly, such evidence should not be permitted until and unless the defendant attacks the child's credibility.¹⁵⁷ Furthermore, not every attack on the victim's credibility should justify expert testimony that the child is believable. The trial judge must weigh the benefit of opinion evidence on credibility against the potential for unfair prejudice, confusion, and delay. In many cases, the court will conclude that the prejudicial effect of the evidence outweighs its evidentiary value.

E. Rehabilitation of a Child Witness Through Evidence of Character for Truthfulness—What Evidence Opens the Door for Rehabilitation?

The law assumes that witnesses testify truthfully.¹⁵⁸ Because of this assumption, evidence supporting the character of a witness for truthfulness is excluded unless the witness's credibility has been attacked.¹⁵⁹ This well-established common law principle finds expression in rule 608(a) of the Federal Rules of Evidence, which states that the credibility of a witness may be supported only if "the

155. *Id.* at 602, 645 P.2d at 1334 (quoting *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976)).

156. See *State v. Lindsey*, 149 Ariz. 472, 720 P.2d 73, 78 (1986).

157. See *Allison v. State*, 179 Ga. App. 303, 346 S.E.2d 380, 385 (1986) (Evidence on the sexually abused child syndrome not proper unless defendant has attacked the victim's credibility.).

158. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 250; 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-45; 4 J. WIGMORE, *supra* note 8, § 1104.

159. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 250 ("A party may not repair credibility until credibility has been attacked. . . ."); C. MCCORMICK, *supra* note 8, § 49, at 115 ("One general principle, operative under both case law and the Federal Rules of Evidence, is that in the absence of an attack upon credibility no sustaining evidence is allowed."); 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-45 ("Rule 608(a) provides that reputation or opinion evidence may not be used to sustain a witness' character for truthfulness until his veracity has first been attacked, since 'there is no reason why time should be spent in proving that which may be assumed to exist.'").

character of the witness for truthfulness has been attacked by opinion or reputation or otherwise.”¹⁶⁰

The trial court has broad discretion in determining when a witness’s credibility has been sufficiently impeached to open the door for rehabilitation. Once the door is open, McCormick writes that “[t]he rehabilitating facts must meet a particular method of impeachment with relative directness. The wall, attacked at one point, may not be fortified at another and distant point. Credibility is a side issue and the circle of relevancy in this context may well be drawn narrowly.”¹⁶¹

In litigation involving children, especially child abuse litigation, the victim is often a vitally important witness. In *State v. Petrich*,¹⁶² the Washington Supreme Court observed that “[c]ases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission.”¹⁶³ The child’s credibility takes on extraordinary importance, and when the child’s truthfulness is attacked or otherwise drawn into question, the proponent has a legitimate need to rehabilitate the child’s credibility.¹⁶⁴ Trial judges

160. FED. R. EVID. 608 reads as follows:

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FED. R. EVID. 608.

161. C. McCORMICK, *supra* note 8, § 49, at 116. See also *Farris v. State*, 643 S.W.2d 694, 697 (Tex. Ct. Crim. App. 1983) (Sexual offense case. The state offered evidence from an expert that a nine-year-old could not fantasize the kinds of sexual acts alleged. The child was not successfully impeached or vigorously cross-examined. The court held that it was error to admit such bolstering evidence. The court stated that “The bolstering testimony must be related to the impeachment to be admissible.”); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 250 (“it is only the damage inflicted that a party may repair. . .”).

162. 101 Wash. 2d 566, 683 P.2d 173 (1984) (en banc).

163. *Id.* at 575, 683 P.2d at 179.

164. In *State v. Petrich*, the Washington court wrote that “[a]n attack on the credibility of these witnesses, however slight, may justify corroborating evidence.” *Id.*

are disposed to permit rehabilitation when the character of the central witness is impugned.

The following paragraphs discuss the methods of impeachment which may open the way for rehabilitation.

Direct Attack. A direct attack on the veracity of the witness opens the door for evidence to repair the witness's credibility.¹⁶⁵ Such an attack may take the form of "evidence of bad reputation, bad opinion of character for truthfulness, conviction of crime, or eliciting from the witness on cross-examination acknowledgment of misconduct which has not resulted in conviction. . . ."¹⁶⁶

"*Slashing Cross-Examination.*" When the cross-examiner insinuates that the witness is unworthy of belief, the court may permit evidence in support of truthfulness. McCormick describes this form of character impeachment as follows:

[A] slashing cross-examination may carry strong accusations of misconduct and bad character, which the witness's denial will not remove from the jury's mind. If the judge considers that fairness requires it, he may permit evidence of good character, a mild palliative for the rankle of insinuation by such cross-examination.¹⁶⁷

In child abuse litigation, the cross-examiner often capitalizes on the fact that the child has changed his or her version of the facts, or recanted altogether. This type of cross-examination is designed to convince the jury to disbelieve the child. In many cases such examination carries the intimation that the child is lying or, at a

165. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 251 ("There can be no question when a party directly assails the character of a witness: This paves the way for counterproof of truthful disposition.").

166. C. MCCORMICK, *supra* note 8, § 49, at 116-17. See also 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-46.

167. C. MCCORMICK, *supra* note 8, § 49, at 117. See also 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 252-53, where the authors write:

When cross-examination is unusually sharp, and succeeds in catching the witness in embarrassing testimonial inconsistencies or in suggesting by tone or innuendo that the witness is lying or corrupt, the court should permit counterproof in the way of evidence of good character. Occasionally the untruthful disposition of a party may be implied by the adversary's cross-examination of that party's witnesses, and here it seems that the party should be able to prove his own truthful character, at least where his testimony or statements have been introduced in evidence or are otherwise important in the case.

Id. See also 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-46 to -47, where the authors write that: "When the witness denies misconduct but insinuations have been conveyed to the jury by an accusatory cross-examination, Wigmore and McCormick agree that rehabilitating evidence should be allowed in the judge's discretion if he finds the witness' denial has not erased the jury's doubts." *Id.*

minimum, is uncertain about the truth. The trial court may permit the proponent of the testimony to rehabilitate the child's credibility if the cross-examination amounts to an attack on character for truthfulness.

Prior Inconsistent Statements. Impeachment with prior inconsistent statements may or may not open the door to supporting evidence. Use of a prior inconsistent statement to suggest that a child simply made a mistake does not impugn the child's credibility, and does not call for supporting character evidence. If, on the other hand, the cross-examiner employs inconsistent statements to convince the jury that the child is unworthy of belief, then the court may permit support. These cases must be evaluated on their unique facts, and the decision left to the discretion of the trial judge.¹⁶⁸

Contradiction. Impeachment by contradiction usually does not amount to an attack on the credibility of the witness whose testimony is contradicted.¹⁶⁹ Cases can be imagined, however, in which the form of the contradiction, or the matters contradicted, may call the credibility of the witness so far into question as to render rehabilitation appropriate.¹⁷⁰ Again, the decision is within the sound discretion of the court.

Bias or Corruption. The fact that a child witness is a party to litigation or is aligned with or related to a party is not sufficient to call for support of the child's credibility. This is true even when the cross-examiner points out the child's potential bias. However, if the cross-examiner alleges or insinuates that the child is deliberately distorting the truth in order to aid a party, then the cross-examination amounts to an attack on credibility, and the court may permit rehabilitation.¹⁷¹

168. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 251, where the authors write:

Viewed as a mere indication that the witness erred either in his statement or in his testimony, this kind of impeachment is not an assault upon character; viewed, however, as suggesting deliberate falsehood on one or the other occasion, it does indeed impugn character. There is no clear rule, and the matter is consigned to the discretion of the trial judge.

See also C. McCORMICK, *supra* note 8, § 49, at 117-18; 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-47 to -48.

169. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 253, where the authors state that impeachment by contradiction usually does not open the door for support of the witness whose testimony has been contradicted.

170. See C. McCORMICK, *supra* note 8, § 49, at 117-18; 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-48 to -50.

171. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 252; C. McCORMICK, *supra* note 8, § 49, at 117; 3 J. WEINSTEIN, *supra* note 8, ¶ 608[08], at 608-47.

Defect in Capacity. During cross-examination of a child witness, counsel may raise questions about the child's capacity to observe, remember, or relate. In the normal case, doubts about capacity do not constitute an attack on credibility, and evidence of good character for truthfulness should be excluded. The proper response to such cross-examination is to establish that the child possesses the requisite capacity to testify.¹⁷²

F. Rehabilitation of a Child Witness Through Evidence of Character for Truthfulness—Methods of Rehabilitation

When the trial judge rules that a child's character for truthfulness has been attacked, and that rehabilitation is in order, counsel may select from among several methods of support. First, counsel may call a character witness. The character witness testifies in the form of opinion or reputation regarding the child's character for truthfulness.¹⁷³ Character witnesses are used but infrequently; a fact which is somewhat surprising in view of the availability of character witnesses regarding children. In many cases, for example, counsel could call a school teacher, Sunday school teacher, or scout leader as a character witness. These adults are imbued with high status and respectability in the community, and the opinion of such a person about a child's character for truthfulness may go far toward rehabilitation.

A second method of rehabilitation is to use redirect examination to explain away the damage done on cross-examination.¹⁷⁴ If the trial court permits, counsel may ask the child about specific instances of conduct which demonstrate truthfulness.¹⁷⁵ Counsel must

172. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 254, where the authors state that "[w]hile there appear to be no authorities in point, it seems that impeachment by showing a defect in the capacity of the witness to observe or recount should not pave the way for proof of good character, which should be excluded on grounds of relevancy."

173. See FED. R. EVID. 608(a), which states in part that "[t]he credibility of a witness may be . . . supported by evidence in the form of opinion or reputation . . ." For discussion of character witnesses, see generally, 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 255; T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* 164-69, 292-94 (1980). For discussion of the foundation which must be laid to use a character witness see E. IMWINKELRIED, *supra* note 28, at 52-53.

174. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 256.

175. Rule 608(b) states that inquiry regarding specific instances of conduct is limited to cross-examination. Arguably, therefore, it is not proper to inquire into specific instances of conduct on redirect examination. Professor Graham addresses this issue in his book titled *Handbook of Federal Evidence*. Professor Graham states that:

Specific instances of conduct probative of truthfulness or untruthfulness of the

confine this mode of rehabilitation to the questioning of the child, however, and may not admit extrinsic evidence of specific instances of truthful conduct.¹⁷⁶

A third method of rehabilitation is to offer expert testimony on the issue of credibility.¹⁷⁷ In child sexual abuse litigation, this evidence may come in the form of an opinion that a child suffers from the sexually abused child syndrome.¹⁷⁸

G. Corroboration

Corroboration of children's testimony is important in two respects. First, in some circumstances, the testimony of children in sexual offense cases must be corroborated. Second, corroboration can be used to rehabilitate the testimony of children who have been impeached. The following paragraphs discuss the substantive requirement of corroboration, the use of corroboration as a technique for rehabilitation, and several types of corroborating evidence.

1. Corroboration as a Substantive Requirement

At common law the uncorroborated testimony of the victim of a sex offense was sufficient to support a conviction.¹⁷⁹ While a con-

witness on the stand may not be developed under Rule 608(b) upon direct or redirect examination; inquiry on cross-examination only is specified.

If character for truthfulness or untruthfulness surfaces for the first time on cross-examination, redirect is treated as equivalent to cross-examination for the purpose of permitting use of specific instances of conduct under Rule 608(b).

See *Government of Virgin Islands v. Roldan*, 612 F.2d 775, 778 n.2 (3d Cir. 1979). . . .M. GRAHAM, *supra* note 8, § 608.4, at 453 n.8.

176. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 308, at 257, where the authors state that "[t]he first sentence of Rule 608(b) leaves no doubt that the truthfulness of the principal witness cannot be established by extrinsic evidence, such as testimony by others, concerning specific instances of his conduct."

177. Professors D. Louisell and C. Mueller recognize the possibility of expert testimony on credibility. See *id.* § 308, at 255, where the authors write that "[a]t least in theory, a party might call a psychologist or psychiatrist to render an opinion that the witness has a truthful disposition. Whether such testimony will be received, or will be excluded on other grounds, remains to be seen." (footnote omitted).

178. See *State v. Petrich*, 101 Wash. 2d 566, 575, 683 P.2d 173, 180 (1984) (en banc) ("Once a witness's credibility is in issue, evidence tending to corroborate the testimony may, in the trial court's discretion, be obtained from an expert witness." In the *Petrich* case an expert opined that it is normal for child sexual abuse victims to delay in reporting their abuse.).

179. 7 J. WIGMORE, *supra* note 8, § 2061, at 451 ("At common law, the testimony of the prosecutrix or injured person, in the trial of all offenses against the chastity of women, was alone sufficient to support a conviction; neither a second witness nor corroborating circumstances were necessary . . ."). See also *United States v. Bear Runner*, 574 F.2d 966 n.1 (8th Cir. 1978); Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120 (1984).

viction could be premised on this testimony, many courts held that corroboration was required when the prosecutrix's testimony was "contradictory, uncertain, improbable, or . . . impeached."¹⁸⁰ In effect, the courts imposed a corroboration requirement in cases where the victim's testimony was less than clear and convincing, or where the witness's credibility was attacked.¹⁸¹ The result was that in many cases involving children, corroboration became a requirement.

During the first half of this century, courts and legislatures became increasingly wary of uncorroborated allegations of sexual offenses.¹⁸² As a result, a number of states imposed a requirement that testimony of an alleged victim must always be corroborated.¹⁸³

During the 1970's, the pendulum moved again, this time away from the corroboration requirement. Today, the great majority of jurisdictions do not impose corroboration as a substantive requirement, and a conviction can be based on the uncorroborated testimony of the victim.¹⁸⁴ This is not to say, however, that corroboration

180. *Roberts v. State*, 87 Okla. Crim. 93, 101, 194 P.2d 219, 224-25 (1948). The Roberts court states the rule which was followed in many jurisdictions. The court wrote:

In cases of this character, the question often arises as to whether it is necessary to corroborate the evidence of the prosecutrix. This court has often announced the rule to be that where the evidence of prosecutrix is contradictory, uncertain, improbable, or she has been impeached, it is necessary, under the law, that her testimony be corroborated.

But this court has also held that one may be convicted upon the uncorroborated evidence of the prosecutrix where her testimony is not contradictory, uncertain or improbable, and she has not been impeached . . . Each case stands upon the facts of that individual case, subject to the rule that the court in this class of cases will closely scrutinize and examine the evidence of each individual case.

Id. (citations omitted). See also *State v. Baldwin*, 571 S.W.2d 236, 239 (Mo. 1978), where the court writes:

It is only in those cases where the evidence of the prosecutrix is of a contradictory nature, or when applied to the admitted facts in the case, her testimony is not convincing and leaves the mind of the court clouded with doubts, that she must be corroborated or a judgment cannot be sustained.

Id.

181. See 7 J. WIGMORE, *supra* note 8, § 2061 n.1, where Wigmore collects many cases in which convictions were reversed for lack of corroboration. See also *People v. McGrath*, 28 Ill. 2d 132, 135, 190 N.E.2d 746, 748 (1963) ("where a conviction for taking indecent liberties is based upon the testimony of a *child of tender years*, the evidence must be corroborated or otherwise clear and convincing in order to sustain a judgment of guilt.") (emphasis added); *State v. Baldwin*, 571 S.W.2d 236, 239 (Mo. 1978).

182. For discussion of this phenomenon, see 3A J. WIGMORE, *supra* note 8, § 924a, at 736-37.

183. See, e.g., *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982) (en banc). The District of Columbia no longer requires corroboration. See *Jackson v. United States*, 503 A.2d 1225 (D.C. 1986). See also Annotation, *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120 (1984).

184. See, e.g., *United States v. Bear Runner*, 574 F.2d 966 (8th Cir. 1978) ("At least

is never required. Trial judges frequently require corroboration if the victim's testimony is uncertain or unclear, a result which seems fully justified.

Hearsay evidence often plays a central role in litigation involving children. In child abuse cases the out-of-court statements of the victim may be the strongest, and in some cases, the only direct evidence of abuse or of the identity of the abuser. In civil cases the courts generally hold that hearsay evidence is sufficient to support a finding of fact or a verdict.¹⁸⁵ In criminal litigation there is diversity of opinion concerning the sufficiency of hearsay to support a finding or judgment of guilt. If the primary evidence bearing on an element of a crime or a civil cause of action is the hearsay testimony of a child witness, the trial judge may well impose a requirement that the out-of-court testimony be corroborated. In a criminal case especially, in which the hearsay statements of the child are often the most damning evidence against the accused, a corroboration requirement is sometimes appropriate. In some cases corroboration may be required as a matter of due process of law.

2. *Corroboration to Rehabilitate*

The proponent of a child's testimony may use corroborative evidence to rehabilitate the child's testimony following impeach-

35 states now reject any corroboration requirement for rape."); *United States v. Shipp*, 409 F.2d 33, 35-36 (4th Cir. 1969); *United States v. Smith*, 303 F.2d 341, 342 (4th Cir. 1962), *cert. denied*, 396 U.S. 864 (1969); *Jackson v. United States*, 503 A.2d 1225 (D.C. 1986); *State v. Byers*, 102 Idaho 159, 627 P.2d 788 (1981) ("the requirement of corroboration in sex crime cases is no longer the law in Idaho"); *State v. Foley*, 392 A.2d 1094 (Me. 1978); *State v. Myers*, 359 N.W.2d 604, 608 (Minn. 1984) ("in a prosecution for criminal sexual conduct the complainant's testimony need not be corroborated. Corroboration of an allegation of sexual abuse of a child is required only if the evidence otherwise adduced is insufficient to sustain conviction."); *State v. Sandberg*, 392 N.W.2d 298 (Minn. Ct. App. 1986); *State v. Carver*, 380 N.W.2d 821, 826 (Minn. Ct. App. 1986) ("Corroboration of the testimony of a complainant in sex offenses is not required."); *State v. Folley*, 378 N.W.2d 21, 25 (Minn. Ct. App. 1985); *State v. Hamrick*, 714 S.W.2d 566 (Mo. Ct. App. 1986); *State v. Leigh*, 580 S.W.2d 536, 541 (Mo. Ct. App. 1979) ("A prima facie case of rape can be made on the uncorroborated testimony of the victim."); *People v. Fuller*, 50 N.Y.2d 628, 409 N.E.2d 834, 431 N.Y.S.2d 357 (1980); *State v. Cabral*, 122 R.I. 623, 410 A.2d 438 (1980); *Moore v. State*, 703 S.W.2d 762, 763 (Tex. Ct. App. 1985) ("The rule is well-established that in statutory rape cases the victim's testimony need not be corroborated."); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972); Annotation, *Modern Status of Rule Requiring Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R.4th 120 (1984). *Contra McCrary v. State*, 176 Ga. App. 683, 337 S.E.2d 442 (1985).

185. For discussion of the sufficiency of hearsay evidence to support a verdict in civil or criminal proceedings see Myers, *Hearsay Statements by the Child Abuse Victim*, —BAYLOR L. REV. —(1986).

ment.¹⁸⁶ In child abuse litigation, the credibility of the complaining witness is often in issue, and courts are generous in permitting the proponent to corroborate the child's impeached testimony. Professors Carlson, Imwinkelried, and Kionka write that:

[T]he witness's proponent may use corroboration to bolster the witness's credibility. Even if the opposing counsel waives cross-examination and never attempts to impeach the witness, the proponent may introduce another witness's testimony that corroborates the prior witness. *A fortiori*, if the opposing counsel endeavors to impeach the witness, there is even greater need for evidence shedding light on the witness's truthfulness. After attempted impeachment, there is all the more reason to allow the witness's proponent to resort to corroborating testimony.¹⁸⁷

Corroboration often takes the form of testimony from another witness which supports or strengthens the child's testimony.

3. *What Constitutes Corroborative Evidence?*

Corroborative evidence is any admissible evidence which tends to support or strengthen a child's testimony.¹⁸⁸ "What facts or evidence will serve as confirming or corroborative facts will necessarily vary depending on the facts to be corroborated."¹⁸⁹ In child abuse litigation, the most frequently encountered forms of corroborating evidence are physical evidence of abuse, a confession or admission by the defendant, eyewitness testimony, and expert testimony on the battered child syndrome or the sexually abused child syndrome. The determination whether to receive evidence which is offered as

186. Corroboration to rehabilitate must await impeachment. In *State v. Petrich*, 101 Wash. 2d 566, 574-75, 683 P.2d 173, 179 (1984) (en banc), the court wrote:

Petitioner also correctly assumes that corroborating testimony intended to rehabilitate a witness is not admissible unless the witness's credibility has been attacked by the opposing party. An attack of credibility is not found merely by evaluating cross-examination tactics; several factors taken in conjunction may show a challenge to credibility. In particular cases, the credibility of a witness may be an inevitable, central issue. Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the credibility of these witnesses, however slight, may justify corroborating evidence.

Id. (citations omitted).

187. R. CARLSON, E. IMWINKELRIED & E. KIONKA, *MATERIALS FOR THE STUDY OF EVIDENCE* 335 (1983).

188. See BLACK'S LAW DICTIONARY 414 (4th ed. 1968) ("Evidence supplementary to that already given and tending to strengthen or confirm it; additional evidence of a different character to the same point.").

189. *In re Brunken*, 139 Ill. App. 3d 232, 487 N.E.2d 397, 401 (1985).

corroboration lies within the sound discretion of the trial judge.¹⁹⁰

H. *Prior Consistent Statements*

In certain circumstances, the prior consistent statement of a witness may be admitted for the limited purpose of rehabilitating the witness's impeached testimony.¹⁹¹ Under the traditional view, however, these out-of-court statements are hearsay, and cannot be admitted as substantive evidence unless within an exception.¹⁹²

Under Federal Rule of Evidence 801(d)(1)(B) and its state equivalents, certain prior consistent statements are defined as nonhearsay. Rule 801 states in part that

[a] statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.¹⁹³

190. See 7 J. WIGMORE, *supra* note 8, § 2062, at 464-65, where the author writes: The further definition of the term "corroboration," by detailed rule of law, is unwise and impractical. Whether there exists such corroborative evidence ought to be a question for the determination of the trial judge upon the circumstances of each case

So far as further definitions have been attempted, they are of two general types similar to those already noted for the accomplice rule. It is said by some courts that the corroboration must be upon some or all *material* facts, by others, and sometimes by express statutory definition, that the corroboration must consist of facts *tending to connect the defendant with the commission*.

Id. (footnotes omitted) (emphasis in original).

191. See 4 J. WIGMORE, *supra* note 8, §§ 1122-33, at 254-97. See also C. McCORMICK, *supra* note 8, § 49, at 118 n.16, where the author writes:

It should first be noted that in various states the rule has been and still is that consistent statements of a witness can not be introduced as "substantive evidence" but must be confined to the purpose of "rehabilitating" a witness. In other words such evidence is regarded by these courts as inadmissible hearsay within the definition of hearsay and not within any exception to the hearsay rule.

Id. Professor Wigmore felt use of prior consistent statements to corroborate a witness's testimony was not hearsay. See 4 J. WIGMORE, *supra* note 8, § 1123, at 254; 6 *id.* § 1792, at 327. It is generally agreed that prior consistent statements cannot be used to rehabilitate unless the witness' testimony is in some measure impeached. See 4 J. WIGMORE, *supra* note 8, § 1124, at 255, where the author writes:

When the witness has merely testified on direct examination, without any impeachment, proof of consistent statements is unnecessary and valueless. The witness is not helped by it; for, even if it is an improbable or untrustworthy story, it is not made more probable or more trustworthy by any number of repetitions of it. Such evidence would ordinarily be cumbersome to the trial and is ordinarily rejected.

Id. But see *State v. Perry*, 298 N.C. 502, 505, 259 S.E.2d 496, 498 (1979) ("Unlike the law in many other states, prior consistent statements of a witness in North Carolina are admissible as corroborative evidence even when that witness has not been impeached.").

192. See C. McCORMICK, *supra* note 8, §§ 49, at 118 n.16, and § 251, at 744-48.

193. FED. R. EVID. 801(d)(1)(B). For discussion of 801(d)(1)(B) see generally FED. R.

A growing number of decisions involving children—nearly all pertaining to child abuse—rely on a state equivalent of rule 801(d)(1)(B) to authorize admission of a child witness's prior consistent statements as substantive evidence.¹⁹⁴

The primary difficulty encountered in the use of prior consistent statements to rehabilitate involves the determination of when a witness has been impeached, thus opening the door for rehabilitation.¹⁹⁵ The following paragraphs discuss impeachment techniques which may justify admission of prior consistent statements.¹⁹⁶

Bad Character. Wigmore opined that impeachment by evidence of bad reputation for truthfulness should not open the door,¹⁹⁷ a proposition with which McCormick agrees.¹⁹⁸ McCormick explains that “[w]hen the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements. The defense does not meet the assault.”¹⁹⁹

Prior Inconsistent Statements. There is substantial disagreement among courts concerning whether impeachment by prior inconsistent statement permits rehabilitation by prior consistent statement.²⁰⁰

EVID. 801(d)(1)(B) advisory committee note.

Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

Id.; M. GRAHAM, *supra* note 8, § 801.12, at 733-42; 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 420, at 186-206; 4 J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)(B)[01], at 801-149 to -160.

194. See cases collected *infra* note 209.

195. See C. MCCORMICK, *supra* note 8, § 49, at 118-19; 4 J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)B4(B)[01], at 801-49 to -60; 4 J. WIGMORE, *supra* note 8, §§ 1124-33, at 254-96. See also *State v. Thompson*, 379 N.W.2d 295, 297 (S.D. 1985) (A child's statements could not be admitted as prior consistent statements when the child had not testified at the time the statements were offered. Receipt was improper because at that point there had been no impeachment.).

196. See generally 4 J. WIGMORE, *supra* note 8, §§ 1125-31, at 258-93.

197. *Id.* § 1125, at 258.

198. C. MCCORMICK, *supra* note 8, § 49, at 118.

199. *Id.* (footnotes omitted).

200. 4 J. WIGMORE, *supra* note 8, § 1126, at 258-67. See C. MCCORMICK, *supra* note 8, § 49, at 119.

There is much division of opinion on the question whether impeachment by inconsistent statements opens the door to support by proving consistent statements.

A few courts hold generally that the support is permissible. This rule has the merit of easy application in the court room. Some courts, since the inconsistency remains despite all consistent statements, hold generally that it does not.

Id. (footnotes omitted). See also 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 420, at 189.

McCormick writes that “[a] few courts hold generally that the support is permissible. Some courts, since the inconsistency remains despite all consistent statements, hold generally that it does not.”²⁰¹

Bias or Interest. There is authority that impeachment for bias or interest is properly met with a consistent statement uttered prior to the occurrence of the facts causing bias or interest.²⁰²

Recent Fabrication Due to Undue Influence or Motive to Lie. A charge of recent fabrication caused by undue influence or motive to lie opens the door to prior statements that are consistent with trial testimony.²⁰³ Most courts hold that a consistent statement is admissible only if it was uttered prior to the event giving rise to the motive to fabricate.²⁰⁴ The rationale for this requirement is as

201. C. MCCORMICK, *supra* note 8, § 49, at 119.

202. C. MCCORMICK, *supra* note 8, § 49, at 118; 4 J. WIGMORE, *supra* note 8, § 1128, at 268; *State v. Dolphin*, 178 Conn. 564, 424 A.2d 266 (1979).

203. See 4 J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)(B)[01], at 801-149 to -150, where the authors state that “all American jurisdictions concur in allowing consistent statements to be used for rehabilitation” . . . “to rebut charges of recent fabrication or improper influence or motive.” (order of sentences altered) (footnote omitted). See also 4 J. WIGMORE, *supra* note 8, § 1129, at 270-72, where the author writes:

The charge of recent contrivance is usually made, not so much by affirmative evidence, as by negative evidence that the witness did not speak of the matter before, at a time when it would have been natural to speak; his silence then is urged as inconsistent with his utterances now, i.e., as a self-contradiction. . . . The effect of the evidence of consistent statements is that the supposed fact of not speaking formerly, from which we are to infer a recent contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story:

. . . .

In judicial rulings, this use of former similar statements is universally conceded to be proper. . . .

Id. See, e.g., *State v. Brotherton*, 384 N.W.2d 375, 380-81 (Iowa 1986).

204. See, e.g., *State v. Swain*, 493 A.2d 1056, 1058 (Me. 1985) (Twelve-year-old sex abuse victim).

The proponent of a prior consistent statement must demonstrate not only that it is being offered to rebut such a charge, but also that the statement is consistent with the in-court testimony of the witness and that it was made prior to the time the supposed motive to falsify arose.

Id.; *State v. Roy*, 140 Vt. 219, 226-27, 436 A.2d 1090, 1093 (1981) (Seven-year-old physically handicapped sexual assault victim was impeached by the suggestion that “the child had been manipulated by the state’s attorney for purposes of obtaining a certain type of testimony at trial.” The court approved use of prior consistent statements as substantive evidence to rebut the charge of coaching.). See 4 D. LOUISELL & C. MUELLER, *supra* note 8, § 420, at 193-94, where the authors state:

Also by traditional learning, an impeaching effort which does suggest fabrication, influence, or motive makes prior consistent statements relevant only if they were uttered before such corrupting forces came into play. Theoretically this idea is sound, and most modern authority applying Rule 801(d)(1)(B) agrees. But some decisions have abandoned this limitation, no doubt because of the practical difficulty of determining when a motive or influence first appears, and because the jury should be permitted to decide for itself whether the prior consistency is

follows: The witness tells one story on the stand. The cross-examiner states or implies that the testimony is a recent fabrication. To rehabilitate the witness's trial testimony and rebut the charge of recent fabrication, the proponent of the witness offers evidence that at a time when there was no motive to fabricate, the witness made a statement consistent with the witness's current testimony. Since the witness told the same story before there was a reason to fabricate, the trial testimony probably is accurate, and not fabricated.

The Wisconsin Supreme Court's decision in *Thomas v. State*²⁰⁵ illustrates the scenario in which a consistent statement is made prior to an alleged reason to fabricate. The case involved the alleged sexual abuse of an intellectually handicapped eight-year-old girl.²⁰⁶ Not long after the alleged abuse, the child gave a statement to the sheriff. On direct examination at trial, the child testified that defendant engaged in sexual intercourse with her. Her direct testimony was consistent with her statement to the sheriff. On cross-examination, however, the child stated that "her testimony on direct examination was based on what the prosecutor told her to say and not what she actually remembered."²⁰⁷ Following the child's testimony, the trial court permitted the state to admit evidence of the child's prior statement to the sheriff. The supreme court held that the prior consistent statement was admissible to rebut an express or implied charge of recent fabrication or improper influence. The court stated:

At the trial the defendant attempted to impeach Sandra's testimony by establishing that Sandra was improperly influenced because she was told what to say by her mother, aunt and the

tainted by the same motive or influence which the attacking party claims is at work during trial.

Id. See 4 J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)(B)[01], at 801-154 to -156, where the authors write:

There exists a controversy among the circuits which focuses on whether, to be admissible under Rule 801(d)(1)(B) a prior consistent statement must be made prior to the existence of a motive to fabricate. While decisions from some circuits have read such a requirement into Rule 801(d)(1)(B), decisions from other circuits have admitted prior consistent statements without the limitation that they must have been made before the existence of a motive to fabricate.

Id.

205. 92 Wis. 2d 372, 284 N.W.2d 917 (1979). See also *State v. Roy*, 140 Vt. 219, 436 A.2d 1090 (1981).

206. The child was eight but had the mental capacity of a six-year-old. *Thomas*, 92 Wis. 2d at 375, 284 N.W.2d at 920.

207. *Id.*

prosecutor. If Sandra's statement was consistent with her direct examination testimony at trial and rebutted all or part of the defendant's claim that her testimony was the result of undue influence it would be admissible. There can be no doubt that the statement rebuts the charge that Sandra's testimony was unduly influenced by the prosecutor because the statement was made prior to her having any contact with the prosecutor. Therefore, we conclude that the statement was properly admissible for the limited purpose of rebutting the defendant's charge of improper influence by the prosecutor.²⁰⁸

Impeachment by charge of recent fabrication due to undue influence or motive to lie is particularly important in child abuse litigation.²⁰⁹ The defendant often attempts to establish during cross-examination that the child was pressured or coached into fabricating allegations of abuse.²¹⁰ In cases involving adolescents, the defense

208. *Id.* at 377, 284 N.W.2d at 926.

209. *See, e.g., State v. Conroy*, 131 Ariz. 528, 642 P.2d 873 (Ct. App. 1982); *State v. Messamore*, 2 Haw. App. 643, 639 P.2d 413 (1982) (dicta); *State v. Swain*, 493 A.2d 1056 (Me. 1985) (error to admit prior consistent statements when reason to fabricate arose before the prior statement); *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985); *Cunningham v. State*, 100 Nev. 396, 683 P.2d 500 (1984), *cert. denied*, 469 U.S. 935 (1984) (Two reasons to fabricate, one arising before and one after the prior consistent statement. The court holds that it was proper to admit the prior consistent statement to rebut the reason to fabricate that arose subsequent to the prior statement.); *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977) (Defendant alleged that victim had been coached on how to testify. Held: Proper to admit prior consistent statements.); *State v. Jenkins*, 326 N.W.2d 67, 71 (N.D. 1982) (Nine-year-old victim. "The record reflects that Jenkins' cross-examination of the victim, the victim's mother, and Linda Heilman attempted to establish that the victim or her mother had made up a story concerning the charged crime." Held: Prior consistent statements properly admitted.); *Thomas v. State*, 92 Wis. 2d 372, 377, 284 N.W.2d 917, 926 (1979) (Sixteen-year-old victim who was eighteen at time of trial. Defendant's cross-examination sought to establish that the young woman was coached in her testimony by her mother. Held: Proper to admit prior consistent statements.); *State v. Roy*, 140 Vt. 219, 226-27, 436 A.2d 1090, 1093 (1981) (Useful discussion of substantive use of prior consistent statements.); *In re G.P.*, 679 P.2d 976 (Wyo. 1984) (Four-year-old witness. Held: Proper to admit prior consistent statements.).

210. *See State v. Conroy*, 131 Ariz. 528, 642 P.2d 873, 875 (Ct. App. 1982); *Begley v. State*, 483 So. 2d 70, 73 (Fla. Ct. App. 1986); *State v. Bell*, 90 N.M. 134, 138, 560 P.2d 925, 929 (1977) (Seventeen-year-old victim of sexual assault. "Defendant on cross-examination declared that the victim had been 'coached' in her oral testimony and implied that she was testifying from memory of the written statement. The [prior consistent] statement was properly admitted to rebut this implicit charge of improper influence." The statement was used as substantive evidence under the New Mexico equivalent of Federal Rule 801(d)(1)(B).); *State v. Jenkins*, 326 N.W.2d 67, 71 (N.D. 1982) (Nine-year-old victim in sex abuse case).

The record reflects that Jenkins' cross-examination of the victim, the victim's mother, and Linda Heilman attempted to establish that the victim or her mother had made up a story concerning the charged crime.

We believe the statements made by the victim, and testified to by the victim's mother, were not hearsay because, pursuant to Rule 801(d)(1), NDRE, the declarant

may argue that the child was angry at the defendant for imposing discipline, or for some other reason, and that the charge of abuse is an attempt to get even, in short, a vindictive lie. In cases where there is either an express or an implied charge of recent fabrication, courts rather uniformly admit prior consistent statements to rehabilitate.²¹¹

Accuracy of Memory. An effort to impeach a child may proceed by attacking the child's memory. In such a case the proponent of the child's testimony should be permitted to rehabilitate the child by introducing a consistent statement made shortly following the event in question, at a time when the child's memory was fresh.²¹²

(the victim) testified at trial and was subject to cross-examination concerning the statements, and the statements were consistent with her testimony and were offered to rebut an express or implied charge against her of recent fabrication.

Id.; State v. Roy, 140 Vt. 219, 226-27, 436 A.2d 1090, 1093 (1981) (Seven-year-old handicapped child. Defense argued that child was coached by prosecutor. Held: Proper to use prior consistent statements as substantive evidence.); *In re G.P.*, 679 P.2d 976, 1001-02 (Wyo. 1984) (Four-year-old victim. Termination of parental rights case. Court approves use of prior consistent statements as substantive evidence to rebut charge of recent fabrication. On direct examination the child stated that his father beat him. On cross-examination he stated that employees of the state children's home told him how to testify. The child's prior consistent statement to an employee of the home was admitted under the Wyoming version of Rule 801(d)(1)(B)).

211. See authorities collected *supra* note 210. Prior consistent statements may be used whether the charge of recent fabrication is express or implied. See 4 D. LOUISSELL & C. MUELLER, *supra* note 8, § 420, at 190 ("Under Rule 801(d)(1)(B), it makes no difference whether the charge of fabrication, motive, or bias is 'express' or 'implied.'" While Professors D. Louisell and C. Mueller make the foregoing statement in the context of Rule 801(d)(1)(B), their statement should apply in cases where the prior statement is not admitted under that rule). See also Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575, 586, 607 (1979).

212. See C. McCORMICK, *supra* note 8, § 49, at 119 n.18, where the author states:

If the witness's accuracy of memory is challenged, it seems clear common sense that a consistent statement made shortly after the event and before he had time to forget, should be received in support. "... The accuracy of memory is supported by proof that at or near the time when the facts supposed to have transpired, and were fresh in the mind of the witness, he gave the same version of them that he testified to on the trial." Smith, C.J. in *Jones v. Jones*, 80 N.C. 246, 250 (1879).

Id. Judge J. Weinstein and Professor Berger argue in their treatise that when a witness's memory is impeached, it may be improper to admit a prior consistent statement as *substantive* evidence under Rule 801(d)(1)(B). See J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)(B)[01], at 801-153 to -154, where the authors write:

The Advisory Committee's notes are silent as to whether the substantive effect of the rule extends to situations where the prior consistent statement is admitted not to rebut an inconsistent statement but to refute an imputation of inaccurate memory on the part of the witness by showing that he made the same statement when the event was recent. Normal usage would argue that the words "fabrication," "influence" and "motive" are only intended to cover situations where the witness deliberately changes his story. Rule 801(d)(1)(B) should apply only when there is some suggestion—even if it is slight—that the witness consciously altered

Trial Court Discretion. The decision whether to admit prior consistent statements to rehabilitate an impeached witness lies within the sound discretion of the trial court.²¹³ The difficulty lies in deciding when prior consistent statements are appropriate to meet the thrust of the impeachment. McCormick suggests that “[t]he general test for solution is whether evidence of . . . consistent statements is logically relevant to explain the impeaching fact. The rehabilitating facts must meet a particular method of impeachment with relative directness.”²¹⁴

III. CROSS-EXAMINATION

A. *Introduction*

Cross-examination of child witnesses is a delicate and difficult business. When testimony from a child constitutes the central evidence on a litigated issue, the skill and ingenuity of the examiner may determine the outcome of the case. Sections (III)(B) through (III)(W) discuss principles and techniques of cross-examination of children. The importance of cross-examination cannot be overemphasized, and as counsel prepares to take the child on cross, it is advisable to recall Dean Wigmore’s observation that cross-examination “is beyond any doubt the greatest legal engine ever invented for the discovery of truth.”²¹⁵

B. *Purposes and Goals of Cross-Examination*

The basic purposes of cross-examination are (1) to elicit testimony which is favorable to the cross-examiner’s theory of the case, and (2) to undermine the witness’s direct testimony by challenging the witness’s credibility or his or her testimony.²¹⁶ During the early

his testimony after making the inconsistent statement by which he has been impeached.

Id. (footnotes omitted).

213. See *State v. Johnson*, 220 Neb. 392, 400-01, 370 N.W.2d 136, 142 (1985).

214. C. McCORMICK, *supra* note 8, § 49, at 116.

215. 5 J. WIGMORE, *supra* note 8, § 1367, at 32. See also 4 J. WEINSTEIN, *supra* note 8, ¶ 800[01], at 800-11.

216. The cross-examiner may avoid the type of direct attack on the credibility of the child which may alienate or even anger the jury, while seeking to establish that the child’s testimony is incredible. For discussion of cross-examination, see generally, F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 24, at 16 (1978) (Basic objectives of cross-examination are “to discredit the witness or his testimony, and to adduce information

stages of cross-examination, when the child is most likely to be cooperative, the cross-examiner induces the child to divulge information which is consistent with counsel's version of the facts. In many cases the cross ends when these facts are in the record. In other cases, counsel conducts some form of impeaching cross-examination. The impeaching examination is usually held in abeyance, however, until counsel has capitalized on the positive approach.

The specific goals of cross-examination vary from child to child. There are, however, several basic objectives underpinning most cross-examination. Counsel may commit the child to a specific version of the facts so that the child can be impeached with prior inconsistent statements or contradicted by extrinsic evidence.²¹⁷ The examiner may spotlight inconsistencies in the child's testimony. Inconsistencies may indicate that the testimony is mistaken or deliberately falsified, or that the child is confused, uncertain, highly suggestible, or lacking in personal knowledge of the facts. The examiner may hope to show that the child was coached, or that the direct testimony was memorized. Finally, cross-examination may demonstrate that the child lacks the capacity to observe, remember, or communicate.

C. *Discovery*

Trial lawyers know that successful cross-examination depends on preparation. In most respects the preparation required for child and adult witnesses is similar. The key to preparation is discovery. In

from the witness which is favorable to the defense."); T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 6.3, at 240 (1980).

There are two basic approaches to cross examination: a. Elicit favorable testimony (the first purpose). This involves getting the witness to agree with those facts which support your case in chief and are consistent with your theory of the case.

b. Conduct a destructive cross (the second purpose). This involves asking the kinds of questions which will discredit the witness or his testimony so that the jury will minimize or even disregard them.

Id.; C. McCORMICK, *supra* note 8, § 30, at 66. The purposes of cross-examination are:

[F]irst, to elicit new facts, qualifying the direct, or in some states bearing on any issue in the case; second to test the story of the witness by exploring its details and implications, in the hope of disclosing inconsistencies or impossibilities; and third, to prove out of the mouth of the witness, impeaching facts known to the cross-examiner such as prior contradictory statements, bias and conviction of crime.

Id.

217. For discussion of impeachment with prior inconsistent statements, see *infra* subsection (IV)(D). For discussion of impeachment by contradiction, see *infra* subsection (IV)(N).

civil litigation, broad pretrial discovery is the rule. A child's deposition may be taken, and in personal injury litigation, rule 35 may be employed to secure a physical or psychiatric examination of a child whose physical or mental condition is in issue.²¹⁸ Material falling within a recognized privilege may be withheld.²¹⁹ If the discovery process is abused, the usual motions to compel discovery, protective orders, and sanctions are available.²²⁰

In criminal litigation, discovery is more limited than in the civil arena.²²¹ Yet, the need for discovery is equally compelling. In child abuse litigation, for example, information from several sources should be pursued. In the usual case, the alleged victim is subjected to a string of interviews with police officers, child protective service workers, mental health professionals, and prosecutors. Most of the interviewers take careful notes, and some interviews may be recorded. Access to interviewers' notes and audio or audio-visual tapes could disclose prior inconsistent statements, possible coaching, defects in capacity, or other valuable information. If a child is in foster care, counsel may attempt to subpoena the social service records. When a child is receiving psychotherapy, the therapist's notes may prove valuable. If a child is involved with the juvenile court, counsel may seek access to the child's juvenile court file. In most jurisdictions juvenile court and social service records are confidential. The psychotherapist's records may be protected by a psychotherapist-patient privilege. The prosecutor can be expected to resist disclosure of confidential or privileged information. In some cases, however, the defendant's need to prepare a defense overcomes the state's interest in protecting such material.

If the defense requests discovery of privileged or otherwise confidential material, the state may seek a protective order.²²² The

218. FED. R. CIV. P. 35 reads in part as follows:

When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. . . .

Id.

219. See FED. R. CIV. P. 26(b)(1), which limits the scope of discovery to "any matter, not privileged, which is relevant to the subject matter involved in the pending action" See also 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2016-2020 (1970).

220. FED. R. CIV. P. 26(c).

221. See generally W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE §§ 19.1-19.5 (1984). The trial judge exercises considerable discretion over the scope of discovery. See *State v. Lairby*, 699 P.2d 1187, 1194 (Utah 1984).

222. See *State v. Pettit*, 66 Or. App. 575, 675 P.2d 183 (1984). *Pettit* involved a

Colorado Supreme Court's decision in *People v. District Court*²²³ provides a good illustration of the issues raised by a discovery request which pits the defendant's right to prepare a defense against the public policy of protecting confidential communications. In *People v. District Court* the defendant was charged with first degree sexual assault. The adult victim suffered emotional trauma as a result of the assault, and she sought psychotherapy. In an effort to discover the contents of the victim's treatment records, the defendant served the therapist with a subpoena duces tecum. The state resisted discovery, arguing that the records fell within the statutory psychologist-patient privilege. The trial judge held that although the statutory privilege applied, the defendant's constitutional right of confrontation required limited disclosure of the records.

On appeal, the defendant raised two arguments: First, that the psychologist-patient privilege would be waived if the victim testified at trial, and that the defendant was, therefore, entitled to pretrial access to the records, and second, that the right to confront and cross-examine accusatory witnesses mandated access to the records.²²⁴ The court rejected both arguments. As to the first argument, the court held that the victim's *postassault* mental condition was not in issue, and that her testimony at trial would not necessarily constitute a waiver of the privilege as it pertained to *postassault* treatment.²²⁵

The court also rejected the defendant's contention that his right to confront and cross-examine accusatory witnesses prevailed over the statutory psychologist-patient privilege. The court acknowledged that cross-examination is the essence of effective confrontation.²²⁶ The court observed, however, that the right of cross-examination is not absolute, and that the examination may be curtailed in appro-

prosecution for intrafamilial sexual abuse. The defendant sought discovery of the new address of his daughter and her mother. The trial court granted the protective order on the condition that the defendant be permitted to interview the victim and the mother two days before trial. The appellate court held that the state failed to make a sufficient showing of good cause to justify the protective order. The court held, however, that the error was harmless. *Id.*

223. 719 P.2d 722 (Colo. 1986) (en banc). As this article went to press, the United States Supreme Court handed down its decision in *Pennsylvania v. Ritchie*, 47 S. Ct. Bull. (CCH) B1020 (Feb. 24, 1987). A plurality of the Court held that the sixth amendment confrontation clause is a *trial* right only, and does *not* create a right to pretrial discovery.

224. The defendant raised, and the court discussed, other issues not here relevant.

225. See *People v. District Court*, 719 P.2d at 726, where the court writes that "[a]t this point, the victim has not acted in any manner which would permit the conclusion that she has waived her privilege with respect to her psychotherapy records." In footnote 2 the court continues: "Further, we note the prematurity of this issue. At this time, we do not know whether the victim will testify, nor to what she would testify at the time of trial. . . ." *Id.* at 726 n.2.

226. *Id.* at 726.

priate circumstances.²²⁷ The right to cross-examine sometimes yields to competing policy interests and the necessities of justice.²²⁸ In the case of victims of sexual assault, the policy justification for protecting treatment records is strong. The court wrote:

[T]he purpose of the statutory psychologist-patient privilege is to aid in the effective diagnosis and treatment of mental illness by encouraging the patient to fully disclose information to the psychologist without fear of embarrassment or humiliation caused by disclosure of such confidential information. [I]t is of paramount importance to assure a victim of a sexual assault that all records of any treatment will remain confidential unless otherwise directed by the victim. The knowledge that the alleged assailant would be entitled to discover these otherwise privileged documents could hamper a victim's treatment progress because of her unwillingness to be completely frank and open with the psychotherapist.

. . . The defendant's constitutional right to confront is not so pervasive as to place sexual assault victims in the untenable position of requiring them to choose whether to testify against an assailant or retain the statutory right of confidentiality in post-assault psychotherapy records.²²⁹

The court buttressed its rejection of the confrontation argument by pointing out that the defendant had "failed to make any particularized factual showing in support of his assertion that access to the privileged communications of the victim is necessary for the effective exercise of his right of confrontation."²³⁰ The court felt strongly that the mere fact that the records "might possibly" contain evidence useful to the defense was not sufficient justification to merit discovery.²³¹

Several conclusions can be drawn from *People v. District Court*. Most importantly, a defendant's right to discover privileged documents can be balanced against the policy justifications supporting

227. *Id.*

228. *See* *Ohio v. Roberts*, 448 U.S. 56, 64 (1980).

229. *People v. District Court*, 719 P.2d at 726-27.

230. *Id.* at 727.

231. *Id.* at 726. The court wrote:

At the hearing below, the defendant argued that because the victim might have told her therapist a different version of the events relating to the sexual assault than had been disclosed to police officials, access to the therapy records was necessary for full cross-examination of the victim. The vague assertion that the victim may have made statements to her therapist that might possibly differ from the victim's anticipated trial testimony does not provide a sufficient basis to justify ignoring the victim's right to rely upon her statutory privilege.

Id.

the privilege. Additionally, trial courts can refuse to allow defendants to engage in nonspecific fishing expeditions into the sensitive treatment records of physicians and psychologists.

On the other side of the coin, however, the circumstances of some cases will tip the scales toward discovery. For example, if the therapist who treated a child victim will testify at trial for the state, discovery may be appropriate. This is especially so when the therapist will testify as an expert concerning the sexually abused child syndrome, and will describe the relationship of the victim's *postassault* symptoms to the alleged crime. Furthermore, if a defendant articulates a particularized showing of need for specific documents, the court may exercise its discretion to allow discovery. In these cases the court may examine the documents *in camera* before disclosing them to the defendant. The court could then release only those documents which would be helpful to the defense. Additionally, the court could impose a protective order on the information released to counsel to ensure that the information is not misused, and that it does not fall into inappropriate hands such as those of the press.

D. Discovery of Education Records

In some cases counsel seeks discovery of a child's education records. Education records may contain information indicating that a child is a disciplinary problem at school, or that the child is dishonest. Education records may indicate that a child had emotional problems which existed prior to the alleged wrongdoing. Records may reflect intrafamilial conflict which caused behavior problems at school. Indications of such conflict, as in divorce for example, may lead to evidence that one parent has convinced a child to falsify charges of abuse against the other parent. Finally, education records may indicate that a child requires special educational programming for conditions such as mild mental retardation or psychological problems.

Needless to say, education records often contain sensitive and confidential information. School officials do not permit access to such records unless the person seeking access has the necessary legal authority. Two federal statutes govern access to education records. These statutes and their implementing regulations are in force in every state. Many states and local school districts supplement the federal laws with rules of their own.

1. *The Buckley Amendment*

The Federal Family Education Rights and Privacy Act (usually called the Buckley Amendment) establishes a complex system for the protection and limited disclosure of education records.²³² Counsel may be successful in subpoenaing a child's education records because the regulations implementing the Buckley Amendment specifically provide that:

An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is . . . [t]o comply with a judicial order or lawfully issued subpoena; Provided, That the educational agency or institution makes a reasonable effort to notify the parent of the student . . . of the order or subpoena in advance of compliance therewith.²³³

When counsel subpoenas education records, the foregoing regulation requires educators to notify "the parent" before releasing the records.²³⁴ In many child abuse and divorce cases, the parent who is notified is the custodial parent, and the custodial parent may resist disclosure. In criminal litigation the custodial parent may enlist the assistance of the prosecutor, who may seek to quash the subpoena.

Rather than subpoena a child's education records, counsel may request the client-parent to visit the school and inspect the records. Under the Buckley Amendment, parents have authority to inspect their child's education records unless a state law or court order denies them that right.²³⁵ Alternatively, the lawyer might visit the

232. 20 U.S.C. § 1232g (1980). 34 C.F.R. § 99.1-99.67 (1985).

233. 34 C.F.R. § 99.31(a)(9) (1985).

234. The regulations define "parent" as follows:

"Parent" includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. An educational agency or institution may presume the parent has the authority to exercise the rights inherent in the Act unless the agency or institution has been provided with evidence that there is a State law or court order governing such matters as divorce, separation or custody, or a legally binding instrument which provides to the contrary.

34 C.F.R. § 99.3 (1986).

235. See 34 C.F.R. § 99.11(a) (1986), which reads in part as follows:

(a) Each educational agency or institution . . . shall permit the parent of a student . . . to inspect and review the educational records of the student. The agency or institution shall comply with a request within a reasonable period of

school with or without the client. If the attorney inspects the records personally, the parent must give written consent to the inspection.

Counsel should be aware that some records relating to students may not constitute a part of the education record.²³⁶ School officials sometimes argue that since such information does not fall within the definition of an "education record," the information need not be disclosed in response to a subpoena or a request for inspection. These "non-record" records include "[r]ecords of a law enforcement unit of an educational agency or institution which are . . . [m]aintained solely for law enforcement purposes,"²³⁷ and certain treatment records created or maintained by physicians, mental health professionals, or paraprofessionals, and used in connection with treatment provided for a child.²³⁸

2. *The Education for All Handicapped Children Act*

Millions of handicapped children receive special education programming. The provisions of the Federal Education for All Handicapped Children Act²³⁹ apply to schools providing special

time, but in no case more than 45 days after the request has been made.
Id. For the definition of "parent" see *id.* § 99.3 (1986). The definition of "parent" is reproduced at *supra* note 234.

236. 34 C.F.R. § 99.3 (1986) (definition of "education records").

237. 34 C.F.R. § 99.3 (1986) (defining "education records").

(b) The term [education records] does not include:

.....
(2) Records of a law enforcement unit of an educational agency or institution which are:

(i) Maintained apart from the records described in paragraph (a) of this definition; [Paragraph (a) defines educational records generally.]

(ii) Maintained solely for law enforcement purposes, and

(iii) Not disclosed to individuals other than law enforcement officials of the same jurisdiction; *Provided*, That educational records maintained by the educational agency or institution are not disclosed to the personnel of the law enforcement unit.

Id. (emphasis in original).

238. 34 C.F.R. § 99.3 (1986) (defining "education records").

(b) The term [education records] does not include:

.....
(4) Records relating to an eligible student which are:

(i) Created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity;

(ii) Created, maintained, or used only in connection with the provision of treatment to the student, and

(iii) Not disclosed to anyone other than individuals providing the treatment. . . .

Id.

239. See 20 U.S.C. §§ 1400-1461 (1975). For the regulations implementing the Act see 34 C.F.R. §§ 300.1-300.754 (1986).

programming for such children. The Act provides parents with a right to inspect their child's education records.²⁴⁰ The education record provisions of the Education for All Handicapped Children Act are coordinated with the provisions of the Buckley Amendment, and the two statutes work together to regulate access to school records on handicapped children.

E. The Truthfulness of Child Witnesses

Do children testify truthfully? The question should not be answered with a simple yes or no. The issue is too complex for such a glib response. On the one hand, parents know that children stretch the truth, or, if we eschew euphemism, lie. Many normal, well adjusted three and four-year-olds deny guilt when they are caught red handed in the cookie jar, and if siblings are fighting, it is a safe bet that each will say, "but she started it." At the same time, children are often shockingly blunt about the truth. The average five-year-old has not learned the "need" to avoid offense in social situations. Thus, the youngster walks up to the boss who has come to dinner and says, "You should not smoke. It's yucky and you'll die." The offender's fifteen-year-old brother may be as mortified as the parents, but the preschooler is unaware of the faux pas.

In the legal setting, where witnesses describe factual occurrences, children age five and below generally tell the truth as they understand it. This is not to say that children of this age cannot lie. Children of tender years sometimes lie to please or protect important adults, or to stay out of trouble. At this young age, however, most children do not understand the need to rework facts in order to affect the outcome of litigation. Thus, a five-year-old may deny guilt for a broken window because the child understands the direct link between the act and the punishment which follows. The same child is not likely to understand the complex relationship between court testimony and the guilt or innocence of a defendant.

Even in the litigation context, however, some young children are able to comprehend the need to alter the facts, or at least to deny that anything happened. For example, suppose a five-year-old's big brother is before the juvenile court on a charge of arson. Little brother may understand that if he tells what he saw, something bad will happen to his sibling. The five-year-old is unlikely to be

240. 34 C.F.R. § 300.562(a) (1986).

proficient or convincing in his lie, but he may comprehend the need for it.

In sum, preschool age witnesses usually tell the truth as they understand it. It would be inaccurate to suggest, however, that such children never stray from the truth. While the developmental immaturity of such children substantially increases the probability that they testify truthfully, an occasional child does not. Additionally, a preschool child's understanding of the truth may be distorted through coaching or other forms of suggestion.²⁴¹ Thus, children sometimes believe that what they are saying is the truth, when in fact the truth has been obscured.

When children reach age eight or nine, they can reason logically, and by eleven or twelve, most children begin to reason abstractly.²⁴² Due to their increased cognitive sophistication, many children above age eight can understand the reasons for and against bending the truth in court. In this regard, the differences between children and adults are diminished, and by the time children reach adolescence, many of them are as cognitively mature as the average adult witness.

In the context of sexual abuse litigation, a growing body of psychological and legal literature suggests that young children seldom deliberately lie. The authorities point out that young children, especially preschoolers, lack the experience needed to fabricate detailed accounts of sexual abuse.²⁴³ Therefore, when children describe the details of sexual contact, they probably do so on the basis of personal experience. One commentator describes a dominant theme of contemporary thinking when she writes:

[C]hildren do not make up stories asserting they have been sexually molested. It is not in their interests to do so. Young children do

241. See *S.P.N. v. M.W.N.*, 708 S.W.2d 767 (Mo. Ct. App. 1986) (Child custody case. Mother fabricated allegations of sexual abuse by the father in her attempt to win custody.).

242. For discussion of child development see generally, D. SHAFFER, *DEVELOPMENTAL PSYCHOLOGY* (1985).

243. See *United States v. Cree*, 778 F.2d 474, 477-78 (8th Cir. 1985) (Physical abuse case. "It is highly unlikely that a four-year-old child would fabricate such accusations of abuse."); *Lancaster v. People*, 200 Colo. 448, 453, 615 P.2d 720, 723 (1980) ("children of tender years are generally not adept at reasoned reflection and at concoction of false stories under such circumstances."); *In re Meeboer*, 134 Mich. App. 294, 350 N.W.2d 868 (1984); *State v. Taylor*, 103 N.M. 178, 704 P.2d 433 (Ct. App. 1984); *State v. McCafferty*, 356 N.W.2d 159, 164 (S.D. 1984) ("A young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of his or her experience."). *Contra Commonwealth v. Haber*, 351 Pa. Super. 79, 505 A.2d 273, 276 (1976) ("We do not believe that the out-of-court assertions of children, particularly four and five-year-old children, are substantially more trustworthy than the out-of-court assertions of adults.").

not have the sexual knowledge necessary to fabricate an allegation. Clinicians and researchers in the field of sexual abuse are in agreement that false allegations by children are extremely rare.²⁴⁴

As stated above, preschool children usually tell what they believe to be the truth. In some cases, however, a child who believes she or he is testifying truthfully is actually telling a story which has been implanted through the suggestion of adults.²⁴⁵ In such cases the child is not lying, but neither is the child telling the truth. How does this distortion of the truth occur? In several ways. Some individuals working with sexually abused children are of the view that "where there's smoke there's fire." If sexual abuse is suspected, the professional presumes that it has occurred, and sets out to uncover evidence to support his or her suspicion. Statements by the child which are ambiguous or somewhat suggestive of abuse are construed as proof of maltreatment. Leading and suggestive questions are asked in order to "help" the child reveal the awful secret. These questions are considered permissible because "kids don't make these things up," and because the easiest and most direct route to the "truth" is to help the child tell the story. The child is rewarded with sympathy or a smile when the "right" answer is given. Thus, the zealous police officer, social worker, mental health professional, or lawyer—all the while seeing him or herself as a child advocate—may unintentionally distort the truth through subtly suggestive questions which are asked with a view to a predetermined outcome.²⁴⁶

In other cases, the child has been programmed with a distorted view of the facts *before* law enforcement or mental health professionals become involved. It is unfortunately true that in child custody litigation, some parents fabricate allegations of sexual abuse in an effort to secure custody.²⁴⁷ If the professionals interacting with the children approach them with a presumption that abuse

244. Faller, *Is the Child Victim of Sexual Abuse Telling the Truth?*, 8 CHILD ABUSE & NEGLECT 473, 475 (1984).

245. See, e.g., *S.P.N. v. M.W.N.*, 708 S.W.2d 767 (Mo. Ct. App. 1986) (Child custody battle incident to divorce. Mother fabricated allegations of sexual abuse against the father in an effort to win custody.).

246. Some mental health professionals believe that children of very tender years cannot be coached. See *In re Cheryl H.*, 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (1984) (Psychiatrist testified that three-year-old victim of sexual abuse could not have been coached.).

247. See, e.g., *S.P.N. v. M.W.N.*, 708 S.W.2d 767 (Mo. Ct. App. 1986) (Child custody battle incident to divorce. Mother fabricated allegations of sexual abuse in an effort to win custody.).

probably occurred, they are likely to interpret ambiguous or even innocent behavior as indicative of abuse. When the child is questioned, there is a substantial danger that the interview will be structured to reinforce answers which establish abuse.²⁴⁸

While it is true that young children usually tell the truth about abuse, professionals must approach each case from a position of strict neutrality. If anything, there should be a presumption that nothing deviant or criminal has occurred. Such a presumption of innocence is particularly important when (1) there is no physical evidence of abuse, (2) circumstantial evidence of abuse is ambiguous or conflicting, (3) the child's statements are unclear, or the child recants, (4) the form of abuse could be confused with innocent behavior, (5) the adult reporting the abuse has an axe to grind against the accused, or (6) the child has a grudge against the accused.

F. *The Right to Cross-Examine*

In criminal litigation, cross-examination is a right of constitutional stature.²⁴⁹ The right to cross-examine is an integral part of the sixth amendment right to confront accusatory witnesses.²⁵⁰ In *Chambers v. Mississippi*²⁵¹ the Supreme Court described the rights to confront and cross-examine in the following words:

The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." . . . It is, indeed, "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." . . . Of course, the right to confront

248. See Coleman, *Has a Child Been Molested?*, 6 CAL. LAW. 15, 15-16 (July, 1986).

249. See *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.") (emphasis in original); *Pointer v. Texas*, 380 U.S. 400, 405 (1965); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984) ("cross-examination is itself considered to be a fundamental right possessed by criminal defendants."); *Phillips v. Neil*, 452 F.2d 337, 343 (6th Cir. 1971) (cross-examination is essential to the "fair adjudication of criminal matters"), cert. denied, 409 U.S. 884 (1972). See also C. McCORMICK, *supra* note 8, § 19, at 47, where the author writes: "For two centuries, common law judges and lawyers have regarded the opportunity for cross-examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that the opportunity is a right and not a mere privilege." *Id.*

250. For discussion of the right to confront accusatory witnesses, see Myers, *Hearsay Statements by Children*, 38 BAYLOR L. REV. 702 (1986).

251. 410 U.S. 284 (1973).

and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interests be closely examined.²⁵²

The right to cross-examination exists in civil litigation,²⁵³ including proceedings in juvenile court.²⁵⁴ In the civil sphere, however, the right is premised on the due process clause rather than the sixth amendment.²⁵⁵

G. *Limitations on Cross-Examination*

The right to cross-examine opposing witnesses in civil and criminal litigation is not unlimited,²⁵⁶ and trial judges have discretion to control the scope of such examination.²⁵⁷ This discretion is broader in the civil context than in the criminal, because in civil litigation the sixth amendment's confrontation clause is not at work. The

252. *Id.* at 294-95.

253. *See, e.g.,* *People v. District Court*, 719 P.2d 722, 727 (Colo. 1986) (en banc) ("Parties to civil litigation also have a limited constitutional right to thoroughly cross-examine adverse witnesses.").

254. *See In re Gault*, 387 U.S. 1, 57 (1967) ("absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.").

255. *See In re James A.*, 505 A.2d 1386, 1390 (R.I. 1986) (Family court case. The court states that there is "no constitutional right to confrontation or cross-examination . . . in noncriminal proceedings." The right to cross-examine opposing witnesses in civil litigation is premised on principles of due process.).

256. *See Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 291, 294-95 (1973); *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc).

257. *See Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc); *State v. White*, 456 A.2d 13 (Me. 1983); *State v. Kingsbury*, 399 A.2d 873 (Me. 1979) (Trial court may refuse to permit defendant to recall victim to the stand after she has been dismissed.); *Garcia v. State*, 629 S.W.2d 196, 198-99 (Tex. Ct. App. 1982) (Defendant was convicted of rape of a 13-year-old victim. The child testified for the state. She was cross-examined at length during the state's case-in-chief. After the state rested, defendant sought to recall the victim for further cross-examination. The trial judge held a chambers conference with counsel during which defendant's lawyer was invited to demonstrate the need for further cross-examination. No showing was made. The trial court permitted defendant to recall the victim, but did not allow leading questions or impeachment. Defendant argued on appeal that this limitation on cross-examination was error. The court of appeal affirmed, holding that the trial court did not abuse its discretion in limiting the cross-examination.). *See also* FED. R. EVID. 611(a), which states: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." *Id.* *See also* 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 334, at 406-17.

court may limit or refuse to permit cross-examination in the following areas:

Embarrassing questions. The court may limit questions which are unduly embarrassing for the child.²⁵⁸ In the context of sexual abuse litigation, the nature of the case often makes it necessary for the cross-examiner to delve into embarrassing matters, and trial courts respect counsel's need to ask such questions. Improper limitations on questions about embarrassing topics could violate the confrontation clause.

Irrelevant or collateral matters. The court may disallow cross-examination on irrelevant, marginally relevant, and collateral matters.²⁵⁹

Undue consumption of time. The court may limit examination which constitutes an undue consumption of time,²⁶⁰ or which is unduly repetitive.²⁶¹

Assuming facts not in evidence. Questions which assume facts not in evidence may be excluded.²⁶²

Confusing, misleading, ambiguous, unintelligible, or compound questions. The court may instruct counsel to refrain from questions which are unintelligible or which confuse the witness. This authority is particularly important with children, many of whom are easily confused. When it is apparent that a child is confused, the court may require the attorney to phrase questions in a manner that is understandable to the child.²⁶³

Harassment or annoyance. The court may curtail questions designed to harass or annoy the witness.²⁶⁴

258. See FED. R. EVID. 611(a); *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc); *State v. John C.*, 503 A.2d 1296 (Me. 1986) (Proper to exclude embarrassing questions under Rules 403 and 611.).

259. See *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc).

260. FED. R. EVID. 611(a)(2).

261. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

262. See *United States v. Turcotte*, 515 F.2d 145, 151 (2d Cir. 1975); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 334, at 415.

263. See *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 335, at 416. See also CAL. EVID. CODE 765(b), which reads:

With a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age 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 of the witness.

Id.

264. *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986); *Davis v. Alaska* 415 U.S. 308, 316 (1974); *People v. District Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc); FED. R. EVID. 611(a)(3).

Undue prejudice. Questions which would be unnecessarily prejudicial to the interests of a witness may be excluded.²⁶⁵

Questions designed to elicit inadmissible evidence. The court has discretion to forbid questions which are designed to or which are likely to elicit inadmissible evidence.²⁶⁶

Rape shield laws. Questions which are improper because they violate a rape shield law may be forbidden.

In criminal litigation, the right to confront and cross-examine witnesses is carefully balanced against the reasons for limiting cross-examination.²⁶⁷ Counsel must be permitted to pursue cross-examination on relevant matters, including impeachment.²⁶⁸ The overriding importance of cross-examination often requires trial courts to permit questioning at the boundary of propriety.

H. Should You Cross-Examine?

Cross-examination is always risky, and when child witnesses are involved, the risks are multiplied. One wrong question, or one question too many, can bring down the examiner's case. Jurors usually like child witnesses, and as adults the jurors feel protective of the youngster. If the jury thinks that the cross-examiner is taking advantage of the child or being mean, they may react very negatively. Even mild cross-examination designed to demonstrate weaknesses or inconsistencies in the child's direct examination may draw the ire of the jury. The dangers accompanying cross-examination raise the question of whether the need to cross-examine outweighs the risks. Naturally, if the child is the principal witness for the opposing side, or if the child's testimony is particularly damaging, cross-examination is usually necessary, but in some cases counsel may simply "smile gracefully after the direct examination and say, 'No questions.'"²⁶⁹

265. *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986).

266. *People v. Superior Court*, 719 P.2d 722, 726 (Colo. 1986) (en banc).

267. See *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984) ("a balance must be struck between permitting a trial court to exercise its sound discretion and affording a criminal defendant the opportunity to expose bias and prejudice").

268. See *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1436 (1986).

[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Id.; *Davis v. Alaska*, 415 U.S. 308 (1974); *Stevens v. Bordenkircher*, 746 F.2d 342, 346-47 (6th Cir. 1986).

269. F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 23, at 16

In deciding whether to cross-examine a child, counsel should ask several questions. Has the witness hurt my case? Is the witness important? Was the witness's testimony credible? Did the witness give less than expected on direct? Do I want to foreclose the other side's opportunity for redirect? What are my realistic expectations on cross-examination? What risks must I take? Does the jury like the child?²⁷⁰ Experience is the best guide on when to cross-examine a child, but in every case, these questions should be asked.

I. Build Rapport

One of the keys to successful cross-examination is the establishment of rapport with the child. In civil litigation it is often possible to meet the child during the discovery phase. If opposing counsel thwarts informal opportunities to meet the child, the attorney can use a deposition to fulfill the twin goals of discovery and building rapport.

In criminal litigation, especially child abuse cases, defense counsel frequently has no opportunity to meet informally with the child. If a preliminary hearing is conducted, counsel can use the hearing to conduct discovery and to establish rapport with the child. If there is no preliminary hearing, defense counsel may meet the child for the first time at trial. In such cases the cross-examiner has only a minute or so to establish rapport. Counsel's task is complicated if

(1978). Messrs. Bailey and Rothblatt provide useful guidance on when to forego cross-examination. They write:

The most difficult phrase for an inexperienced attorney to utter is, "No cross-examination." But you must learn to discipline yourself to say those words at the proper times.

Improper cross-examination can devastate your case. It is often said that nineteen out of twenty cross-examinations are either worthless or cause actual harm to counsel's case. The mere fact that your adversary has presented a witness does not compel you to cross-examine him. A cross-examination is a mistake if it simply facilitates a repetition of the story to reinforce with witness' testimony either consciously or unconsciously in the minds of the jurors. Avoid cross-examination if it will serve no other purpose than to allow the witness to clarify or elucidate his previous testimony.

If the witness has given testimony that does not harm your client, there is no reason to question him. Remember that one wrong answer can shatter your case, and you should never ask a question unless you know that the answer will help your case. If the witness is decent and apparently honest, it is far better to smile gracefully after the direct examination and say, "No questions." If the witness is a disreputable person, unworthy of questions, shrug your shoulders and indicate that you wouldn't dignify the witness with any questions.

Id.

270. See T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 6.2, at 238-40 (1980).

the prosecutor or the child's parent has told the child that the defense lawyer is not to be trusted. Yet, with many children, especially young ones, it is possible to gain a degree of trust and rapport in a very short time.

Each lawyer has a unique approach to establishing rapport, and there is no single "correct" technique. Probably the only prerequisites are that the attorney like children and feel comfortable with them, and that counsel treat each child with respect. Some attorneys begin their cross-examination with a smile and a string of innocuous questions designed to put the child at ease. Sometimes it is appropriate to empathize with the child by saying, "I know this is tough being here today. You have been through a lot today. I'll be asking you some questions and then, pretty soon, you will be all done and you can go home. How's that?" Letting the child know that cross-examination is just a series of questions reduces the child's anxiety.

When the attorney has established rapport with the child, the examiner proceeds with the first stage of cross-examination, during which favorable information is elicited.²⁷¹ During this phase it is helpful if the child believes that the cross-examiner thinks the child is truthful. In some cases the cross-examination ends at that point. Counsel does not engage in negative cross-examination, thereby avoiding the risk of offending the jury.

J. Ask a Series of Nonsubstantive Questions to Which the Child Will Agree, Then Switch to Substantive Issues

After a friendly rapport is established, counsel may ask a series of innocuous questions to which the child will agree. Counsel demonstrates approval and pleasure with the answers, thus reinforcing the likelihood of further agreement. Once the child is "in the groove" of agreeing to neutral questions, counsel moves subtly into questions which are designed to elicit favorable information. The attorney continues speaking in the same friendly, up-beat tone of voice, and the same nods of approval follow favorable answers. When this technique works, the child may agree to a version of the

271. See *id.* § 6.3, at 240, where Professor Mauet writes:

At the end of the direct examination, most witnesses will have testified in a plausible fashion and their credibility will be high. The witness' inherent distrust of the cross-examiner will be minimal. This is the time to extract favorable admissions and information from the witness, since the witness' credibility will enhance the impact of the admissions.

Id.

facts that is favorable to the cross-examiner or that is inconsistent with the direct testimony.

The following partial examination of a seven-year-old demonstrates the technique by which counsel induces a child into a pattern of agreement. After a favorable rapport is established, the cross-examination by defense counsel proceeds as follows:

Q: Beth, you are in the second grade now aren't you?

A: Yes.

Q: And you get good marks don't you?

A: Uh huh, real good ones sometimes.

Q: Good for you. Your music teacher is Mr. Jones isn't it?

A: Yes.

Q: You like music don't you?

A: Oh yes. I play a drum.

Q: And next year you will be in third grade won't you?

A: Uh huh.

Q: Now Beth, you have talked to quite a few people about coming here to tell your story today haven't you?

A: Yes.

Q: You talked to Officer Jones the policeman didn't you?

A: Yes.

Q: He's a nice man isn't he?

A: Yes.

Q: I'll bet Officer Jones told you some funny jokes didn't he?

A: Yeah. He's funny.

Q: And you talked to Mr. Smith the social worker didn't you?

A: Yes.

Q: And then you talked to Dr. Phillips a couple of times didn't you?

A: Yes. She let's me play in her office.

Q: And you talked to Ms. Rogers, the nice attorney sitting right over there didn't you?

A: Oh yes.

Q: A few days ago did you get to talk to Officer Jones again?

A: Yes.

Q: Officer Jones brought you here to the courtroom didn't he?

A: Yeah. He showed me all about it.

Q: And he told you all about coming here to tell your story didn't he?

A: Uh huh.

Q: And then you got to go way up in the elevator to see Ms. Rogers in her office didn't you?

A: Yes. My mommy and I went together.

Q: Right. And Ms. Rogers talked to you about coming to court didn't she?

A: Yeah. We talked all about it.

Q: You got to tell your story to Ms. Rogers that day didn't you, just like you told it to her before, and just like you told it to other people didn't you?

A: Uh huh.

Q: And Ms. Rogers listened very closely to what you said didn't she?

A: Yes.

Q: And sometimes she asked you questions about your story didn't she, like I'm doing now?

A: Yeah.

Q: And sometimes she helped you understand how to tell your story the best way didn't she?

A: Yes.

The foregoing examination obviously is designed to elicit information about coaching. By getting the child into the habit of agreeing with counsel on a series of questions, the likelihood is increased that the child will give the desired reply to questions that might otherwise be answered more carefully. On redirect, Ms. Rogers will undoubtedly ask Beth, "And what did I tell you to say in court, Beth?" "Oh, the truth Ms. Rogers." This rehabilitation reduces the sting of innuendo created by the cross-examination, but counsel has opened the door to the possibility of coaching.

The "agreement" technique can be employed to get a child to agree that another version of the facts is possible. For example, after establishing a positive rapport and asking a series of appropriate questions, counsel can begin asking questions such as this: "Maybe that's how you thought it happened, but it could have been a little different couldn't it?" Hopefully, the child's tendency to agree will combine with the possibility that things could in fact have been "a little different," and the child will agree again. It should be mentioned that this technique for encouraging children to agree to different facts may not be effective with three and four-year-olds. Many very young children have an absolutist view of the world, and they may stick stubbornly to one version of the facts.

K. Combine a Moderate Level of Anxiety with the "Agreement" Technique Described in (III)(J)

The preceding section describes a technique designed to assist in eliciting favorable information by increasing the likelihood that a

child will agree with the examiner. In some cases the effectiveness of this technique is enhanced by causing the child to believe that giving a "no" answer may lead to unpleasantness. In other words, counsel attaches a psychological cost factor to a "no" answer. By inducing a belief that disagreeing with the cross-examiner may cause an unwelcome result, the odds are increased that the child will agree.

The things that make children anxious change with age. For the three to five-year-old, the thought of getting into trouble causes anxiety. Children between the ages of six and ten or eleven are acutely aware of people's reactions to them as individuals, and these children work hard to avoid social embarrassment. For the adolescent, self-esteem is very important.

To induce the needed anxiety in a five-year-old, defense counsel first establishes a warm rapport with the child. Then the attorney proceeds, questioning as follows:

Q: Now Billy, you know you are not supposed to tell a lie don't you?

A: Yes.

Q: You get into trouble if you tell a lie, don't you?

A: Yeah.

Q: You would get into trouble if you told a lie here, wouldn't you?

A: Uh huh.

Q: You don't want to tell a lie, just the truth, right?

A: Oh yes ma'am.

Q: You will tell the truth when you answer my questions, won't you?

A: Yeah.

There is a dual motive for these questions. First, the questions are designed to get the child into the habit of agreeing with counsel. The child is positively reinforced when he agrees, and on some psychological level he wonders what will happen if he displeases the attorney by disagreeing. The second purpose of the questions is to induce a mild level of anxiety in the child by forcing the child to focus on punishment. Hopefully, the anxiety will combine with the fear of displeasing the attorney to strengthen the likelihood that the child will agree with counsel. When the connection is made, counsel proceeds with further examination. Questioning begins on collateral matters and moves toward substantive issues. The examination might proceed along the following lines:

Q: Now Billy, if I said my shirt was red, that would be a lie, wouldn't it?

A: Yes.

Q: And if I said my shirt was yellow, that wouldn't be right, would it?

A: No.

Q: So I shouldn't say my shirt is yellow, should I?

A: No.

Q: If I said my shirt was yellow I might have made a mistake, huh?

A: Yeah. You made a mistake.

Q: Sometimes we make mistakes don't we?

A: Yeah.

Q: So, if I made that mistake I could fix things by saying that my shirt is white, huh?

A: Yeah.

Q: Then, because I fixed my mistake I wouldn't get in trouble would I?

A: No.

Q: So it's a good idea to fix your mistakes when you make them so you can stay out of trouble isn't it?

A: Yes.

Q: Now you said a little while ago, when Ms. Rogers was talking to you, that the man had on a red jacket. You might have made a little mistake when you said it was red, huh? It might have looked like it was red but maybe it was another color like orange, huh?

A: Well, maybe.

Q: So the jacket might have been orange, huh?

A: Yeah.

By maximizing the child's desire to agree with counsel, the foregoing technique increases the likelihood that the cross-examiner will be able to elicit favorable information.

L. Cross-Examination Through Indirection

A child's direct testimony will contain one or more components that damage the cross-examiner's case. As the direct examination draws to a close, the cross-examiner determines which of these components can be attacked or undermined, and which cannot. For example, in child custody litigation incident to divorce, a nine-year-old may testify that he wants to live with his mother. On direct examination the child testifies that his father was always working, that they never did anything together, and that after his parents separated, his father once got drunk and hit him with a belt for no reason. Counsel knows that the belt incident is true, but also knows that father spent a good deal of quality time with his son.

Father took the boy to ball games and on fishing trips, and he helped his son build numerous model airplanes. Until the separation, and his wife's temporary custody of the child, father and son had a close and loving relationship. It may be possible to get the child to change his testimony regarding the number and quality of father-son activities. At a minimum, it should be possible to establish that the boy's testimony is inconsistent with the facts.

In situations like that of the child described above, where direct testimony is susceptible to challenge, the most effective cross-examination is often accomplished by concealing the ultimate objective from the witness. With a specific goal firmly in mind, the cross-examiner asks a series of seemingly innocuous questions which do not appear to be related to the topic the attorney has in mind. Thus, the witness's suspicions are not aroused.²⁷² The questions are structured so that the witness must answer in a particular way. In order to ensure that the witness does not catch on, the attorney may change from topic to topic; always returning, however, to the string of questions that leads eventually to the ultimate goal. Gradually, through a series of carefully structured questions, the attorney locks the witness into a predetermined position. Only then, when the witness is painted into a corner, does the examiner raise the subject which he or she had in mind all along. If and when the ultimate question is posed, the witness has only two choices: Either the witness answers in a way that is consistent with answers to prior questions, and which favors the cross-examiner, or the witness sticks to the story given on direct. The liability accompanying adherence to the direct testimony is that that position is now contradicted by answers given on cross. In either case, the cross-examiner comes out ahead.²⁷³

Returning to the nine-year-old discussed above, the cross-examination might proceed along the following lines. First, through the use of leading questions, counsel establishes that the boy's favorite

272. To gain a mental image of this technique, recall the movie *E.T.* During the opening scenes of this famous movie, Elliot lures E.T. out of the back yard shed and into his room with Reese's Pieces. The cross-examiner's task is like Elliott's, to lead the child along with tempting questions until it's too late.

273. See T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 6.4, at 242 (1980) ("Successful cross-examinations are usually based on *indirection*—the ability to establish points without the witness perceiving your purpose or becoming aware of the point until it has been established."). See also *id.*, § 6.4, at 248, where the author writes: "Cross-examination is in part the art of slowly making mountains out of molehills. Don't make your big points in one question. Lead up to each point with a series of short, precise questions." *Id.*

activities are fishing, sports activities, and building model airplanes. Next, the attorney asks the boy to describe each of the model airplanes hanging from the ceiling of his room. This is followed by leading questions in which the cross-examiner describes the details of each fishing expedition and ball game. The father is not mentioned at all, and the entire focus is on the child and his successes. The following questions are asked: "And on that trip you caught a two pound rainbow, didn't you?"; "You had to work real hard to get that fish in the boat, didn't you?"; "But you finally got him, didn't you?"; "I'll bet he tasted great, didn't he?" Finally, when a complete picture is painted of the models, the fishing exploits, and the ball games, counsel drives home that point that father was there to build each model, catch each fish, and buy each ball park hot dog. Counsel may conclude this portion of the cross-examination by saying, "Well, Billy, I guess your dad really did do a lot of things with you didn't he?" Or, counsel may simply leave the discrepancy between direct and cross for argument.

M. Suggestibility

The lay public and the legal profession share the belief that children are more suggestible than adults. Psychological research conducted in Europe during the first quarter of this century fuels this belief.²⁷⁴ One early writer stated, "Create, if you will, an idea of what the child is to hear or see, and the child is very likely to hear or see what you desire."²⁷⁵ Were the early researchers accurate in their assessment of children's suggestibility? A psychological experiment reported in 1982 reinforces the conclusion that in some circumstances children are highly suggestible.²⁷⁶ In this study children witnessed a staged event involving three men and a woman. A short time later, a police officer questioned the children about the woman's appearance. The questioning of one school age boy proceeded as follows:

Q: Wearing a poncho and a cap?

A: I think it was a cap.

274. See Goodman, *Children's Testimony in Historical Perspective*, 40 J. Soc. ISSUES 9, 18-22 (1984).

275. M. BROWN, *LEGAL PSYCHOLOGY* 133 (1926).

276. H.R. DENT, *THE EFFECTS OF INTERVIEWING STRATEGIES ON THE RESULTS OF INTERVIEWS WITH CHILD WITNESSES*, IN *RECONSTRUCTING THE PAST* 279-98 (A. Trankell ed. 1982), quoted in Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Soc. ISSUES 51, 52 (1984).

Q: What sort of cap was it? Was it like a beret, or was it a peaked cap, or . . . ?

A: No, it had sort of, it was flared with a little piece coming out. It was flared with a sort of button thing in the middle.

Q: [w]as it a peak like that, that sort of thing?

A: Ye-es.

Q: That's the sort of cap I'm thinking you're meaning, with a little peak out there.

A: Yes, that's the top view, yes.

Q: Smashing, Um—what color?

A: Oh. Oh—I think that was um black or brown.

Q: Think it was dark, shall we say?

A: Yes—it was dark.²⁷⁷

As it turns out, the woman wore nothing on her head! Yet the child recalled a hat, and later volunteered, inaccurately, that the woman carried a dark colored purse that matched the cap. Furthermore, the child initially said that the nonexistent cap was flared, but in response to suggestive questioning changed his story to coincide with what the questioner wanted to hear—that the cap was peaked. Finally, note that the youngster described the “top view” of the imagined cap. Due to his diminutive size, the boy could not see the top of the woman's head. This exchange between an authority figure and a child who was eager to please offers graphic evidence that under some circumstances children can be led into inaccurate testimony by persistent, directed questioning.

The suggestibility of children is important for three reasons. First, the cross-examiner can occasionally undermine the credibility of a child's testimony by demonstrating that the child is highly suggestible. Second, some suggestible children can be led to alter their direct testimony through skillful use of suggestive questions during cross. Third, in some cases the cross-examiner's pretrial investigation reveals that adults such as parents, investigators, or mental health professionals conducted highly suggestive interviews of a child; interviews which may have distorted or even obliterated the truth. In these cases the cross-examiner elicits information from the child about the number of interviews and what occurred each time. This testimony may be followed by cross-examination of the individuals who interviewed the child. Cross-examination of the adults is designed to elicit evidence of improperly suggestive interview techniques.

277. Loftus & Davies, *supra* note 276, at 52.

As stated above, the cross-examiner can capitalize on the suggestibility of some children. Consider the following excerpt from the cross-examination by defense counsel of a young child at a preliminary hearing:

Q: Do you remember the last time that we talked?

A: Yes, I do.

Q: And when I had that different colored suit on, do you remember that?

A: Yes, I do. I really-

Q: The one that was red?

A: Yes. I remember it.

Q: You remember it?

A: Yeah.

Q: Do you remember the stripes I had on the other suit were red and they went around my legs that way? Do you remember that?

A: Uh-huh (affirmative).

Q: And do you remember we talked about going and getting ice cream?

A: Yes. I remember that.

Q: And that me and you were going to get an ice cream, and do you remember my friend that was with me? The other guy that had a beard like I do? Do you remember that man?

A: Yes. I do remember that man, but I don't remember his name.

Q: And the three of us were going to go get an ice cream. Do you remember that?

A: Yes. I remember that.

Q: How come we didn't go get the ice cream?

A: I can't remember.

Q: Why didn't we get the ice cream? What happened?

A: I don't know.

Q: We just didn't go, did we?

A: No, we didn't.

In fact, the attorney had never met the child. There was no red suit with horizontal stripes, no aborted trip to the ice cream store, and no bearded friend. Yet, under the hand of a skilled cross-examiner, the child accepted as true a set of imagined events. When the attorney was finished, the child's credibility was seriously undermined.²⁷⁸

The second use of suggestibility is illustrated by the cross-examination technique described in section (III)(J). After establishing

278. Yengich, *Child Sexual Abuse Cases*, 1986 UTAH L. REV. 443, 446 (1986).

rapport with the child, counsel employs a series of leading questions to coax the child into a position that is inconsistent with the child's direct testimony.

The third important aspect of suggestibility concerns the possibility that a child witness was subjected to improper suggestion prior to trial. When counsel learns that improper suggestion has occurred, it becomes possible to attack the opposition *without* attacking the child. After all, it is not the child's fault that adults misused their authority to alter the child's recollection of events. Cross-examination of a child always carries the risk of alienating the jury. When counsel can establish that an adult has improperly implanted ideas in a child's mind, however, the jury is unlikely to be sympathetic with the adult, and counsel has more freedom for vigorous cross-examination. By attacking the interviewer, the cross-examiner convinces the jury that the child *and* the examiner's client have been treated unfairly.

While children are undoubtedly suggestible, it would be a mistake to conclude that they are always susceptible to suggestive questioning. Psychological research indicates that in some cases children may actually be less suggestible than adults. Psychologists Elizabeth Loftus and Graham Davies summarize this work on childhood suggestibility with the statement that "[t]he possibility . . . exists that children are more suggestible [than adults] to certain kinds of information and less suggestible to others."²⁷⁹ Loftus and Davies point out that suggestibility cannot be considered in a vacuum, and that the proper way to understand suggestibility is to study it in the context of memory. They write as follows concerning the relationship between suggestibility and memory:

[D]evelopmental differences in the ability to retrieve information could . . . lead to age differences in individual degrees of suggestibility. If, in general, children have greater difficulty than adults in retrieving information from long-term memory [sic] — and there is quite a bit of evidence to suggest that they do—perhaps children would be especially prone to rely on new (retrievable) information in their reports. One source of new information would be suggestive questioning.

. . . Subjects were especially prone to suggestion when considerable time, say several days, had elapsed between the initial event and the introduction of misinformation. Apparently, when the initial memory is weakened over time, it becomes especially vulnerable to the introduction of new inputs.

279. Loftus & Davies, *supra* note 276, at 55.

. . . [W]ith simplified forms of leading questions, children may be especially vulnerable [to suggestion].

. . . Whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other factors. If an event is understandable and interesting to both children and adults, and if their memory for it is still equally strong, age differences in suggestibility may not be found. But if the event is not encoded well to begin with, or if a delay weakens the child's memory relative to an adult's, then age differences may emerge. In this case, the fragments of the event that remain in the child's memory may not be sufficient to serve as a barrier against suggestion, especially from authoritative others.²⁸⁰

The work of Loftus and Davies clearly indicates that childhood suggestibility should be considered in conjunction with the closely related issue of the fallibility of memory. As memory fades over time, its accuracy may decline while suggestibility increases. Fading memory is susceptible to new input which can come from suggestive questioning. Inaccurate information can be incorporated into memory, actually supplanting accurate data. Yet, when the child takes the stand, he or she testifies believing in the accuracy of what is said.

For the cross-examiner, a key area of pretrial investigation focuses on the possibility that a child has been subjected to improper suggestion. The longer the delay between an event and a child's statements describing it, the greater the likelihood that improper suggestion would be effective. Who interviewed the child? A parent with an axe to grind? A police officer who believes in a presumption of guilt? A mental health professional who shares that presumption and uses suggestive interview techniques to "help the child reveal the awful truth?" What type of questions were employed during the interview? Were they leading and suggestive, or were they nonleading? Was the interviewer a trusted authority figure? These and other questions are vitally important to the cross-examiner seeking to discover the improper use of suggestion.

N. Fantasy

Children enjoy a rich fantasy life.²⁸¹ At one moment a seven-year-old is an astronaut, the next a cowgirl, and the next a rabbit.

280. *Id.* at 54, 56-57, 61, 63.

281. For discussion of children's fantasy see Myers, *The Testimonial Competence of Children*, 25 J. FAM. L. 287 (1985-86).

While some children experience difficulty differentiating fact from fantasy, the great majority can distinguish between what actually occurs and what is imagined.²⁸² In other words, children can leave the world of fantasy and return to the world of fact. While a cross-examiner may coax a child into flights of fancy, this tactic seldom undermines the basic value of the child's testimony.²⁸³ Jurors know that children fantasize, but the jury can usually tell when a child is attempting to relate factual occurrences. Furthermore, during the redirect examination, counsel can ask questions to reassure the jury that the child understands the difference between fact and fantasy.

While the childhood penchant for fantasy is usually not particularly fertile ground for the cross-examiner, in some cases a child's fanciful beliefs may at least drive a wedge of doubt into the jury's mind, providing fuel for closing argument. For example, it may be worthwhile to ask a child of eight or younger what television cartoon shows she or he watches. Ask the child to describe favorite characters. Then follow up by asking whether these characters fly or have super-human strength. Some children launch into detailed descriptions, telling the jury all about how their favorite characters "really fly!"

In some cases the cross-examiner can capitalize on a particular child's tendency toward hyperbole and fantasy. In their book titled *Cross-Examination in Criminal Trials*,²⁸⁴ F. Lee Bailey and Henry Rothblatt provide an example of such cross-examination. They write that:

Some children, particularly younger ones, are highly imaginative. You can demolish such witnesses by encouraging them to flights of fancy. The following is a cross-examination of a young child who has given highly damaging testimony on direct examination. The witness is successfully impeached without any reference to his direct testimony:

Q: What is your favorite sport?

282. See *id.*

283. See *State v. Van Hoff*, 371 N.W.2d 180, 184 (Iowa Ct. App. 1985), *cert. denied*, 106 S. Ct. 598 (1985). The *Van Hoff* case concerned the testimonial competence of an eight-year-old. During the competency examination the boy stated that he could hit a baseball to the moon. The court held that the child's factual mistake and fanciful magnification of his batting prowess did not indicate an inability to differentiate fact from fantasy. The child was a competent witness. The court held, however, that a child's difficulty in differentiating fact from fantasy is relevant on the issue of competence.

284. F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 97, at 95-96 (1978).

- A: Baseball.
Q: I'll bet you are very good at it?
A: Yes, I am.
Q: You look like a strong boy. Aren't you the best player in your class?
A: Yes.
Q: What position do you play?
A: I am a pitcher.
Q: You probably have a good fast ball?
A: Yes, I have.
Q: Do you also have a good curve ball and sinker?
A: Yes.
Q: I don't imagine many players get hits when you are pitching?
A: No, none of them do.
Q: You throw no-hitters all the time?
A: Yes, I do.
Q: And how are you as a batter?
A: Very good.
Q: I'll bet you hit a lot of home runs.
A: Every time.
Q: That's wonderful. Every time you pitch you throw a no-hitter and every time you are at bat you hit a home run?
A: Yes, I do.
Q: No further questions.

With the exception of the rare child who cannot distinguish fact from fancy, the cross-examiner usually must be content with the hope that the collateral matter of fantasy will raise doubts about a child's testimony.

O. Inconsistency Between Direct Testimony and Prior Behavior

When a child's testimony on direct examination is inconsistent with the child's behavior, the cross-examiner can focus on the inconsistency. For example, in the child custody case discussed in section (III)(L), the child testified on direct that his father was always working and that the two of them never did things together. The cross-examiner forced the child to acknowledge that his father helped him build model airplanes, and that he and his dad went to ball games and on fishing trips. The cross-examiner may have better luck convincing children than adults to acknowledge inconsistencies between their testimony and their behavior. Adults try to explain away such inconsistencies, whereas children are often more forthright.

P. Coached Testimony

Witness preparation is necessary and entirely proper.²⁸⁵ The need to prepare child witnesses is particularly great because young children do not understand the nature of legal proceedings, their role in them, or the consequences of what they say. However, when the proponent of a child witness oversteps the illusive boundary separating preparation from coaching, the cross-examiner must respond.

Children are particularly susceptible to improper coaching, and too many adults take advantage of that fact.²⁸⁶ The phenomenon of coaching is prevalent in sexual abuse litigation, although it occurs in other contexts as well. In abuse litigation, children often endure a series of interviews with police officers, child protective service workers, therapists, investigators, and attorneys. The possibility of coaching exists during each interview. While the law enforcement and legal professionals who work with abused children attempt to guard against improper influence, the desire to win, which drives the adversary system, sometimes tempts conscientious individuals over the line.²⁸⁷

285. For discussion of preparation techniques with child witnesses, see Perry & Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369 (1985).

286. See *People v. Matthews*, 17 Ill. 2d 502, 162 N.E.2d 381 (1959). In this sex offense case the victim was six at the time of the incident and seven at the time of trial. Her mother promised her a paint set if she told the truth. The Illinois Supreme Court found that there was nothing improper in a parent encouraging a child to be truthful. There was no evidence of coaching. Furthermore, the reward was made known to the court for its consideration in evaluating the child's credibility.

287. See F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 80, at 73-74 (1978), where the authors write as follows:

A witness who has testified at length as to details should be questioned with regard to coaching by the district attorney. There is nothing improper per se about a review of testimony before trial. However, such reviews can easily lead to suggestions which fill in blank spots in the witness' memory.

Some witnesses, believing that meetings with the prosecutor are improper, lie and deny that such meetings occurred. If this happens, speak with the prosecutor off the record, and have him admit that such interviews took place. Otherwise, establish the frequency and duration of the meetings.

The following is an example of cross-examination of a witness regarding meetings with the assistant district attorney:

Q: Have you spoken to anyone from the district attorney's office about this case?

A: Yes, I have.

Q: Who did you speak to?

A: Mr. Nash and Mrs. Belli.

The cross-examiner can raise the possibility of coaching by asking the child to describe each interview. The fact finder is educated to the fact that more than one adult has “helped” the child prepare. A portion of a child’s cross-examination by defense counsel may proceed along the following lines:

Q: So, you’ve told your story lots of times, haven’t you?

A: Yeah.

Q: And all the grown-ups asked you questions, didn’t they?

A: Lots of questions.

Q: And sometimes the grown-ups said things like, “Is this the way it happened?” didn’t they?

A: Uh huh.

Q: And Mr. Nash is the prosecutor trying this case?

A: Yes, sir.

Q: How often did you see Mr. Nash alone?

A: Twice.

Q: When was that?

A: Both meetings were about two months ago.

Q: How long did those meetings last?

A: About five hours all together.

Q: Did you go over the facts in this case?

A: Yes.

Q: Did you do that in great detail?

A: Yes.

Q: Did you meet with Mr. Nash and Mrs. Belli together?

A: Yes, I did.

Q: For how long?

A: About half an hour.

Q: Did you meet with Mrs. Belli alone?

A: Yes.

Q: How often?

A: Once.

Q: How long did that meeting last?

A: About an hour and a half.

Q: So you reviewed your testimony for about seven hours?

A: Yes.

Q: And were you told of the direction cross-examination was likely to take?

A: Yes.

. . . Counsel leaves the jury with the impression not only that the witness spoke with the prosecutor’s office but that he spoke with them often and for long periods of time, creating a possible inference for the jury that the witness’ testimony may be more a product of the meetings than a product of the witness’ memory.

Id.

Q: And sometimes they helped you tell your story if you got stuck, didn't they?

A: Yes.

Q: And you talked to Ms. Rogers, the prosecutor, a couple of times, didn't you?

A: Yes.

Q: And Ms. Rogers asked you all kinds of questions, didn't she?

A: Yeah.

Q: And sometimes if you didn't quite know how to tell what happened, she helped you out, didn't she?

A: Sometimes.

Q: Sometimes she would help you remember what happened, wouldn't she?

A: Yes.

Q: And I'll bet that when you got the right answer, Ms. Rogers said you were a good girl, didn't she?

A: Uh huh.

In some cases of alleged sexual abuse, coaching is uncovered by asking the child to describe the details of what happened. Suppose, for example, that on direct examination a six-year-old points to her genital area and testifies that, "he came into my room and touched me down there." On cross-examination, counsel asks the child to describe what she means by "down there." If the child replies with vocabulary that is unnatural in a child of that age—"he put his penis in my vagina"—the jury will realize that someone has helped the child define what occurred. Such a technique is risky, of course, because the child is just as likely to say, "he put his tail in my guzzy bear." This terminology is completely natural in a child who has been abused, and it carries no connotation of improper coaching. Even so, the cross-examiner may be able to turn such testimony to his or her advantage by arguing that the description is so vague that the child does not know what happened or, that if anything happened, it was not criminal.

The cross-examiner should watch the child's eyes to determine whether the youngster looks to an adult for encouragement or even for answers. For example, if a young witness looks at the prosecutor before answering questions, counsel might ask, "Do you need Ms. Rogers' help to answer my questions? You look at her a lot?" Of

course, if an adult is assisting a child with gestures or head nods, the cross-examiner can ask the court to call a halt.

Q. Memorized Testimony

Sometimes the cross-examiner gets the impression that a child's direct testimony is memorized rather than spontaneous. In his book titled *Fundamentals of Trial Techniques*, Professor Thomas Mauet describes a cross-examination technique which is effective with memorized testimony:

While not a common phenomenon, sometimes a witness on direct examination will give clues that his testimony, at least in critical parts, is memorized, or is so similar in certain respects to another witness' testimony that it suggests they got together and planned identical stories. The clues may be words and phrases that are not natural for the witness. They may be that the witness has testified to details that normally would not be remembered, or has omitted facts that would ordinarily be recalled. A clue may be in the deliberateness of the testimony or some other unusual delivery. Whatever the clue, the approach is the same. These witnesses can be asked to violate one of the cardinal rules of cross-examination: never repeat the direct examination. Witnesses who have memorized parts of their testimony, particularly children who have been coached, will usually repeat the testimony essentially verbatim, using the same words, phrases, and details as before. These witnesses will often claim to remember details you would not expect them to, or fail to remember facts that they normally would remember. They will sometimes use a vocabulary that is not natural for them. The jury will usually pick up on the striking similarity between the two narrations, or the peculiar recall of the witnesses, or an odd word choice. Once this has been demonstrated, you should inquire whom the witness talked to before testifying, to uncover the origins of the memorization.²⁸⁸

288. T. MAUET, *FUNDAMENTALS OF TRIAL TECHNIQUES* § 6.8, at 285-86 (1980). See also F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* § 11:38, at 324 (2d ed. 1985). See also F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 95, at 92-94 (1978), where the authors write as follows:

If you wish to show that a child's testimony has been rehearsed, you must do more than simply ask the witness if he has rehearsed or memorized. The following examination reveals a better approach:

Q: After you heard that explosion and saw the man run away, you ran right home, didn't you, Jimmy?

A: Yes, I did.

By establishing that all or portions of a child's testimony is memorized, counsel raises the possibility that the child has no present recollection of the facts, or that the child was improperly coached.

R. The Negative Child

Many child witnesses are cautioned to beware of the cross-examiner. Children are advised that the cross-examiner may try to trick them with deceptive questions. An occasional child attempts to protect against trickery by answering the cross-examiner's questions with the opposite of what the child thinks the attorney wants to hear. Such a child *can* be tricked into giving favorable information. The cross-examiner asks questions that are designed to

Q: And you told your mother what you had seen and heard?

A: That's right.

Q: And then a policeman came to your house?

A: Yes.

Q: And you told him what you had seen and heard?

A: Yes.

Q: And did he write down your answers?

A: Yes, he did.

Q: Were you taken to the district attorney's office the next day?

A: Yes.

Q: Did a man there ask you a lot of questions?

A: Yes.

Q: And did he write down your answers?

A: Someone else wrote them down.

Q: And then did the man who asked you the questions read something to you?

A: Yes.

Q: Did he read it several times?

A: Yes.

Q: Did he give you a copy of what he read to you?

A: Yes, he did.

Q: And you have read it several times since he gave it to you?

A: That's right.

Q: And you have tried to tell your story today as it appears in that paper, haven't you?

A: Yes.

At this point in such a cross-examination, defense counsel should request a copy of the statement. Such a request will not be dangerous. If the child's testimony is very similar to the statement, the jury will conclude that the child's testimony was the result of coaching. If, on the other hand, the testimony varies greatly from the statement, this inconsistency will allow you to discredit the witness. . . .

Id.

make the child think the attorney wants a particular answer. In fact, the attorney wants precisely the opposite answer. When the question is asked, the child gives the answer he or she thinks the attorney does not want, and counsel obtains the desired information.

S. Cross-Examination of a Child Who Uses Dolls to Illustrate Direct Testimony

In sex abuse litigation, children sometimes illustrate their direct testimony with anatomically correct dolls.²⁸⁹ If the prosecutor uses dolls on direct, it is very likely that the child was introduced to them prior to trial. The child may have used anatomically correct dolls during the investigatory stage and during preparation in the prosecutor's office. If the child is in psychotherapy, dolls may have played a part in therapy.

In some cases the cross-examiner can establish that a child was exposed to improperly suggestive coaching with dolls.²⁹⁰ The conscientious prosecutor understands the danger and the impropriety of suggestive use of dolls, and the cross-examiner rarely uncovers improper coaching by the prosecutor. Psychotherapists and child protective service workers are sometimes a different story, however. Mental health and social work professionals may feel that the best approach is to "help" the child tell the story. If the child hesitates or has difficulty demonstrating what the adult thinks occurred, then the professional simply helps the child get started. Of course, such "help" is fraught with the danger of improper suggestion.

Cross-examination which is designed to uncover suggestive use of dolls might proceed as follows:

Q: Now Mary, do you remember the dolls you were holding a few minutes ago when Ms. Rogers, the prosecutor, was talking to you?

A: Yes.

Q: You played with dolls like those before you came to court today, didn't you?

A: Uh huh.

Q: Did you play with dolls like those in Doctor Smith's office?

289. See *supra* subsection (I)(G) for discussion of the legal issues involved in use of dolls as demonstrative evidence.

290. See *Newton v. State*, 456 N.E.2d 736, 742 (Ind. Ct. App. 1983) (Not error to permit child to illustrate testimony with dolls. However, "the fact the witness did practice is a factor considered in determining her credibility.").

A: Yes.

Q: And when you first saw those dollies in Doctor Smith's office, did the doctor tell you that you could play with them right there in her office?

A: Yeah.

Q: And one was a man doll and one was a little girl doll, huh?

A: Right.

Q: And Doctor Smith told you that the little girl doll was like you, didn't she?

A: Yes, like me.

Q: And she said that the man doll was like Tom, who is sitting over there, didn't she?

A: Yes.

Q: And did Doctor Smith sometimes show you how to put the dollies close to each other?

A: Yes.

Q: And then, after she showed you how to put the dollies, did you do it all by yourself, just like you did here in court today?

A: Yeah.

If the attempt to disclose improper pretrial coaching goes nowhere, the cross-examiner can abandon the line of questioning. If impropriety is disclosed, however, the child's direct testimony is substantially undermined, and the jury may begin to question the state's motives.

The cross-examiner can sometimes use dolls affirmatively. After a child illustrates one version of the facts on direct, the cross-examiner may convince the child to agree to a different version. Counsel holds the dolls and manipulates them while asking questions. The child may agree with counsel's version of what happened. Alternatively, counsel may place the dolls in positions where it would be physically impossible for abuse to occur, and then ask the child whether "this is the way it happened?" If the child says "yes," the direct testimony is weakened.

T. Cross-Examination Designed to Elicit Inconsistencies in Testimony

The goal of cross-examination is sometimes to elicit statements that are inconsistent with the direct testimony. This can be accomplished by getting the child to agree to leading questions that inject subtle alterations in the details of the story. The odds for success are increased when counsel alters the sequence of events. At one moment the examiner asks about the end of the story, and at the

next moment about the middle.²⁹¹ This technique is especially effective with children who have memorized their testimony or who have been heavily coached. Such children become confused when the cross-examiner's questions are not in the "right" order. Counsel may also attempt to keep more than one line of questioning going at the same time. This round robin approach is effective with children between the ages of three and ten or eleven. The child is kept off balance, increasing the likelihood of inconsistency.

When the cross-examiner succeeds in eliciting a number of inconsistencies from a child, the attorney must decide whether to let the loose ends dangle until closing argument, or to ask the ultimate question: "So Billy, based on what you have just said, it is possible that nothing happened at all, isn't it?"

U. Cross-Examination Concerning Perception, Memory, or Communication

Rather than launch a frontal attack on the substance of a child's testimony, the cross-examiner may focus on issues of perception, communication, or memory. On the matter of perception, counsel may get the child to admit that an event happened quickly and unexpectedly, and that the child was frightened or surprised. Perhaps the child was deeply absorbed in play or was watching television when the crucial event transpired. Young children have a short attention span. As a rule of thumb, children aged three to five have one minute of attention span per year of life. If the event in question required sustained attention to detail, the child may have become distracted.

Young children have difficulty with such concepts as time, distance, size, and speed. If a child's direct testimony is premised on estimates of such matters, the cross-examiner may ask questions which lead the child into inaccurate estimates of time, distance, speed, and so on. Pointing out the child's deficiencies in these areas may raise doubts about the entire direct testimony.

A child's direct testimony may be attacked by demonstrating that the child's recollection for detail is weak. If a long period of delay has ensued between the event and the trial, the child's memory for detail may have faded.

291. This process can take considerable time. Counsel should remember, however, that the longer the child talks, the more likely she is to make inconsistent statements.

V. Cross-Examination on Collateral Matters

If a child's direct testimony is clear, credible, and impervious to specific cross-examination techniques, it may be wise to forego cross or to confine questioning to collateral matters. Focusing on the details of the direct simply affords the witness an opportunity to repeat an already convincing story. Counsel may limit the cross-examination to isolated weak points in the hope that doubt about details will generalize to the rest of the witness's testimony.

W. Rape Shield Statutes

The trial of a rape or sexual assault case is often very humiliating and traumatic for the victim. Describing the details of an involuntary sexual encounter is difficult under the best of circumstances, let alone in a courtroom packed with strangers. Furthermore, until recently, the initial affront was sometimes not the last. A second onslaught was leveled when defense counsel presented evidence regarding the victim's sexual proclivities or history. Such evidence took two forms: opinion or reputation evidence, and proof of specific instances of past sexual behavior. The result of such evidence was to place the victim on trial along with the defendant. In response to this unfortunate result, the states enacted statutes known as rape shield laws.²⁹² The statutes are designed to limit inquiry into the prior sexual behavior of complaining witnesses. The shield laws have withstood constitutional challenge.²⁹³

Rule 412 of the Federal Rules of Evidence is a rape shield statute.²⁹⁴ Its provisions are similar to the statutes in effect in many

292. See C. McCORMICK, *supra* note 8, § 193, at 573. For background and discussion of the federal rape shield statute, see generally 2 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 196-199, at 597-622; 2 J. WEINSTEIN, *supra* note 8, ¶¶ 412[01]-412[03], at 412-1 to -33.

293. See, e.g., *Doe v. United States*, 666 F.2d 43, 47-48 (4th Cir. 1981); *Commonwealth v. Joyce*, 382 Mass. 222, 415 N.E.2d 181 (1981); *State v. Howard*, 121 N.H. 53, 426 A.2d 457 (1981); Annotation, *Constitutionality of "Rape Shield" Statute Restricting Use of Evidence of Victim's Sexual Experiences*, 1 A.L.R.4th 283 (1980).

294. FED. R. EVID. 412 reads in part as follows:

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also

jurisdictions. At bottom, rule 412 is a rule of exclusion. The rule provides that in criminal cases, reputation or opinion evidence concerning the past sexual activity of the victim is never admissible.²⁹⁵ With three exceptions, evidence of specific instances of past sexual conduct of the victim is excluded as well. The exceptions are, first, evidence of specific instances of sexual conduct is admissible to the extent required by the Constitution. Second, the court may admit evidence of past sexual behavior of the victim with individuals other than the defendant when such evidence is offered by the defendant on the issue of whether the defendant was the source of semen or injury. Third, the court may receive evidence of past sexual contact between the victim and the defendant on the issue of consent.

Under rape shield laws like rule 412, exclusion of evidence of prior sexual activity is the rule, and admission is the exception. With this in mind, the following paragraphs discuss circumstances in which evidence of a child's prior sexual activity may be admissible. The discussion begins with analysis of two of the specific exceptions articulated in rule 412. The remaining paragraphs discuss instances in which the constitutional rights to confrontation and due process may dictate the admission of evidence of prior sexual behavior.

Source of Semen or Injury—Rule 412(b)(2)(A). Rule 412 provides that evidence of prior sexual activity is admissible to establish that the defendant is not the source of semen or injury. Clearly, the

not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivision (c)(1) and (c)(2) and is constitutionally required to be admitted, or

(2) admitted in accordance with subdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

Subsection (c) of rule 412 sets forth the procedure which must be satisfied in order to employ the rape shield statute.

295. See 2 D. LOUISELL & C. MUELLER, *supra* note 8, § 197, at 602, 605. Professors Louisell and Mueller discuss the possibility that in some cases the Constitution may require receipt of reputation or opinion evidence regarding past sexual activity of the complaining witness. See *id.* § 198, at 615. On this point see *State v. Johns*, 615 P.2d 1260, 1263-64 (Utah 1980) (“[T]here are some cases in which the reputation of the prosecutrix and in which specific prior sexual activity may become relevant and its probative value outweigh[s] the detrimental impact of its introduction.”). In civil cases, evidence of a sexual assault victim's prior sexual conduct is governed by rules 404 and 608.

defendant must be permitted to prove that he is not the source of semen discovered on the child.²⁹⁶ Furthermore, the defense should be permitted to establish that someone else caused the victim's physical injury or condition.²⁹⁷ For example, if a child's hymen is torn, the defendant should be afforded an opportunity to prove that the injury occurred through sexual activity with another.²⁹⁸

Rule 412 permits the defendant to put on evidence of the victim's prior sexual activity to establish that someone else caused injury. Does the word "injury" embrace psychological trauma engendered by sexual assault? For example, could the defendant offer proof that the complainant's prior sexual activity with others is the source of psychological injury?²⁹⁹ In the normal case the answer should be no. If the defendant is routinely permitted to explore the victim's sexual history in an effort to link psychological symptoms to past sexual behavior, the "injury" exception may defeat the exclusionary purpose of the rape shield statute. The exception may swallow the rule.

While usually it is proper to exclude evidence of prior sexual activity as an explanation for psychological symptoms, in some

296. See *McLean v. United States*, 377 A.2d 74, 78 n.6 (D.C. Ct. App. 1977); *State ex rel. Pope v. Superior Court*, 113 Ariz. 22, 545 P.2d 946 (1976); Annotation, *Modern Status of Admissibility, in Statutory Rape Prosecution, of Complainant's Prior Sexual Acts or General Reputation for Unchastity*, 90 A.L.R.3d 1300 (1979).

297. See *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978). In this sexual assault case the state

introduced expert medical testimony concerning the condition of the complainant's genital area. The testimony was based upon an examination conducted approximately six months after the alleged incident. The doctor testified that the complainant did not have an intact hymenal ring and that her vaginal opening was unusually open for a child of her age. In his opinion, the findings were "entirely consistent although certainly not diagnostic of" attempted or partial penetration by an adult penis.

Id. at 112, 969 N.W.2d at 197. In response to this testimony, the defendant sought to offer evidence of the victim's prior sexual activity in order to establish that he was not the cause of the minor's condition. The state argued that such evidence was barred by the rape shield statute. The appellate court held that the defendant's proffered evidence should have been admitted. The court wrote:

It is well settled that where the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition.

Id. at 114, 269 N.W.2d at 198.

298. See *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978) (quoted in the preceding footnote).

299. Professors Louisell and Mueller argue persuasively that in most cases the word "injury" should not include psychological injury. See 2 D. LOUISELL & C. MUELLER, *supra* note 8, § 198, at 611. Their point is that if the term is construed to include psychic injury, the "injury" exception may defeat the exclusionary purpose of the rape shield law.

child sexual abuse cases it may be necessary to admit such evidence. In a growing number of cases, the prosecution offers expert testimony that a child's psychological symptoms constitute substantive evidence that the child was abused.³⁰⁰ When the state attempts to establish the defendant's guilt through evidence of the psychological consequences of the alleged sexual abuse, the defendant has a compelling need to prove that the child's symptoms were caused by someone else. In such cases, the defendant has the right to put on evidence of the child's prior sexual activity with others in order to establish the source of the child's "injury."³⁰¹

Consent—Rule 412(b)(2)(B). Rule 412 authorizes the admission of evidence of prior sexual behavior between the victim and the defendant on the matter of consent. Consent is not an issue in child sexual abuse litigation,³⁰² and this exception to the exclusionary effect of rule 412 is seldom applicable.³⁰³

Impeachment of credibility. Evidence of a child's prior sexual conduct is generally inadmissible to impeach the child's veracity or credibility.³⁰⁴ Prior sexual conduct has very little, if anything, to do with veracity.³⁰⁵

Impeachment by Contradiction. If a child testifies to lack of sexual experience prior to an alleged assault, the defendant may

300. For discussion of the sexually abused child syndrome see *supra* section (II)(D).

301. See 2 D. LOUISELL & C. MUELLER, *supra* note 8, § 198, at 611 ("Clearly the term 'injury' in Rule 412 cannot reach psychological difficulties suffered by a complainant, at least where these are not a direct consequence of the crime charged.").

302. See *State v. Howard*, 121 N.H. 53, 426 A.2d 457, 461 (1981) ("This case involves statutory rape. Consent, in the legal sense, therefore, is not an issue . . .") (citations omitted).

303. Consent is not a defense to a charge of child sexual abuse. Under some criminal statutes, however, the severity of the offense is elevated if the assault is accomplished by coercion or threat. When a defendant is charged under such a statute, it is possible to argue that evidence of prior consensual sexual activity between the minor and the defendant is relevant.

304. See 2 D. LOUISELL & C. MUELLER, *supra* note 8, § 197, at 606. See also *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (Case involves an adult rape victim. The court states that proof of specific acts of sexual activity with persons other than the defendant "is ordinarily insufficiently probative . . . of her general credibility as a witness . . . to outweigh its highly prejudicial effect."); *People v. Wilson*, 678 P.2d 1024, 1024 (Colo. Ct. App. 1984) (Proper for the trial court to delete portions of child's diary admitted in evidence which discusses prior sexual acts with others.); *Skaggs v. State*, 438 N.E.2d 301, 305 (Ind. Ct. App. 1982) (Defendant sought to justify question relating to victim's prior sexual behavior on the theory that the rape shield statute only proscribes evidence of prior sexual activity, not lack of prior sexual activity. The court disagreed, and stated that "the Rape Shield statute creates a blanket exclusion for evidence of a victim's prior sexual conduct.").

305. See *United States v. Kasto*, 584 F.2d 268, 271-72 (8th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) (quoted in the preceding footnote); *State v. Davis*, 269 N.W.2d 434 (Iowa 1978).

wish to contradict the testimony.³⁰⁶ Contradiction is important if the child's testimony increases the jury's sympathy for the youngster. Despite the exclusionary language of rule 412, cases arise in which fairness dictates receipt of contradictory evidence to dispel a false impression of innocence or sexual naivete.³⁰⁷

Proof of Prior False Accusations of Abuse. When a child has a history of making false accusations of sexual abuse, the child's present allegation may be untrue too. In such a case, it is sometimes proper to admit evidence of the child's prior false accusations.³⁰⁸ In approving such evidence the court in *People v. Mikula*³⁰⁹ wrote as follows:

In a prosecution for a sexual offense, the defendant may cross-examine the complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges. In a case such as the one before us, where the verdict necessarily turned on the credibility of the complainant, it is imperative that the defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainant's credibility.

306. For discussion of impeachment by contradiction see *infra* section (IV)(N).

307. See 2 D. LOUISELL & C. MUELLER, *supra* note 8, § 198, at 614-15 for excellent discussion of this subject. See *People v. Rice*, 709 P.2d 67, 68 (Colo. Ct. App. 1985). In *Rice* the defendant argued that the prosecutor portrayed the twelve-year-old victim as young and sexually unsophisticated. The defense sought to cross-examine the child regarding past sexual activity in an effort to establish that she was not so innocent as that state was making her out to be. The appellate court agreed with the trial judge that the cross-examination should not be allowed. The Court of Appeals wrote:

Defendant asserts that his constitutional right to confrontation was violated because he was unable to cross-examine the victim concerning any prior sexual experience she might have had, thus refuting the prosecution's implication that she was young and sexually unsophisticated. Defendant argues that, since his theory of defense was a general denial to both charges, the credibility of the victims was a paramount issue in this case. Moreover, he continues, because the trial court did not allow this evidence to be elicited, the credibility of the victim was never able to be tested pursuant to the principles set out in *Davis v. Alaska*, 415 U.S. 308. We disagree.

In refusing to allow the inquiry, the trial court ruled that it was a collateral issue. We agree with the trial court.

. . . [T]he basic purpose of [the rape shield] statute is to "protect rape and sexual assault victims from humiliating public fishing expeditions into their past sexual conduct without a showing that such evidence would be relevant to some issue in the pending case." In our view, the testimony sought to be elicited by defendant falls squarely within the prohibition of the statute

Id.

308. See *People v. Wilson*, 678 P.2d 1024, 1027 (Colo. Ct. App. 1984), *cert. denied*, 469 U.S. 843 (1984); *People v. Mikula*, 84 Mich. App. 108, 269 N.W.2d 195 (1978); COLO. REV. STAT. § 18-3407(b)(2) (1978).

309. . 84 Mich. App. 108, 269 N.W.2d 195 (1978).

We emphasize that the complainant is not to be put on trial for any prior sexual activity. The evidence here discussed seeks to impeach her not because she is shown to be unchaste but because she has lied concerning similar charges in the past.³¹⁰

Not all the authorities permit the defendant to put on evidence of false allegations of sexual abuse. In *United States v. Cardinal*,³¹¹ for example, the Sixth Circuit Court of Appeals upheld the trial court's ruling that such evidence was barred by the federal rape shield rule. Trial judges have discretion to balance the need for the evidence against its potential prejudice.

Evidence of Prior Sexual Activity as Related to the Possibility that a Child Fabricated Alleged Abuse. Many people believe that children do not fabricate allegations of sexual abuse. Jurors who share this view are likely to believe a child's testimony regarding abuse because they conclude that the child could not make up such a story. May the defendant offer evidence of the child's prior sexual activity to establish that the child fabricated the alleged abuse, and that prior sexual experience made it possible for the child to invent a realistic and detailed account? In *State v. Howard*³¹² the New Hampshire Supreme Court said yes.³¹³ In *Howard*, the state sought a pretrial order limiting evidence pertaining to the twelve-year-old complainant's prior sexual behavior. The prosecution argued that such evidence was excluded by the rape shield statute. At the hearing on the state's motion, defense counsel offered to prove that the minor had extensive and somewhat bizarre sexual experience.

The Supreme Court held that under the facts before it, the defendant should be permitted to offer evidence of the child's prior sexual experience. The court wrote:

We believe that the average juror would perceive the average twelve-year-old girl as a sexual innocent. Therefore, it is probable that jurors would believe that the sexual experience she describes must have occurred in connection with the incident being prosecuted; otherwise, she could not have described it. However, if statutory rape victims have had other sexual experiences, it would

310. *Id.* at 115-16, 269 N.W.2d at 198-99.

311. 782 F.2d 34, 36 (6th Cir. 1986), *cert. denied*, 106 S. Ct. 2282 (1986).

312. 121 N.H. 53, 426 A.2d 457 (1981). *See also* *United States v. Nez*, 661 F.2d 1203, 1206 (10th Cir. 1981) (*dicta*). *See* Annotation, *Admissibility in Rape Case, Under Rule 412 of Federal Rules of Evidence of Victim's Past Sexual Behavior*, 65 A.L.R. Fed. 519 (1983).

313. *Contra State v. Clarke*, 343 N.W.2d 158 (Iowa 1984).

be possible for them to provide detailed, realistic testimony concerning an incident that may have never happened. To preclude a defendant from presenting such evidence to the jury, if it is otherwise admissible, would be obvious error. Accordingly, a defendant must be afforded the opportunity to show, by specific incidents of sexual conduct, that the prosecutrix has the experience and ability to contrive a statutory rape charge against him.³¹⁴

The reasoning of the *Howard* decision is applicable in at least three situations involving children who have experienced prior sexual activity. First, some children intentionally fabricate false allegations of sexual abuse. Second, others misconstrue innocent behavior as sexual contact. Finally, a rare child may fantasize acts which did not occur.³¹⁵ In each such case, prior sexual experience with individuals other than the defendant may improperly enhance the believability of the child's description of fabricated or imagined abuse. In some such cases, the defendant should be permitted to offer evidence of the child's prior sexual behavior in order to

314. 426 A.2d at 462.

315. See *State v. Clarke*, 343 N.W.2d 158, 162 (Iowa 1984). *Clarke* involves an adult victim. Defendant allegedly forced the victim to have oral sex with him. Defendant argued that the prosecutrix "was drunk and disoriented at the time and simply imagined the event." *Id.* at 159. Defendant argued that he should be permitted to offer evidence of the complainant's prior experience with oral sex. The court rejected the argument, and wrote as follows:

One theory on which defendant suggests relevancy is that if the complainant had previously experienced oral sex with another person she would more likely later fantasize such an event and be less able to distinguish fact from fiction. In response, the State argues that there is no basis in logic or common experience for the suggested inference that such an experience would make more likely her fantasizing of the event. . . . The State concedes that in some cases the court may properly allow the defendant to question a complaining witness about prior sexual conduct based on the theory that an act was fantasized, but it contends such evidence should be allowed only as the basis of expert psychological or psychiatric testimony.

. . . . [Defendant] argues that [the complaining witness'] alleged first-hand knowledge of the mechanics of oral sexual intercourse makes it more likely that she could describe the allegedly fantasized event in a plausible way and make the event more believable to a jury and to herself as well. In other words, the defendant anticipates that the complainant will describe in detail what she claims occurred in connection with the alleged act of sexual abuse. He fears that because the complainant is a relatively young female, the jury will infer that she could only have sufficient knowledge of the details of oral sexual intercourse to describe it believably if the event actually happened. He wishes to argue that she is able to describe a fantasized act of oral sex plausibly because of some similar previous experience with another person, thereby eliminating the inference that the act of sexual abuse must be real or she would be unable to describe it. Again, however, we find no logical or natural inference that the complaining witness could more plausibly describe a fantasized act of oral sex if she had experienced oral sex with another person.

Id. at 162-63.

counteract the aura of reliability surrounding the child's testimony.

Bias or Ulterior Motive. In criminal litigation, the defendant has a constitutional right to confront and cross-examine accusatory witnesses.³¹⁶ In particular, defense counsel must be allowed to cross-examine regarding possible bias or ulterior motive.³¹⁷ In its 1974 decision in *Davis v. Alaska*,³¹⁸ the Supreme Court emphasized the importance of cross-examination designed to disclose bias. The Court wrote that "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."³¹⁹ In the 1986 case *Delaware v. Van Arsdall*,³²⁰ the Court reiterated the importance of impeachment through a showing of bias when it stated that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."³²¹

In child sexual abuse litigation, the defendant's constitutional right to cross-examine the alleged victim regarding possible bias or ulterior motive occasionally runs into the countervailing policy underlying the rape shield laws. The case of *State v. DeLawder*³²² illustrates the point. In *DeLawder*, the defendant claimed that at the time of the alleged sexual assault, the minor was pregnant by someone else, and that she fabricated the rape charges against defendant "because she was afraid to tell her mother she voluntarily

316. For in-depth discussion of the sixth amendment right to confront accusatory witnesses see Myers, *Hearsay Statements by Children*, 38 BAYLOR L. REV. 702 (1986).

317. The defendant's right to cross-examine accusatory witnesses is not without limit. See *supra* section (III)(G) for discussion of the trial court's authority to limit and control cross. See also *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1435 (1986).

318. 415 U.S. 308 (1974).

319. 415 U.S. at 315-17 (emphasis in original omitted) (quoting 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1395, at 123 (3d ed. 1940)).

320. 106 S. Ct. 1431 (1986).

321. *Id.* at 1436.

322. 28 Md. App. 212, 344 A.2d 446 (1975). The *DeLawder* case does not concern a rape shield statute. Rather, the decision turns on the rule that "because consent is not an issue in a carnal knowledge prosecution, evidence that the prosecutrix had prior intercourse with men other than the accused, or that her reputation for chastity was made is *immaterial when offered as an excuse or justification*, and so is inadmissible for that reason." *Id.* at 448. Despite the fact that the case does not deal specifically with a rape shield statute, the court's reasoning is applicable when analyzing such a provision. For a case that does deal expressly with a rape shield statute see *State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (1976).

had sexual intercourse with others. To show that she thought she was pregnant at the time of the alleged encounter with [the defendant], it would be necessary to establish that she had engaged in prior acts of sexual intercourse."³²³ In holding that the defendant had a right to present evidence of the complainant's prior sexual conduct, the court wrote:

[W]e . . . conclude . . . that the jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place on the prosecutrix's testimony which provided "a crucial link in the proof . . . of [the accused's] act. The accuracy and truthfulness of the prosecutrix's testimony . . . were key elements in the State's case against DeLawder. In fact, its case depended entirely on her veracity. The claim of bias, prejudice or ulterior motive which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of the prosecutrix's possible fear of her mother."³²⁴

The decision in *State v. Jalo*³²⁵ provides further support for the argument that in some cases the defendant's right to confront and cross-examine overcomes the policy of the rape shield statutes. In *Jalo* the ten-year-old victim accused the defendant of various attempted sexual acts. The defendant denied any wrongdoing. He argued that prior to the alleged assault, the minor had voluntarily engaged in sexual conduct with defendant's thirteen-year-old son and with others. When the defendant discovered this activity, he told the complainant that he would notify her parents. Before he could do so, the child falsely accused him of sexual abuse. At trial, defendant sought to inquire into the complainant's prior sexual activity on the theory that the girl fabricated the charges against him in order to stay out of trouble. The appellate court held that the defendant had a constitutional right to pursue such evidence despite the fact that it necessitated revelation of the complainant's prior sexual conduct. The court stated that on the facts before it, the policy of the rape shield statute had to "be subordinated to the defendant's constitutional right of confrontation."³²⁶

The authorities are clear that in some cases, the defendant's right to pursue cross-examination related to possible bias or ulterior

323. *Id.* at 451 (footnote omitted).

324. *Id.* at 454 (citations omitted).

325. 27 Or. App. 845, 557 P.2d 1359 (1976).

326. *Id.* at 851, 557 P.2d at 1362.

motive must be permitted.³²⁷ To the extent a rape shield statute is violated by such examination, the Constitution mandates the violation.

Defendant May Not Use Rape Shield Statute as a Shield. In several reported decisions, defendants sought to employ rape shield statutes to exclude testimony by victims on the ground that the testimony related to the child's prior sexual activity. To put it mildly, the courts responded coolly to this interpretation of the statutes.³²⁸ The purpose of the rape shield statutes is to protect victims, not to provide a defense for perpetrators.

327. Not every claim of bias or ulterior motive will suffice to permit the defendant to inquire into past sexual conduct. *See, e.g., Kelly v. State*, 452 N.E.2d 907, 909-10 (Ind. 1983), where the court writes:

Defendant first contends that the trial court erred in granting the state's motion in limine which requested the court to prohibit any mention of, or references to, the victims' past sexual conduct in accordance with the rape shield statute. He argues that he has professed his innocence on all the charges and that the victims and their mother pressed charges against him because he had threatened actions against them for delinquency and neglect. He asserts that his daughters were using drugs and alcohol, running away from home, were sexually promiscuous and lived in a deplorable environment. His tendered exhibit No. 2 was a letter from one daughter describing the living conditions in her mother's home and the use of alcohol and sexual promiscuity of both daughters. He argues that this letter would have supported his allegation that the victims only testified out of fear that he would report them to juvenile authorities for their conduct and living conditions. He argues that since his defense was based upon the bias and ulterior motives of the witnesses, he needed to have the right to the full confrontation and cross-examination of them.

. . . In this case, defendant was allowed to question the witnesses regarding acts of delinquency other than sexual conduct, such as alcohol abuse, drug abuse, and running away from home. He also presented evidence concerning the living conditions and conduct of the girls. It is clear that defendant was not prohibited from impeaching the credibility of the witnesses by means other than their prior sexual conduct.

The purpose of the Rape Shield Statute is "to shield victims of sex crimes from a general inquiry into a history of their sexual conduct" to keep these victims from feeling that they are on trial. That purpose has been served in this case and the trial court properly invoked the Rape Shield Statute.

Id. (citations omitted). *See also Commonwealth v. Elder*, 389 Mass. 743, 452 N.E.2d 1104 (1983).

328. *See Edwards v. State*, 500 N.E.2d 1209 (Ind. 1986).

Appellants claim the trial court erred in admitting the testimony of a prosecuting witness relating to past sexual conduct after sustaining the State's Motion in Limine under the Rape Shield Statute. Ind. Code § 35-37-4-4. However, appellants totally misconstrue the statute. The testimony of the six-year-old boy to which appellants are objecting was addressed to the depraved sexual conduct of appellants, not to the conduct of a victim entitled to the protection of the Rape Shield Statute. The testimony in the instant case was admissible to show the depraved conduct of appellants.

Id.; *Jarrett v. State*, 465 N.E.2d 1097, 1098-99 (Ind. 1984).

Defendant contends that the trial court erred in overruling defendant's motion to suppress. Defendant sought to exclude the fact that the victim and one of the

IV. IMPEACHMENT

A. Introduction and General Principles

This section discusses techniques for impeachment of credibility.³²⁹ The fundamental purpose of impeachment is explained by Judge Weinstein and Professor Berger as follows: “[T]he basic aim of all credibility rules [is] to admit evidence which better enables the trier of fact on the basis of his experience to determine whether it is reasonable to conclude that the witness is lying or telling the truth.”³³⁰

There are five traditional techniques or modes of impeachment.³³¹ First, the credibility of a witness may be attacked by proving that the witness made prior statements that are inconsistent with her or his trial testimony. Second, credibility may be undermined by proof that the witness is biased or interested. Third, evidence of a witness’s character may be offered to prove that the witness is unworthy of belief. Fourth, testimony may be impeached by proof of defects in a witness’s capacity to observe, remember, or relate.

victim’s friends were found attempting anal intercourse. Defendant believes that rape shield statute precluded the introduction of this evidence. His reliance on this statute is entirely misplaced. The statute shielded the *victim* of sex crimes. from a general inquiry into the history of past sexual activity. The statute has absolutely no application to the facts of this case, a case involving a five-year-old child and an incident that occurred after the crime.

Id. (citations omitted) (emphasis in original); *Kinsley v. State*, 474 N.E.2d 513, 514-15 (Ind. Ct. App. 1985).

Kinsley first contends admission of evidence of his sexual history with T.L. and F.H. was reversible error, claiming [the rape shield statute] prohibits such evidence in a sex crime trial. We disagree.

....
Kinsley himself is not protected from having his past sexual history divulged since the statute clearly excludes the accused from its protection. . . .

....
. . . This statute was designed to protect witnesses as well as victims, not to provide a defense for the accused.

Id.

329. See FED. R. EVID. 607-610. For in-depth discussion of impeachment, see generally M. GRAHAM, *supra* note 8, §§ 607.1-610.1, at 414-506; 3 D. LOISELL & C. MUELLER, *supra* note 8, §§ 296-329, at 175-388; C. MCCORMICK, *supra* note 8, §§ 33-50, at 72-121; J. WEINSTEIN, *supra* note 8, ¶¶ 607[01]-610[03], at 607-8 to 610-5.

330. 3 J. WEINSTEIN, *supra* note 8, ¶ 607[02], at 607-21.

331. At common law a witness could be impeached for lack of religious belief. See 3 J. WEINSTEIN, *supra* note 8, ¶ 607[02], at 607-21. This is no longer the case. See FED. R. EVID. 610, which states that “[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.” See also M. GRAHAM, *supra* note 8, § 607.1, at 416 (“Impeachment by reference to matters of religion is never allowed, Rule 610.”).

Fifth, extrinsic evidence may be used to contradict a witness's testimony.

Credibility has two components: First, the willingness to tell the truth, and second, the capacity to testify truthfully. The first aspect of credibility relates to the sincerity of the witness, and on this score impeachment takes such forms as proof of conviction of crime, prior acts of misconduct not resulting in conviction, bias, partiality, or corruption. The second aspect of credibility concerns factors which render it difficult or impossible for a witness to testify accurately. In this area impeachment concentrates on defects in perception, memory, or narrative skill, and lack of personal knowledge.

B. The Collateral Fact Rule

The so-called collateral fact rule has an important impact on impeachment. Under the rule, extrinsic evidence is inadmissible to impeach a witness on a collateral fact.³³² The collateral fact rule does not govern all modes of impeachment. The rule *does* apply to impeachment by (1) prior inconsistent statement, (2) most, but not all, types of contradiction³³³ of specific facts, and (3) specific instances of misconduct not resulting in conviction.³³⁴ The collateral fact rule does *not* apply to impeachment for (a) bias, interest, corruption, or coercion, (b) deficits in mental or physical capacity, (c) lack of personal knowledge, or (d) conviction of crime under rule 609 of the Federal Rules of Evidence.

Two components of the collateral fact rule should be defined. What is "extrinsic" evidence and what is a "collateral fact"? The word "extrinsic" is defined as "not forming a part of or belonging

332. See M. GRAHAM, *supra* note 8, § 607.2, at 416-20; C. McCORMICK, *supra* note 8, § 36, at 77-78.

333. C. McCormick defines contradiction as follows:

"Contradiction" may be explained as follows. Statements are elicited from Witness One, who has testified to a material story of an accident, crime, or other matters, to the effect that at the time he witnessed these matters the day was windy and cold and he, the witness, was wearing his green sweater. Let us suppose these latter statements about the day and the sweater to be "disproved." This may happen in several ways. Witness One on direct or cross-examination may acknowledge that he was in error. Or judicial notice may be taken that at the time and place it could not have been cold and windy, e.g., in Tucson in July. But commonly disproof or "contradiction" is attempted by calling Witness Two to testify to the contrary, i.e., that the day was warm and Witness One was in his shirtsleeves.

C. McCORMICK, *supra* note 8, § 47, at 109.

334. See FED. R. EVID. 608(b).

to a thing."³³⁵ In the context of impeachment, extrinsic evidence is evidence which is not part of the witness's testimony.³³⁶ Extrinsic evidence generally is presented after the witness to be impeached leaves the witness stand.

The term "collateral fact" is not so easily defined. The most helpful approach toward understanding "this protean word of art"³³⁷ is to define the three classes of facts which are *not* collateral. Peeling away the layers of noncollateral facts discloses a core of meaning in the word "collateral." The three classes of noncollateral facts are: (1) facts that have independent relevance to the litigation, (2) facts that are admissible to discredit, and (3) facts that a witness would know if the witness experienced an event. (The third category relates only to impeachment by contradiction.) The three classes of noncollateral facts are described below.

Class One. Facts that are relevant to a case for a purpose other than impeachment are not collateral.³³⁸ To determine whether a fact is collateral, ignore its utility for impeachment purposes and ask whether the fact has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."³³⁹ If the answer is "yes," then the fact is not collateral.

Class Two. Discrediting facts which may be established by extrinsic evidence are not collateral. This class of noncollateral facts includes those establishing bias, interest, corruption, coercion, conviction of crime, deficits in mental or physical capacity, and lack of personal knowledge.

335. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 441 (1985).

336. It is possible to use extrinsic evidence to impeach a witness who is still on the stand. This happens, for example, when a witness is impeached with the witness's deposition.

337. C. McCORMICK, *supra* note 8, § 47, at 110.

338. See M. GRAHAM, *supra* note 8, § 607.2, at 417 ("A matter generally is non-collateral if the matter is relevant in the litigation for a purpose other than to contradict the in court testimony of the witness."); C. McCORMICK, *supra* note 8, § 36, at 77-78, and § 47, at 110-12; 3A J. WIGMORE, *supra* note 8, § 1020, at 1009-10.

When we seek to learn what "collateral" means, we are obliged either to define further—in which case it is a mere epithet, not a legal test—or to illustrate by specific instances—in which case we are left to the idiosyncrasies of individual opinion.

The only test in vogue that has the qualities of a true test—definiteness, concreteness, and ease of application—is that laid down in *Attorney General v. Hitchcock* [[1847] 1 Exch. 91, 99 (Pollock, C.B.)]: *Could the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose independently of the self-contradiction?*

Id. (emphasis in original); 3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-85 to -91.

339. FED. R. EVID. 401.

Class Three. The third class of noncollateral facts arises when a witness's direct testimony contains factual mistakes which the witness would not make if the witness had actually experienced the event in question. If the impeaching attorney can prove that the witness is mistaken about such basic facts, then the witness's entire testimony is called into question. Factual evidence establishing that a witness is wrong about essential facts is not collateral.

McCormick describes the third class of noncollateral facts as follows:

[A] third kind of fact must be considered. Suppose a witness has told a story of a transaction crucial to the controversy. To prove him wrong in some trivial detail of time, place or circumstance is "collateral." But to prove untrue some fact recited by the witness that if he were really there and saw what he claims to have seen, he could not have been mistaken about, is a convincing kind of impeachment that the courts must make place for, although the contradiction evidence is otherwise inadmissible because it is collateral. To disprove such a fact is to pull out the linchpin of the story. So we may recognize this . . . type of allowable contradiction, namely, the contradiction of any part of the witness's account of the background and circumstances of a material transaction, which as a matter of human experience he would not have been mistaken about if his story were true.³⁴⁰

Two examples will illustrate the third class of noncollateral facts. On direct examination, a child testifies that he was very close to the train crossing where a train collided with a car. The child asserts that a wooden crossing guard with red flashing lights was down and across the road, but that the car was driven around the guard and onto the track, where it was struck. To impeach the child's testimony, counsel may establish that there are no crossing guards of any kind at the site of the accident. If the child had actually witnessed the accident, he would not be mistaken about so basic a fact as the crossing guards. Thus, evidence about the crossing guards is not collateral, and the child's testimony may be contradicted with extrinsic evidence.

The second example relates to a prosecution for sexual abuse. On direct examination, the child testifies that the defendant forced her to touch his erect penis, and that the defendant ejaculated. By way of impeachment, defense counsel desires to establish that

340. C. McCORMICK, *supra* note 8, § 47, at 111, 112.

defendant is physically incapable of erection or ejaculation. While there is room for disagreement on these facts, it is likely that a court would permit extrinsic medical evidence to contradict the child's testimony. This evidence is not collateral because a child who experienced the events described by the alleged victim would not be mistaken about such events.

A fact is collateral unless it falls into one or more of the foregoing classes of noncollateral facts. The collateral fact rule imposes limits on impeachment by prior inconsistent statement, contradiction, and specific instance of misconduct. The effect of the rule is discussed in the context of these modes of impeachment.

1. Prior Inconsistent Statement and the Collateral Fact Rule

During cross-examination, counsel may impeach a witness with prior statements which are inconsistent with the witness's direct testimony. While the witness being impeached is on the stand, the collateral fact rule does not apply, and counsel may inquire about prior statements regardless of whether the statements are relevant for a purpose other than impeachment, that is, regardless of whether they are collateral. Of course, the trial judge may limit such impeachment if the prior statements are of marginal importance or if the attempted impeachment amounts to a waste of time. This limitation does not spring from the collateral fact rule, however, but from the court's authority to control the proceedings.

The collateral fact rule comes into play when the cross-examiner confronts the witness with a prior inconsistent statement about a collateral fact. Counsel may ask about the statement, and the witness is required to answer, but counsel is bound by the witness's answer from the stand,³⁴¹ and may not use extrinsic evidence to prove the utterance of the prior inconsistent statement concerning a collateral fact.

2. Contradiction of Specific Facts and the Collateral Fact Rule

When a witness testifies that specific facts occurred, the cross-examiner may impeach the witness by disproving the facts, that is, by contradicting the witness's testimony.³⁴² Contradicting facts may

341. It is said that the cross-examiner must "take the answer."

342. For an illustration of contradiction see C. McCORMICK, *supra* note 8, § 47, at 109.

be extracted from the witness him or herself, or the attorney may use extrinsic evidence in the form of documents or a second witness to contradict the testimony of the witness being impeached.

During the cross-examination of a witness whose testimony is impeached by contradiction, the collateral fact rule does not apply. The cross-examiner may contradict the witness with questions about collateral and noncollateral contradicting facts. The trial court may control such cross-examination, but the court's limiting authority springs from its power to control the examination rather than from the collateral fact rule.

The collateral fact rule applies to impeachment by contradiction in the following way: A witness may not be contradicted on a collateral fact by extrinsic evidence. As to collateral facts, the cross-examiner must "take the witness's answer." Thus, suppose an eyewitness to an auto accident states on direct examination that the defendant ran a red light, and that the investigating officer had red hair. The first fact is highly relevant to the litigation and is not collateral. Extrinsic evidence may be offered to contradict this testimony. The color of the officer's hair, on the other hand, is collateral. The cross-examiner may not use extrinsic evidence to prove that the officer's hair is actually brown.³⁴³

3. *Specific Instances of Misconduct Not Resulting in Conviction and the Collateral Fact Rule*

Rule 608(b) of the Federal Rules of Evidence provides that a cross-examiner may attack the credibility of a witness by asking the witness about specific instances of misconduct which did not result in conviction, but which are probative of untruthfulness.³⁴⁴ The trial court has discretion to control such impeachment.

Application of the collateral fact rule to impeachment with specific instances of conduct not resulting in a conviction is straight

343. Nor may the cross-examiner impeach the witness on this collateral fact with a prior inconsistent statement about the color of the officer's hair.

344. See FED. R. EVID. 608(b), which reads as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Id.

forward. These facts are always collateral. The cross-examiner must take the witness's answer, and extrinsic evidence may not be used to prove the conduct.³⁴⁵

The whole subject of impeachment is subject to the control of the trial judge.³⁴⁶ Within constitutional limits, the court may regulate efforts at impeachment. McCormick puts it well when he writes that, "impeachment is not a central matter, and the trial judge . . . has a discretion to control the extent to which the proof may go. He has the responsibility for seeing that the sideshow does not take over the circus."³⁴⁷

C. The Voucher Rule

At common law a party could not impeach her or his own witness.³⁴⁸ The party was said to vouch for the credibility of the witness. There were many exceptions to the rule against impeaching one's own witness,³⁴⁹ and the rule was subjected to long and

345. See M. GRAHAM, *supra* note 8, § 607.2, at 417.

346. Judge J. Weinstein and Professor Berger argue that the technical rules relating to collateral facts should be abandoned in favor of a balancing approach under Rule 403 of the Federal Rules of Evidence. They write:

Allowing the judge to rationalize his decision solely by applying the "collateral" label deprives the reviewing court of an opportunity to assess the factors considered by the trial judge. The better approach—and one in accord with the structure of the federal rules—would be to eliminate mechanical application of the "collateral" test in favor of the balancing approach mandated by Rule 403. Evidence at which the collateral test is primarily directed, which is relevant solely because it suggests that the witness may have lied about something in the past would generally be excluded because of its low probative value and its tendency to prejudice the jury. Evidence of higher probative value would be assessed in terms of its impact on the jury in light of the particular circumstances presented. Such an approach would probably effect very little change in prior results, but would authorize a flexible approach when the proffered statement has high probative value but is strongly prejudicial, or when the probative value of the statement is debatable.

3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-88 to -89.

347. C. MCCORMICK, *supra* note 8, § 40, at 88-89.

348. For discussion of the voucher rule see generally, M. GRAHAM, *supra* note 8, § 607.3, at 420-27; 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 297, at 182-91; C. MCCORMICK, *supra* note 8, § 38, at 82-85; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[01], at 607-8 to -20.

349. See 3 J. WEINSTEIN, *supra* note 8, ¶ 607[01], at 607-8 to -9. See also *Wheeler v. United States*, 211 F.2d 19, 21, 24-26 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 1019 (1954) (The *Wheeler* case contains an informative discussion of the rule against impeaching one's own witness and the exception to the rule when the proponent is surprised by the witness's testimony. The witness was a 10-year-old sex abuse victim who made a statement to a police officer shortly after the assault, but who refused to testify at trial. Judge Bazelon ruled that the trial court was correct in permitting the government to impeach the child with her prior statement.); *State v. Hookfin*, 476 So. 2d 481, 488-89 (La. Ct. App. 1985)

vigorous attack.³⁵⁰ The voucher rule is abandoned by rule 607 of the Federal Rules of Evidence, which provides that “[t]he credibility of a witness may be attacked by any party, including the party calling him.” While the voucher rule clings to life in some states, it “is being abandoned in more and more jurisdictions.”³⁵¹

D. *Impeachment with Prior Inconsistent Statements*

A witness’s testimony may be impeached with evidence that prior to testifying the witness told a different story. McCormick describes the theory of impeachment with prior inconsistent statements as follows:

The theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements.³⁵²

Under the traditional view, prior out-of-court statements of witnesses are hearsay if they are offered for the truth of the matter asserted.³⁵³ Over the years, courts³⁵⁴ and commentators argued that some or all prior statements of witnesses should be considered nonhearsay.³⁵⁵ The draftspersons of the Federal Rules of Evidence

(Five and seven-year-old rape victims. At trial one of the children testified that defendant did nothing to him. The prosecutor was surprised by this testimony because the child had on numerous occasions described the rape to him. The state was permitted to impeach the child with the child’s prior statements.); *State v. Thomas*, 1 Wash. 2d 298, 95 P.2d 1036, 1038 (1939) (Thirteen-year-old sexual abuse victim. Not long after the assault the child gave a written statement describing the assault. At trial she testified that nothing happened. The prosecutor was surprised by this testimony and was permitted to impeach the child with her prior statement).

350. See 3 J. WEINSTEIN, *supra* note 8, ¶ 607[01], at 607-12 to -13, where the authors write: “Legal writers have not had a kind word to say about the orthodox rule for many decades. They have called it ‘antiquated,’ ‘anachronistic,’ ‘irrational,’ ‘pernicious,’ ‘an evidential sacred cow,’ ‘a serious obstacle to the ascertainment of truth,’ and a rule ‘more honored in its breach than in its observance.’” *Id.*

351. C. McCORMICK, *supra* note 8, § 38, at 84.

352. *Id.* § 34, at 74. See also E. IMWINKELRIED, *supra* note 28, at 43 (“The inconsistency impeaches the witness’s memory or sincerity or both.”).

353. See C. McCORMICK, *supra* note 8, § 251, at 744; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-72 to -73; 3A J. WIGMORE, *supra* note 8, § 1018, at 996-97.

354. See, e.g., *Gelhaar v. State*, 41 Wis. 2d 230, 163 N.W.2d 609 (1969) (The court discusses the traditional rule that prior inconsistent statements are not admissible as substantive evidence. It then goes on to cite C. McCormick and J. Wigmore as to why such statements should be admitted as substantive evidence, and adopts that position. In 1974 Wisconsin adopted a version of the Federal Rules of Evidence.).

355. See C. McCORMICK, *supra* note 8, § 251, at 744-45.

settled upon a compromise position under which some, but not all, prior statements are defined as nonhearsay. Under Rule 801(d)(1)(A), an out-of-court statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.”³⁵⁶

Whether or not prior inconsistent statements are considered hearsay, such statements are admissible for purposes of impeachment. The United States Supreme Court stated in *United States v. Hale*³⁵⁷ that “[a] basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness.”³⁵⁸ When inconsistent statements are used solely for impeachment, they are not offered as substantive evidence, thus the hearsay rule is not implicated.

Before a prior statement may be offered to impeach, a determination must be made that the statement is inconsistent with the witness’s testimony. When is a prior statement inconsistent? Dean Wigmore wrote:

[a]s a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?³⁵⁹

Total or irreconcilable inconsistency is not required before a prior statement may be offered to impeach.

356. FED. R. EVID. 801(d)(1)(A).

357. 422 U.S. 171 (1975).

358. *Id.* at 176.

359. 3A J. WIGMORE, *supra* note 8, § 1040, at 1048 (emphasis in original deleted) (footnote omitted). See also 4 J. WEINSTEIN, *supra* note 8, ¶ 801(d)(1)(A)[01], at 801-109 to -110, where the authors write:

The better view, urged by Wigmore, McCormick, and others, and followed by the federal courts, allows the prior statement whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs. In other words, the keystone for impeachment use is relevancy—would the prior statement of the witness help the trier of fact evaluate the credibility of the witness, taking into account the dangers specified in Rule 403 which may mandate exclusion if they substantially outweigh the probative value of the evidence.

Id. (footnote omitted).

Three recurring scenarios raise questions about the requisite inconsistency between prior statements and trial testimony. In the first situation, a witness testifies to specific facts. The question then arises over whether the witness may be impeached with a prior statement in the form of an opinion. Some decisions prohibit this type of impeachment on the basis of the rule excluding opinions by nonexperts.³⁶⁰ McCormick rejects a wooden application of the opinion rule and writes that “the trend of holdings and the majority view is in accord with the common sense notion that if a substantial inconsistency appears, the form of the impeaching statement is immaterial.”³⁶¹

The first situation is illustrated by a child custody case in which a child testifies that he wants to live with his mother. May the father’s attorney impeach the child’s testimony with the child’s prior statement, “I hate mommy, she made daddy go away, and it’s all her fault”? The answer should not turn on the opinion rule. Rather, the court should assess the degree of inconsistency between the statement and the child’s testimony.

A second question concerns whether a witness’s prior silence can be construed as an assertion that is inconsistent with the witness’s trial testimony. The issue arises when a witness testifies that an event occurred. To impeach the witness’s testimony, the cross-examiner argues that if such an event had occurred, the average person would have uttered a verbal response at the time. The fact that the witness was silent amounts to an assertion that the event did not occur. The witness’s silent assertion is inconsistent with the witness’s testimony, so the argument goes, and should be admitted to impeach.³⁶² The authorities state that if the witness’s silence is inconsistent with the witness’s testimony, impeachment is proper.³⁶³

To illustrate the silent assertion scenario, consider a case in which a child’s prior statements lack an important detail which shows up in later testimony. Would a normal child have included the detail in the prior statement? Is the child’s silence on this important matter an assertion that the detail did not happen? If

360. See C. McCORMICK, *supra* note 8, § 35, at 76.

361. *Id.* See also 3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-78 to -79.

362. See 3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-79.

363. See C. McCORMICK, *supra* note 8, § 34, at 74-75 (“[I]f the former statement fails to mention a material circumstance presently testified to, which it would have been natural to mention in the prior statement, the prior statement is sufficiently inconsistent.”).

so, is the assertion inconsistent with the child's testimony? Answers to these questions control whether impeachment with the child's silence is appropriate.

A third situation raises questions about the very existence of inconsistency between trial testimony and a prior statement. The situation arises when a testifying witness denies any knowledge of an event concerning which he or she made a prior statement. Is the witness's purported lack of memory inconsistent with the prior statement so that the statement may be received to impeach the witness's assertion of lack of knowledge? Many cases hold that there is no inconsistency, and that impeachment is improper.³⁶⁴ Dean Wigmore disagrees, writing that:

It ought to follow that, where the witness now claims to be unable to recollect a matter, a former affirmation of it should be admitted as a contradiction. But courts have usually forbidden this, because the improper effect is apt to be to give a testimonial value . . . to the former statement: its aspect as a mere contradiction being naturally overshadowed.

This is well enough as a caution. But the unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort. An absolute rule of prohibition would do more harm than good, and the trial court should have discretion.³⁶⁵

Wigmore's position has particular merit in child abuse litigation, where recantation is not uncommon. When the child testifies that nothing happened, it is often appropriate to permit counsel to impeach the child by introducing the child's prior statements in which the child describes the abuse.

The famous 1820 decision in *Queen Caroline's Case*³⁶⁶ established the groundwork for what evolved into the foundation requirement for impeachment by written or oral prior inconsistent statements. Before impeachment could occur, counsel had to lay the proper foundation, which consisted of several elements: (1) ask the witness whether he or she made the statement, (2) give the substance of an oral statement or show a written statement to the witness, (3)

364. See *California v. Green*, 399 U.S. 149 (1970), *on remand*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971), *cert. dismissed*, 404 U.S. 801 (1971); 3 J. WEINSTEIN, *supra* note 8, ¶ 607[06], at 607-82 to -83.

365. 3A J. WIGMORE, *supra* note 8, §§ 1043, 1059, 1061.

366. 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820).

establish the time and place of the statement, and (4) determine who was present when the statement was uttered.³⁶⁷

Rule 613(a) of the Federal Rules of Evidence rejects the technicalities of the traditional foundation in favor of a more flexible approach. The rule states that “[i]n examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.” Thus, under the rule, counsel need not lay the traditional foundation. The trial judge may impose a foundation requirement in individual cases, however, to guard against unfairness or waste of time.

E. Bias and Interest

A child’s testimony may be influenced by bias or interest. It is proper to impeach a child witness with evidence of bias for or against a party,³⁶⁸ or with proof that the child is interested in the

367. See E. IMWINKELRIED, *supra* note 28, at 44-45; C. MCCORMICK, *supra* note 8, § 37, at 78-79. For discussion of effective use of impeachment with prior inconsistent statements see generally, F. BAILEY & H. ROTHBLATT, *CROSS-EXAMINATION IN CRIMINAL TRIALS* § 6.7, at 269 (1978), where the authors write:

Effective impeachment requires demonstrating and emphasizing the difference between the witness’ testimony at trial and the prior statement. The two different versions should be clearly presented, one immediately after the other, so that the contrast becomes clear to the jury. . . . This technique has several elements: 1. Recommit the witness to the fact he asserted on direct, the one you plan to impeach. Do this in a matter-of-fact way that does not arouse the witness’ suspicions, if possible. Use the witness’ actual answer on direct when you recommit him, since he is most likely to agree with the actual answer, rather than a paraphrasing. 2. Direct the witness to the date, time, place, and circumstances of the prior inconsistent statement, whether oral or written. Under FRE 613(a), you no longer need to show an impeaching writing to the witness before using it, although you must show it to the opposing counsel upon request. Many state jurisdictions, however, adhere to the old requirement. 3. Establish that the prior inconsistent statement was made at the time and under the circumstances that ensure its reliability. . . . 4. Read the prior inconsistent statement to the witness and ask him to admit making it. . . . 5. If the witness does anything other than unequivocally admit making the statement, you must prove that he did make the statement at your next opportunity.

Id. See also E. IMWINKELRIED, *supra* note 28, at 44, where Professor Imwinkelried writes that: “The opponent should get the witness committed to the inconsistent testimony on direct examination. Unless the opponent does so, the witness may later attempt to explain away the inconsistency by testifying that he or she innocently misspoke.” *Id.*

368. See *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986). In this sex abuse case the child waited approximately two years to reveal what happened. She was six at the time of the alleged assault. The trial court granted the state’s motion to preclude any evidence of hard feelings between the child’s family and the defendant. The defendant denied any wrongdoing. He claimed that the child’s parents made up the story to carry out a “vendetta”

outcome of litigation.³⁶⁹ With child witnesses bias and interest take many forms. The love and loyalty between parent and child may color testimony. A child may harbor dislike or hatred of a party. Fear engendered by or against a party may slant a child's testimony. A child's self-interest in the outcome of a case (e.g., child custody litigation) can have a powerful influence on what the child says on the stand. There are as many emotional and situational factors influencing testimony as there are witnesses.

Courts generally approve broad inquiry into bias or interest.³⁷⁰ In criminal cases the defendant has a constitutional right to cross-examine witnesses to establish bias.³⁷¹ In *Davis v. Alaska*,³⁷² the Supreme Court wrote:

against him. The South Carolina Supreme Court reversed and remanded for a new trial, holding that evidence of improper coaching and bias against defendant was "clearly relevant." See also *State v. Lairby*, 699 P.2d 1187, 1195 (Utah 1984). In this sex offense case the

defendants sought testimony that would have suggested that their former spouses had conspired to fabricate the incidents of sexual abuse and had coached the two children accordingly. The motivation, defendants claim, was to deprive [them] of the custody of their children.

"The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." This principle is subject to the limitation, however, that a defendant is not entitled to embark on "fishing expeditions."

Id. In *Woods v. State*, 657 P.2d 180, 181-82 (Okla. Crim. App. 1983), the trial judge refused to permit the defendant to attempt to show that the 15-year-old victim had a motive to fabricate the charges of sexual abuse against the defendant. The appellate court reversed. The court wrote:

The exposure of a witness's motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. . . .

. . . .

The defense sought to discredit the fifteen-year-old prosecutrix's testimony in his offer of proof to establish that her motive for filing the complaint was to punish her father for refusing to give her consent to marry her twenty-four-year-old fiance, and to retaliate for her father's threats to have her fiance arrested for statutory rape. Defense counsel attempted to elicit on cross-examination that she had on prior occasions made allegations that she had been either sexually molested or had had intercourse with certain family members, and that each time her accusations had been provoked by, or were in retaliation to, threats to have her fiance arrested. We are of opinion that inquiry into this area was relevant to impeach the prosecutrix's credibility by showing a motive or propensity to lie.

Id.

369. For discussion of impeachment bias see generally, M. GRAHAM, *supra* note 8, § 607.7, at 432-38; C. McCORMICK, *supra* note 8, § 40, at 85-89; 3 D. LOISELL & C. MUELLER, *supra* note 8, § 341, at 470-84; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[03], at 607-23 to -44 (all discussing impeachment by bias, interest, or motive).

370. See *United States v. Robinson*, 530 F.2d 1076, 1079 (D.C. Cir. 1976); *Wynn v. United States*, 397 F.2d 621, 623 (D.C. Cir. 1967); *State v. Roberts*, 25 Wash. App. 830, 834-36, 611 P.2d 1297, 1301 (1980); see also E. IMWINKELRIED, *supra* note 28, at 41 ("The courts grant the opponent great latitude in proving bias."); 3 J. WEINSTEIN, *supra* note 8, ¶ 607[03], at 607-23 ("Courts are therefore very liberal in accepting testimony relevant to a showing of bias.").

371. See *Delaware v. Van Arsdall*, 106 S. Ct. 1431, 1436 (1986).

[t]he partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of examination.³⁷³

The right to cross-examine for bias or interest is not without limit.³⁷⁴ In *Delaware v. Van Arsdall*,³⁷⁵ the Supreme Court held that the confrontation clause of the sixth amendment does not prevent courts from imposing limits on such examination. The Court wrote that "trial judges retain wide latitude insofar as the confrontation clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."³⁷⁶ Trial courts have considerable discretion to balance the right to cross-examine against the needs for judicial efficiency and fairness to witnesses.³⁷⁷

Impeachment for bias or interest is not collateral within the meaning of the collateral fact rule.³⁷⁸ Extrinsic evidence may be admitted to establish bias or interest.³⁷⁹ A majority of courts require

[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Id.; *Giglio v. United States*, 405 U.S. 150 (1972); *Davis v. Alaska*, 415 U.S. 308 (1974); *Stevens v. Bordenkircher*, 746 F.2d 342, 346 (6th Cir. 1984) ("[D]efense counsel may also question a witness concerning *why* he is biased.") (citations omitted); *United States v. Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984) ("Once the United States chose to put Ms. Eichler on the witness stand, the defendants had a protected right to show her testimony was not credible or biased."); *Burr v. Sullivan*, 618 F.2d 583, 588 (9th Cir. 1980) (Criminal defendant had right to cross-examine minor witness about witness's involvement in burglaries.); *State v. Roberts*, 25 Wash. App. 830, 834, 611 P.2d 1297, 1300 (1980) ("The cross-examination of a witness to elicit facts which tend to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court."); M. GRAHAM, *supra* note 8, § 607.7, at 434; C. McCORMICK, *supra* note 8, § 40, at 85.

372. 415 U.S. 308 (1974).

373. *Id.* at 316-17.

374. See *State v. Lairby*, 699 P.2d 1187, 1195 (Utah 1984) ("[A] defendant is not entitled to embark on 'fishing expeditions.'"); *State v. Roberts*, 25 Wash. App. 830, 834, 611 P.2d 1297, 1300 (1980) (trial court may reject cross-examination where evidence is vague, or argumentative and speculative, or only remotely shows bias).

375. 106 S. Ct. 1431 (1986).

376. *Id.* at 1435.

377. See 3 J. WEINSTEIN, *supra* note 8, ¶ 607[03], at 607-25 to -30.

378. See *supra* section (IV)(B) for discussion of the collateral fact rule.

379. See M. GRAHAM, *supra* note 8, § 607.2, at 417 ("[M]atters bearing directly upon

an impeaching party to lay a foundation before extrinsic evidence may be offered to establish bias or interest.³⁸⁰ The witness's attention should be directed to the time, place, and content of the impeaching facts, and the witness should be provided an opportunity to explain or deny them. If the witness fully admits the facts, the trial court has the discretion to limit or prohibit extrinsic evidence.³⁸¹

F. Coercion

In child abuse litigation abused children are sometimes coerced into silence or inaccurate testimony.³⁸² Coercion is usually brought to bear by the perpetrator or by an adult aligned with the offender. In such cases, the child's inaccurate testimony may be impeached by establishing the coercion.³⁸³ Child abusers are not the only adults who pressure child witnesses to provide false testimony. It is unfortunately true that some parents embroiled in child custody litigation fabricate allegations of abuse and persuade children to accuse an innocent parent. The target of such an accusation has a right to uncover the truth by impeaching the child's testimony with

the credibility of the witness in a manner other than merely through contradiction or self-contradiction, such as . . . bias, interest, corruption, or coercion . . . are non-collateral and may be contradicted by other evidence.").

380. On this point C. McCormick writes as follows:

A majority of the courts impose the requirement of a foundation question as in the case of impeachment by prior inconsistent statements. Before the witness can be impeached by calling other witnesses to prove acts or declarations showing bias, the witness under attack must first have been asked about these facts on cross-examination. There is federal case authority to this effect. Fairness to the witness is most often given as the reason for the requirement, but the saving of time by making unnecessary the extrinsic evidence seems even more important. . . .

A minority of holdings do not require any warning question on cross-examination of the principal witness as a preliminary to the introduction of extrinsic evidence of bias. The Federal and Revised Uniform Rules (1974) are silent on the subject.

C. MCCORMICK, *supra* note 8, § 40, at 87-88 (footnotes omitted).

381. *See id.* § 40, at 88, where the author writes:

We have seen that in many states the impeacher must inquire as to the facts of bias on cross-examination as the first step in the impeachment. It seems arguable that if the witness fully admits the facts claimed to show bias, the impeacher should not be allowed to repeat the same attack by calling other witnesses to the admitted facts.

Id.

382. *See M. GRAHAM, supra* note 8, § 607.7, at 433, where the author defines coercion as "any form of mental, emotional, or physical duress or compulsion that overcomes a witness' duty to tell the truth."

383. A party calling a witness may impeach its own witness if the so-called voucher rule has been abrogated. If the rule remains in force, counsel must persuade the trial judge that an exception to the rule, such as surprise, exists.

proof of the coercion which produced the inaccurate testimony.³⁸⁴

Coercion may be established through examination of the child. Alternatively, counsel may admit extrinsic evidence to establish coercion. Since this form of impeachment relates directly to the credibility of the witness, the collateral fact rule does not apply, and extrinsic evidence may be admitted.³⁸⁵ A majority of courts require counsel to lay a foundation before offering extrinsic evidence.³⁸⁶ The trial judge has discretion to limit extrinsic evidence used to impeach.³⁸⁷ In the case of coercion, however, rather broad latitude should be accorded the impeacher.

G. *Coached Testimony*

A child whose testimony is the product of improper coaching is a biased witness in that her or his testimony reflects an advocate's position rather than an objective statement of the facts.³⁸⁸ A party

384. See *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986). In this sex offense case the defendant denied guilt. He claimed that the child's parents invented the alleged abuse in order to get even with him. The supreme court held that the trial court committed reversible error when it refused to permit defendant to develop evidence to show that the victim's family was out for revenge. See also *State v. Lairby*, 699 P.2d 1187, 1195 (Utah 1984). In the *Lairby* case the defendants argued that "their former spouses had conspired to fabricate the incidents of sexual abuse and had coached the two children accordingly." The supreme court ruled that inquiry into bias and coaching is proper, but that counsel may not "embark on 'fishing expeditions.'"

385. See *supra* note 379 (Graham quotation concerning admitting extrinsic evidence).

386. The child's attention should be directed to the time, place, and circumstances of the coercion, and the child should be afforded an opportunity to explain what happened. See C. McCormick, *supra* note 8, § 40, at 87-88.

387. See *id.* § 40, at 88-89, where C. McCormick writes:

[I]mpeachment is not a central matter, and the trial judge, though he may not deny a reasonable opportunity at either stage to prove the bias of the witness, has a discretion to control the extent to which the proof may go. He has the responsibility for seeing that the sideshow does not take over the circus.

Id. (footnote omitted).

388. See *Geders v. United States*, 425 U.S. 80 (1976), where the trial court erred in instructing a defendant not to confer with defense counsel during an overnight recess. When the defendant had nearly completed his direct testimony, the court ended trial for the day. The prosecutor asked the court to instruct the defendant not to consult with counsel prior to the beginning of cross-examination the following day. The prosecutor's goal was to eliminate improper coaching by defense counsel. The trial judge so ordered the defendant. The Supreme Court reversed, holding that the trial judge's order deprived defendant of his right to counsel. The Court pointed out that the opponent can attack improper coaching where it exists. The Court wrote:

A prosecutor may cross-examine a defendant as to the extent of any "coaching" during a recess, subject, of course, to the control of the court. Skillful cross examination could develop a record which the prosecutor in the closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to

against whom coached testimony is offered has a right to examine the witness in an effort to disclose coaching.³⁸⁹ Furthermore, counsel may offer extrinsic evidence to establish coaching. The collateral fact rule should not apply to impeachment for coaching because coaching relates directly to the credibility of the witness.³⁹⁰ As is true with impeachment for bias, interest, and coercion, the court may require a foundation before counsel resorts to extrinsic evidence to establish coaching.³⁹¹

H. Character Evidence—Specific Instances of Misconduct for Which There Has Been No Juvenile Court Adjudication

A child's credibility can be attacked with evidence that the child possesses an untruthful character.³⁹² The theory of this type of impeachment is that a dishonest child may be willing to testify untruthfully.³⁹³ An accepted technique for the elicitation of character evidence is through cross-examination concerning specific instances of misconduct that have not led to conviction or juvenile court adjudication.³⁹⁴ The cross-examiner may inquire into acts

respond on the remaining direct examination and on cross-examination.

Id. at 89-90. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 341, at 473, 477.

There seems no end to the facts which may indicate bias, and courts have properly allowed wide-ranging inquiry and proof. Evidence of the following has been upheld:

... that the witness has been 'coached' by trial counsel, or has been influenced by conversations with or hearing the testimony of other witnesses.

Id.

389. See *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986); *State v. Lairby*, 699 P.2d 1187, 1195 (Utah 1984); see also *supra* note 368 (discussion of *Schmidt* and *Lairby*).

390. For discussion of the collateral fact rule, see *supra* subsection (IV)(B).

391. See E. IMWINKELRIED, *supra* note 28, at 42-43, for discussion of the proper foundation.

392. See C. McCORMICK, *supra* note 8, § 41, at 89 ("The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of particular testimony of the witness."); 3 J. WEINSTEIN, *supra* note 8, ¶ 608[01], at 608-7 to -8.

The theory underlying the use of evidence of character or conduct for impeachment purposes is that a person who possesses certain inadequate character traits—as evidenced in a variety of ways including that he has acted in a particular way—is more prone than a person whose character, in these respects, is good, to testify untruthfully. It follows from this hypothesis that evidence of his bad character, or conduct is relevant to prove that he is lying.

Id.

393. See E. IMWINKELRIED, *supra* note 28, at 33.

394. See M. GRAHAM, *supra* note 8, § 608.4, at 450; C. McCORMICK, *supra* note 8, § 42, at 90. The foundation requirement for impeachment with specific acts of misconduct involves establishing when and where the misconduct occurred. The impeacher must also establish that the act is indicative of bad character for truthfulness. See E. IMWINKELRIED, *supra* note 28, at 34.

which violate the law and into misconduct that does not constitute a criminal violation.³⁹⁵

Under rule 608(b) of the Federal Rules of Evidence, cross-examination regarding specific conduct is confined to conduct which is probative of untruthfulness.³⁹⁶ What childhood misconduct is probative of untruthfulness? With younger children, misconduct such as chronic lying or cheating at school may suffice. When the witness is an adolescent, acts such as cheating, false statements, and criminal acts which reflect dishonesty may be probative of untruthfulness.³⁹⁷

The trial judge has considerable discretion to control impeachment by specific acts of misconduct.³⁹⁸ McCormick outlines several factors which courts consider:

[C]ross-examination concerning acts of misconduct is subject to a discretionary control by the trial judge. Some of the factors that may, it seems sway discretion, are (1) whether the testimony of the witness under attack is crucial or unimportant, (2) the relevancy of the act of misconduct to truthfulness, . . . (3) the nearness or remoteness of the misconduct to the time of trial, (4) whether the matter inquired into is such as to lead to time-consuming and distracting explanations on cross-examination or

395. See *United States v. Bagaric*, 706 F.2d 42, 65 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 133 (1983) (“[I]t is clear that the prior misconduct need not have created criminal liability or resulted in conviction . . .”).

396. Rule 608(b) of the Federal Rules of Evidence reads as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

FED. R. EVID. 608(b). See C. McCORMICK, *supra* note 8, § 42, at 90, where C. McCormick describes the limits of impeachment with specific acts of misconduct as follows:

[T]he majority of courts limit cross-examination concerning acts of misconduct as an attack upon character to acts which have some relation to the credibility of the witness. This is the view adopted by Federal Rule of Evidence 608(b). Some courts permit an attack upon character by fairly wide-open cross-examination upon acts of misconduct which show bad moral character and can have only an attenuated relation to credibility. Finally, a number of courts prohibit altogether cross-examination as to acts of misconduct for impeachment purposes.

Id. See E. IMWINKELRIED, *supra* note 28, at 33 (footnotes omitted).

397. For discussion of acts which are and are not probative of untruthfulness see 3 J. WEINSTEIN, *supra* note 8, ¶ 608[05], at 608-32 to -33. See *Gramble v. State*, 492 So. 2d 1132, 1134 (Fla. Ct. App. 1986) (proper to impeach adult witness with evidence she was a chronic liar).

398. See FED. R. EVID. 403, 608(b), 611(a); C. McCORMICK *supra* note 8, § 42, at 91.

re-examination, (5) whether there is undue humiliation of the witness and undue prejudice.³⁹⁹

The decision of the Supreme Judicial Court of Maine in *State v. Walker*⁴⁰⁰ illustrates the scope of trial court discretion. Defendant was accused of sexual abuse of his stepdaughter. He denied the alleged abuse. On cross-examination of the victim, the defendant sought to attack her credibility by eliciting her admission that she stole money from her mother. The trial court refused to permit the inquiry, and the supreme court affirmed, reasoning that this evidence was only marginally related to the issue of truthfulness, and that it could confuse the jury.⁴⁰¹

The collateral fact rule applies to impeachment with evidence of specific acts of misconduct. Such evidence is considered collateral.⁴⁰² The cross-examiner cannot introduce extrinsic evidence of the asserted misconduct.⁴⁰³ If the child denies the misconduct, the examiner must "take the witness's answer."⁴⁰⁴ This is not to say that the cross-examination must end. Counsel may continue to press the witness to admit wrongdoing. Of course, the trial judge has discretion to limit repetitive, harassing, or argumentative questioning.

I. Character Witnesses

A traditional mode of impeachment is through the testimony of character witnesses.⁴⁰⁵ Rule 608(a) of the Federal Rules of Evidence

399. C. McCORMICK, *supra* note 8, § 42, at 91.

400. 506 A.2d 1143 (Me. 1986).

401. *Id.* at 1148. *But see* Gamble v. State, 492 So. 2d 1132 (Fla. Ct. App. 1986) (error to exclude cross-examination designed to show that adult witness was a chronic liar).

402. *See supra* subsection (IV)(B) for discussion of the collateral fact rule.

403. *See* C. McCORMICK, *supra* note 8, § 42, at 92, where the author writes:

In jurisdictions which permit character impeachment by proof of misconduct for which no conviction has been had, an important curb is the accepted rule that proof is limited to what can be brought out on cross-examination. Thus, if the witness stands his ground and denies the alleged misconduct, the examiner must "take his answer," not that he may not further cross-examine to extract an admission, but in the sense that he may not call other witnesses to prove the discrediting acts. This rule is adopted by Federal Rule of Evidence 608(b).

Id.

404. *See* E. IMWINKELRIED, *supra* note 28, at 33, where the author writes:

As the Federal Rule [608(b)] indicates, the opponent is ordinarily restricted to cross-examination. On cross-examination the opponent may inquire whether the witness committed the act. However, the opponent must "accept" or "take" the answer. The opponent must take the answer in the sense that the opponent cannot use extrinsic evidence to contradict the answer. Thus, if witness #1, the witness to be impeached, denies committing the deceitful act, the opponent cannot call witness #2 to testify that he or she was an eyewitness to witness #1's act.

Id.

405. On the subject of character witnesses, see generally M. GRAHAM, *supra* note 8, §§

authorizes impeachment by character witnesses who testify in the form of opinion or reputation.⁴⁰⁶ In litigation involving children, the testimony of a character witness is seldom used.⁴⁰⁷ In some cases, however, counsel may consider offering this testimony. With school-age children, for example, a teacher or principal may possess sufficient knowledge of a child's reputation for untruthfulness in the school community to justify calling the educator as a character witness.⁴⁰⁸

J. Character Evidence—Juvenile Court Adjudication

A witness's credibility may be attacked with evidence of conviction of crime.⁴⁰⁹ Conviction for certain types of criminal activity raises questions about honesty and credibility.⁴¹⁰ Child witnesses

608.2, 608.3, at 445-50; 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 304, at 215-24; 3 J. WEINSTEIN, *supra* note 8, ¶¶ 608[03], 608[04], at 608-16 to -21; C. McCORMICK, *supra* note 8, § 44, at 100-03. For discussion of the foundation requirements for character evidence see E. IMWINKELRIED, *supra* note 28, at 34-36.

406. See FED. R. EVID. 608(a), which reads as follows:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Id.

407. For a case in which the state offered the testimony of a character witness see *State v. Walker*, 506 A.2d 1143, 1149 (Me. 1986) (Harmless error to admit the testimony of a school guidance counselor that a victim of sexual abuse had a good reputation for truthfulness in the school community. The counselor spoke only with three teachers. She did not talk to any of the victim's classmates. The court ruled that "[a] 'community of two or three people is not broad enough to insure that its collective judgment concerning character is reliable.'").

408. See *id.* (harmless error to admit the testimony of a school counselor regarding a child's reputation for truthfulness in the school community).

409. For discussion of impeachment with evidence of conviction of crime see generally, M. GRAHAM, *supra* note 8, §§ 609.1-9, at 461-505; C. McCORMICK *supra* note 8, § 43, at 93-100; 3 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 314-324, at 284-381; 3 J. WEINSTEIN, *supra* note 8, ¶¶ 609[01]-609[13], at 609-46 to -139. Rule 609 of the Federal Rules of Evidence governs impeachment with evidence of conviction. Rule 609(a) states the general rule as follows:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a).

410. See E. IMWINKELRIED, *supra* note 28, at 39-40 ("Proof of the conviction creates a general inference that the witness is sometimes willing to disobey social norms; the conviction thus strengthens the inference that the witness is violating another norm and lying now.").

are rarely subjected to criminal conviction.⁴¹¹ A great many children find their way into the juvenile court system, however, raising important questions about use of juvenile court adjudications to impeach credibility.⁴¹² Competing policies are at work in this area. On one hand is the goal of the juvenile justice system to rehabilitate youthful offenders. To this end, statutes exist to protect the confidentiality of juvenile court records. These statutes are designed to bury the past so that evidence of youthful wrongdoing does not impede efforts to enter the job market and attain responsible adulthood. The policy underlying these statutes augurs against receipt of juvenile court adjudications to impeach. Balanced against the rehabilitative purpose of confidentiality is the need, and in some cases the right, to impeach the credibility of witnesses. Each side of the controversy has merit, and any hard and fast rule would be inappropriate. Decisions turn on a careful assessment of the circumstances in light of certain guiding rules and principles.

The starting point for analysis is rule 609(d) of the Federal Rules of Evidence, which reads as follows:

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Rule 609(d) contains several specific provisions. The rule establishes a preference *against* receipt of juvenile court adjudications to impeach character.⁴¹³ The rule prohibits impeachment of criminal

411. All jurisdictions provide procedures by which minors who fall under the jurisdiction of the juvenile court can be transferred to adult court for prosecution as an adult. See *Kent v. United States*, 383 U.S. 541 (1966); S. DAVIS, *THE RIGHTS OF JUVENILES* §§ 4.1-4, at 4-1 to 4-24 (1986). A minor who is convicted in adult court after transfer from the juvenile court could be impeached with evidence of the conviction. See *Luck v. United States*, 348 F.2d 763, 766-67 (D.C. Cir. 1965); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 322, at 367.

412. See generally Annotation, *Use of Judgment in Prior Juvenile Court Proceeding to Impeach Credibility of Witness*, 63 A.L.R.3d 1112 (1975). The limitations on use of juvenile court adjudications to impeach character apply to minors and to adults with juvenile records. See *People v. Poindexter*, 138 Mich. App. 322, 326, 361 N.W.2d 346, 348 (1984) ("Thus the statute protects not only juveniles, but also adults with juvenile records.").

413. See 3 J. WEINSTEIN, *supra* note 8, ¶ 609[09], at 609-100 ("The burden is on the side wishing to use the adjudication to show that the particular factors of the case excuse compliance with the usual rule of exclusion.").

defendants with such evidence.⁴¹⁴ Furthermore, the rule limits impeachment with juvenile court adjudications to criminal litigation.⁴¹⁵

Apart from the explicit limitations discussed above, trial judges have discretion to permit impeachment with juvenile adjudications when two conditions are satisfied. First, the offense is one which could be used to impeach the credibility of an adult. Second, the court is convinced that there is substantial need for the evidence.

The first requirement of rule 609(d) is that the offense be one which could be used to impeach if it were committed by an adult. Rule 609(a) establishes the parameters for this determination. Rule 609(a) states that evidence of conviction of a crime is admissible if the crime (1) was punishable by death or imprisonment for more than one year, or (2) "involved dishonesty or false statement, regardless of the punishment." The second category embraces *crimen falsi* offenses such as perjury, false statement, fraud, embezzlement, and deceit.⁴¹⁶ A juvenile adjudication for a *crimen falsi* offense may satisfy rule 609(d).

It should be noted that juvenile court adjudications for so-called status offenses will rarely, if ever, be admissible to impeach character. This is so for three reasons. First, status offenses are not crimes. Second, status offenses are unique to minors. The traditional status offenses include running away from home, truancy, curfew violation, and smoking under age. Since only minors can commit status offenses, the rule 609(d) requirement that the crime be one which could lead to impeachment if committed by an adult cannot be satisfied. Third, status offenses do not involve dishonesty or false statement. Thus, the relevance of such an adjudication to credibility is extremely attenuated if it exists at all.

414. See *United States v. Harvey*, 588 F.2d 1201, 1203 (8th Cir. 1978); *McAdoo v. United States*, 515 A.2d 412, 418 (D.C. Cir. 1986); 3 J. WEINSTEIN, *supra* note 8, ¶ 609[09], at 609-100 ("In deference to the policy considerations underlying the juvenile statutes, the subdivision explicitly denies the judge discretion to admit when the witness is the accused.").

415. See *Powell v. Levit*, 640 F.2d 239, 241 (9th Cir. 1978), *cert. denied*, 454 U.S. 845 (1981). In this civil rights action under 42 U.S.C. 1983, the ninth circuit held that:

Fed. R. Evid. 609(d) provides that evidence of prior juvenile adjudications is generally inadmissible to attack the credibility of a witness, except under certain conditions in a criminal case.

Congress specifically added the words "in a criminal case" in limiting the circumstances under which a trial court may exercise its discretion in admitting evidence of a prior juvenile adjudication. The trial court has no discretion to admit such evidence in a civil proceeding.

Powell, 640 F.2d at 241. See also 3 J. WEINSTEIN, *supra* note 8, ¶ 609[09], at 609-100.

416. See M. GRAHAM, *supra* note 8, § 609.4, at 482-85; C. McCORMICK, *supra* note 8, § 43, at 95; 3 J. WEINSTEIN, *supra* note 8, ¶ 609[04], at 609-70 to -71.

The second requirement of rule 609(d) is that impeachment with a juvenile court adjudication must be "necessary for a fair determination of the issue of guilt or innocence." Numerous factors are considered on this head.⁴¹⁷ When the determination of guilt or innocence turns on the credibility of a particular witness, broad latitude for impeachment is required.⁴¹⁸ If a juvenile court adjudication could shed light on the credibility of a key witness, it should be admitted.⁴¹⁹ Other factors include the nature of the offense, the remoteness of the event,⁴²⁰ whether the impeacher is attempting a generalized assault on character or a well-aimed probe for bias,⁴²¹ the probative value of the adjudication,⁴²² whether the witness has reason to cooperate with the prosecution,⁴²³ and whether in the particular case the rehabilitative purposes of the juvenile system have failed.⁴²⁴ The trial court has broad discretion to balance the need for impeaching evidence against the policy favoring confidentiality. Furthermore, the court considers such factors as the potential prejudice caused by such evidence,⁴²⁵ the possibility of wasting time on side issues, and the likelihood of undue harassment or embarrassment of the witness.

417. See *People v. Poindexter*, 138 Mich. App. 322, 326-27, 361 N.W.2d 346, 349 (1984); *Amin v. State*, 686 P.2d 593, 596 (Wyo. 1984); Annotation, *Use of Judgment in Prior Juvenile Court Proceeding to Impeach Credibility of Witness*, 63 A.L.R.3d 1112 (1975).

418. *Amin v. State*, 686 P.2d 593, 596 (Wyo. 1984).

419. See *Amin v. State*, 686 P.2d 593, 596 (Wyo. 1984); FED. R. EVID. 609(d), advisory committee's note ("the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice").

420. See *United States v. Lind*, 542 F.2d 598, 599 (2d Cir. 1976) (not error to exclude evidence of remote juvenile court adjudications); *People v. Hawkins*, 58 Mich. App. 69, 226 N.W.2d 851 (1975); *State v. Schilling*, 270 N.W.2d 769 (Minn. 1978); Annotation, *Use of Judgment in Prior Juvenile Court Proceeding to Impeach Credibility of Witness*, 63 A.L.R.3d 1112 (1975).

421. See *Gonzales v. State*, 521 P.2d 512, 515 (Alaska 1974), *cert. denied*, 419 U.S. 868 (1974); *People v. Poindexter*, 138 Mich. App. 322, 329, 361 N.W.2d 346, 350 (1984); *State v. Tolliver*, 562 S.W.2d 714, 719 (Mo. Ct. App. 1978).

422. See *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830, 833 (1984); *People v. Poindexter*, 138 Mich. App. 322, 329, 361 N.W.2d 346, 349 (1984); *People v. Hawkins*, 58 Mich. App. 69, 74-75, 226 N.W.2d 851, 854 (1975).

423. See *Commonwealth v. Santos*, 376 Mass. 920, 925, 384 N.E.2d 1202, 1205 (1978) (In determining whether to admit a juvenile court record to prove bias, the court should consider "(1) the probationary status of the witness, (2) some suspicion focusing on the witness, and (3) the witness's motives to please the prosecution.").

424. FED. R. EVID. 609(d), advisory committee's note ("Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure . . .").

425. See *Diaz v. Cianci*, 737 F.2d 138 (1st Cir. 1984).

The Supreme Court held in *Davis v. Alaska*⁴²⁶ that criminal defendants have a limited constitutional right to cross-examine for bias. To the extent this right conflicts with the policy of protecting the confidentiality of juvenile court records, the constitutional right prevails. Several courts have held, however, that *Davis* “does not confer a general right of cross-examination concerning a prior juvenile record.”⁴²⁷ Here too, a balancing of interests occurs, and in some cases the right to cross-examine yields to competing considerations. When the impeacher is seeking to uncover bias, interest, or favoritism, courts often permit impeachment. On the other hand, when the attorney launches a nonspecific attack on credibility, courts frequently exercise their discretion to exclude impeachment with juvenile adjudications.⁴²⁸

K. *Defects in Capacity*

A child witness may be impeached with evidence that the child’s ability to perceive, remember, or relate is impaired.⁴²⁹ Additionally, testimony can be attacked with evidence that a witness lacks personal knowledge of the relevant events.⁴³⁰ The capacity of children to perceive, remember, and relate, and the requirement of personal knowledge are considered elsewhere.⁴³¹

The collateral fact rule does not apply to impeachment with evidence of defects in capacity.⁴³² The impeacher may offer extrinsic

426. 415 U.S. 308 (1974).

427. See *United States v. Ciro*, 753 F.2d 248, 249 (2d Cir. 1985), *cert. denied*, 105 S. Ct. 2025 (1985) (Not error to exclude juvenile court adjudication when the witness was not on probation and thus had no strong motivation to lie, and when there was ample other evidence with which to impeach the witness); *State v. Schwartzmiller*, 107 Idaho 89, 685 P.2d 830 (1984) (distinguishing *Davis v. Alaska*, 415 U.S. 308, 316 (1984)); *People v. Poindexter*, 138 Mich. App. 322, 361 N.W.2d 346 (1984); *Amin v. State*, 686 P.2d 593, 595 (Wyo. 1984). See also *Davis v. Alaska*, 415 U.S. 308, 321 (1974) (Stewart, J., concurring) (“I would emphasize that the court neither holds nor suggests that the constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.”).

428. See *People v. Poindexter*, 138 Mich. App. 322, 329, 361 N.W.2d 346, 350 (1984); *State v. Tolliver*, 562 S.W.2d 714, 719 (Mo. Ct. App. 1978).

429. For discussion of impeachment with evidence of impairment of capacity to observe, remember or relate, see generally, 3 D. LOISELL & C. MUELLER, *supra* note 8, § 342, at 484-95; C. McCORMICK, *supra* note 8, § 45, at 104-09; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[04], at 607-44 to -61.

430. All federal witnesses must possess personal knowledge. See FED. R. EVID. 602.

431. See D. SCHAEFFER, *DEVELOPMENTAL PSYCHOLOGY* (1985) for in depth discussion of the developmental psychology of childhood.

432. See *supra* subsection (IV)(B) for discussion of the collateral fact rule. See also 3

evidence to establish these defects.⁴³³ The trial judge retains considerable discretion to control such impeachment, however, and in many cases extrinsic evidence is barred as unduly prejudicial or as an unnecessary invasion of privacy.⁴³⁴ On the other hand, if a child is a key witness, courts often permit use of extrinsic evidence.⁴³⁵

A witness may be impeached with evidence that her or his testimonial capacity is impaired by mental illness.⁴³⁶ It is sometimes appropriate to admit expert testimony on this subject, although the potential for confusion and undue prejudice to the witness often militates against such evidence.⁴³⁷ Difficult issues arise concerning the discovery of confidential treatment records of psychotherapists who are treating child witnesses.

In criminal litigation trial judges have the discretion to order psychiatric evaluations concerning a witness's capacity to testify with minimal credibility.⁴³⁸ Courts are loath to order such examinations, however, and for good reason. A forced psychiatric evaluation often is an unwarranted invasion of privacy.⁴³⁹

D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 484-85, where the authors write: "Like proof of bias, proof of any kind of incapacity on the part of a witness is always relevant. While cross-examination is the usual vehicle for demonstrating incapacity, extrinsic evidence of many kinds is admissible, and should not be rejected as merely 'collateral.'" *Id.*

433. The party calling a witness may be permitted to impeach the witness's credibility with evidence of defect of capacity. *See* FED. R. EVID. 607. *See also* 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 495.

434. *See* 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 485; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[04], at 607-46 ("In this entire area the dangers of prejudice and confusion are inordinately high.").

435. *See* 3 J. WEINSTEIN, *supra* note 8, ¶ 607[04], at 607-45, where the authors write that "[c]ourts should allow counsel particular latitude in cross-examining the very young or the very old since extremes of age are known to affect the accuracy of a person's recollections."

436. *See* 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 484, 490-92.

[T]he attacking party may show that the witness suffers, or has suffered, mental afflictions or illness. The witness may be cross-examined concerning present or previous mental problems or treatment. Some courts have found medical records indicating treatment for mental problems to be discoverable, or properly usable on cross-examination of the witness; a number of cases hold medical records properly excluded.

Id.; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[04], at 607-52.

437. *See* 3 J. WEINSTEIN, *supra* note 8, ¶ 607[04], at 607-52 to -61.

438. *See* Myers, *Testimonial Competence of Children*, 25 J. FAM. L. 287 (1986).

439. *See* United States v. Raineri, 670 F.2d 702, 709 (7th Cir. 1982).

The district court has broad discretion in determining whether to compel a witness to undergo a psychiatric examination. In exercising this discretion the court must consider the infringement on a witness's privacy, the opportunity for harassment, and the possibility that an examination will hamper law enforcement by deterring witnesses from coming forward.

Id. (citations omitted); United States v. Riley, 657 F.2d 1377, 1387 (8th Cir. 1981), *cert. denied*, 459 U.S. 111 (1983); United States v. Martino, 648 F.2d 367, 384-85 (5th Cir.

L. Eyewitness Testimony by Children

Children frequently provide eyewitness testimony. Indeed, in child abuse litigation the victim is usually the only eyewitness. Thus, the reliability of eyewitness testimony by children frequently assumes great importance. Psychologists continue their experimental investigation of the reliability of eyewitness testimony, and while few definite answers are available, enough has been learned to raise questions about the capacity of younger children to provide accurate eyewitness testimony.

In a review of the psychological literature published in 1984, Professors June Chance and Alvin Goldstein report that most of the studies on face-recognition in children reveal that younger children perform less well than older children and adults. Chance and Goldstein write that:

[T]he level of accuracy, as assessed by correct identifications, increases with subjects' age. At kindergarten level, percent correct [identifications] falls between 35 and 40%—or only slightly above chance; at 6 to 8 years, between 50 and 58%; at 9 to 11, between 60 and 70%; and at ages 12 to 14, between 70 and 80%. This latter range of performance is quite similar to that found for adults. These findings suggest that children past age 12 years of age are equal to adults in their performance on face-recognition tasks but that younger children are worse. Nonetheless, one must caution that these findings tell us about children's performances only under laboratory conditions; recognition memory assessed in a situation more closely resembling the real-life situation might be different.⁴⁴⁰

1981); *United States v. Haro*, 573 F.2d 661, 666-67 (10th Cir. 1978); *Hamilton v. United States*, 433 F.2d 526, 528 (D.C. Cir. 1970); *United States v. Stout*, 599 F.2d 866, 869 (8th Cir. 1979); *Collins v. United States*, 491 A.2d 480, 484 (D.C. Ct. App. 1985).

The decision whether to order a psychiatric examination of a witness to determine his competency or to aid the jury's assessment of credibility is a matter within the trial court's discretion. Because such an examination has the potential to impinge upon a witness' right to privacy and to harass a witness, a presumption exists against ordering mental examinations.

Id.

440. Chance & Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 *J. Soc. Issues* 69, 71 (1984). Chance and Goldstein conclude their article with the following observation:

We can conclude that face recognition, as assessed in laboratory studies, improves with age and reaches levels attained by adults somewhere in early adolescence; however, neither adults nor adolescents are correct in identifying faces much more than 75% of the time. Simulation studies show no age differences in the

Nothing in the psychological literature supports the conclusion that eyewitness testimony by children should be rejected out of hand. On the contrary, many litigated cases turn on eyewitness testimony by children, and appellate courts correctly affirm judgments that are based solely or partially on such evidence.⁴⁴¹ At the same time, however, the psychological evidence justifies reasonable caution when considering eyewitness testimony by young children.⁴⁴²

number of correct identifications; subjects of all ages are typically found to be poor at the task. Cognitive developmental differences have been little studied and it is still an open question as to whether they are related to face-recognition performance.

Id. at 76-77.

441. See, e.g., *People v. Schaening*, 177 Cal. App. 3d 385, 222 Cal. Rptr. 907 (1986) (Review denied by the California Supreme Court. The Supreme Court ordered that the *Schaening* opinion not be officially published.) (Eyewitness testimony of five-year-old victim of sexual abuse.); *People v. Nance*, 118 A.D.2d 664, 500 N.Y.S.2d 13 (App. Div. 1986). In the *Nance* case the court wrote:

The defendant was convicted of the rape, sodomy and sexual abuse of a 13-year-old girl. His claim that the victim's eyewitness testimony was insufficient to convict him beyond a reasonable doubt is without merit. It is clear that the testimony was highly reliable. The defendant was identified by both the victim and her mother from a photo array just two days after the incident. Moreover, he was again identified at a *Wade* hearing and then again at a trial by both women. Due to the horrifying circumstances of the attack, it is clear that the victim's attention was clearly focused on the defendant and there was ample time and good light during the attack. Moreover, the descriptions given by the victim and her mother were remarkably consistent and accurate. Under the circumstances, viewing the evidence in the light most favorable to the People, it is clear that the testimony of both eyewitnesses was credible. . . . It is well settled that the accuracy of an eyewitness identification presents an issue of fact for the jury.

Id.; *People v. Grady*, 506 N.Y.S.2d 922 (Sup. Ct. 1986).

442. In the Chance and Goldstein article referred to in the text, the authors report that young children make more *inaccurate* identifications than older children and adults. They write: "When false alarm data are reported, rates of false positive responding decrease with increased age Young school-age children make quite a few false identifications in proportion to their opportunities to do so; the rates of adolescents (13 years and older) differ little from those of adults" Chance & Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 J. Soc. ISSUES 69, 72 (1984). See also L. TAYLOR, EYEWITNESS TESTIMONY § 1-3.1, at 14-18 (1982), where Professor Taylor, a lawyer, writes:

Age can clearly be a factor in a person's ability to perceive an event and later recall it accurately. Generally speaking, psychologists have shown through repeated experiments that there is an improvement of eyewitness capability up to the ages of about fifteen or twenty

The generality is most accurately applied to children. A child is constantly in a process of development, and his ability to observe, identify an object in his mind, relate it to his environment, remember it, later recall it, and match it with another object—e.g., identify a suspect as the perpetrator seen earlier—will vary according to his stage of development. This is most apparent in the ability to recognize faces [A] group of twelve to fourteen-year-olds will identify better than six to nine-year-olds, and that eleven-year-olds will outperform eight-year-olds—who will, in turn, do better than five-year-olds.

Id.

When assessing the reliability of a child's eyewitness testimony, a number of factors should be considered. Was the child familiar with the person to be identified? Familiarity may increase the accuracy of testimony.⁴⁴³ How much time did the child have to observe the person or event? In the case of *People v. Schaening*,⁴⁴⁴ the court was persuaded by the fact that the five-year-old sex offense victim was in close proximity to her assailant for more than thirty minutes. How much time elapsed between the event and the child's testimony? The longer the delay, the greater the possibility a child's memory will fade or be distorted through improper suggestion.⁴⁴⁵ Was the person disguised? Was the child so upset by the event that the ability to perceive accurately was impaired?⁴⁴⁶ Was the child paying close attention, or was the child distracted?⁴⁴⁷ Was the lighting adequate? How far away was the child from the event or person to be identified? How old was the child when the event occurred? Younger children experience more difficulty than older ones with the cognitive tasks involved in eyewitness identification. Is the child bright or dull?⁴⁴⁸ In criminal cases, did inves-

443. See *People v. Schaening*, 177 Cal. App. 3d 385, 394, 222 Cal. Rptr. 907, 912 (1986) (In subsequently denying review, the court ordered that the opinion be not officially published. 222 Cal. Rptr. 907).

444. 222 Cal. Rptr. at 912 (The California Supreme Court denied review in this case. The Supreme Court ordered that the Court of Appeals decision not be officially published. This order by the Supreme Court renders the *Schaening* decision of no precedential value.).

445. See *supra* subsection (III)(M) for discussion of improper postevent suggestion.

446. See Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 8-22, 28. In this article former professor, now Justice, Stewart criticizes the excited utterance exception to the hearsay rule. He writes:

The most unreliable type of evidence admitted under hearsay expectations is the excited utterance. . . . Excitement is not a guarantee against lying, especially since the courts often hold that excitement may endure many minutes and even hours beyond the event. More important, excitement exaggerates, sometimes grossly, distortion in perception and memory especially when the observer is a witness to a non-routine, episodic event such as occurs in automobile collision cases and crimes.

Id.

447. See *People v. Nance*, 118 A.D.2d 664, 500 N.Y.S.2d 13 (App. Div. 1986). In this case the court upheld a conviction based on the testimony of the 13-year-old victim. The court wrote that "[d]ue to the horrifying circumstances of the attack, it is clear that the victim's attention was clearly focused on the defendant . . ." *Id.*

448. On the effect of intelligence on eyewitness identification, see Chance & Goldstein, *Face-Recognition Memory: Implications for Children's Eyewitness Testimony*, 40 J. Soc. ISSUES 69, 74 (1984), where the authors write:

Are age differences in face-recognition performance related to individual differences among children in their rate of cognitive development? Will a relatively bright child perform better than a relatively dull one? Almost no evidence concerning this question is available, although common sense would suggest that

tigating officials employ suggestive identification procedures? These and other factors may affect the accuracy of eyewitness testimony.⁴⁴⁹

In the context of eyewitness testimony by children, it is especially important to consider the possibility that postevent suggestion, often in the form of leading questions, has distorted a child's memory. A significant number of children are subjected to postevent suggestion which corrupts their recollection of events.⁴⁵⁰ The psychological literature indicates that such questioning is a potent factor in causing inaccurate eyewitness testimony.⁴⁵¹ Elizabeth Loftus and Graham Davies are leading researchers on eyewitness testimony,⁴⁵² and in a recent article they remark that "[i]n a legal situation, witnesses are questioned by relatives, police, and attorneys. What they report may be a blend of information they themselves have experienced and new details provided or constructed in the course of questioning."⁴⁵³ Obviously then, counsel should be prepared to raise the possibility of improper postevent suggestion.

M. *Expert Testimony on the Reliability of Eyewitness Testimony by Children*

A growing body of case law grapples with the question of the admissibility of expert testimony on the reliability of eyewitness testimony.⁴⁵⁴ There is authority for the exclusion of such evidence.⁴⁵⁵

information on this point might be invaluable to judges who must decide whether to admit children's testimony in court. . . .

Published studies of adults report little or no correlation between intelligence and face recognition.

Id.

449. See *id.* at 75-76.

450. For discussion of postevent suggestion and cross-examination techniques to deal with it see *supra* sections (III)(M) & (P).

451. List, *Age and Schematic Differences in the Reliability of Eyewitness Testimony*, 22 DEVELOPMENTAL PSYCHOLOGY 50, 57 (1986) ("One of the most consistent findings in psychological research on eyewitness testimony is the influence of leading question or postevent information on memory."); Clifford & Scott, *Individual and Situational Factors in Eyewitness Testimony*, 63 J. APPLIED PSYCHOLOGY 352 (1978); Dodd & Bradshaw, *Leading Questions and Memory: Pragmatic Constraints*, 19 J. VERBAL LEARNING & VERBAL BEHAV. 695 (1980); Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51, 53 (1984); Loftus, *Leading Questions and the Eyewitness Report*, 7 COGNITIVE PSYCHOLOGY 560 (1975).

452. See E. LOFTUS, *EYEWITNESS TESTIMONY* (1979).

453. Loftus & Davies, *Distortions in the Memory of Children*, 40 J. SOC. ISSUES 51, 53 (1984). This article is must reading for any attorney interested in the effect of postevent suggestion on memory.

454. See generally 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 269-71 (Supp.

In *United States v. Thevis*,⁴⁵⁶ for example, the Fifth Circuit Court of Appeal upheld a trial court decision to exclude expert testimony, writing that:

To admit such testimony in effect would permit the proponent's witnesses to comment on the weight and credibility of opponent's witnesses and open the door to a barrage of marginally relevant psychological evidence. Moreover, we conclude, as did the trial judge, that the problems of perception and memory can be adequately addressed in cross-examination and that the jury can adequately weigh these problems through common-sense evaluation.⁴⁵⁷

On the other side of the coin, a growing number of decisions acknowledge that in some cases expert testimony on the reliability of eyewitness testimony may assist the jury.⁴⁵⁸ In *People v. McDonald*,⁴⁵⁹ the California Supreme Court approved receipt of such evidence. The court wrote that:

When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony.⁴⁶⁰

The propriety of expert evidence on the reliability of eyewitness testimony will undoubtedly remain embroiled in controversy for some years. A trend appears to be developing in the authorities, however, toward limited acceptance of such evidence.

1985); Sanders, *Expert Testimony in Eyewitness Facial Identification Cases*, 17 TEX. TECH L. REV. 1409 (1986); Note, *Do the Eyes Have it? Psychological Testimony Regarding Eyewitness Accuracy*, 38 BAYLOR L. REV. 169 (1986).

455. See, e.g., *United States v. Thevis*, 665 F.2d 616, 641-42 (5th Cir. 1982). See also 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 342, at 269 (Supp. 1985) ("One underlying concern is that such testimony might dissuade the jury from exercising exactly the sort of judgment as to credibility that most believe juries are best suited to exercise. Another is that such testimony is of marginal use, and likely to confuse and distract.").

456. 665 F.2d 616 (5th Cir. 1982).

457. *Id.* at 641.

458. See, e.g., *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103, 1105-06 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 213 (1985); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983).

459. 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984).

460. *Id.* at 377, 690 P.2d at 709, 208 Cal. Rptr. at 236 (footnote omitted).

The decision to permit expert psychological testimony concerning eyewitness testimony rests in the sound discretion of the trial judge.⁴⁶¹ When the witness is a child, the psychological evidence raising doubts about the eyewitness testimony of youngsters under age twelve will sometimes combine with other factors to persuade courts to authorize expert testimony. Decisions turn on their unique facts, of course, but when a child is the principal witness, or the only witness linking a defendant to a crime, and when there is a paucity of corroborating evidence, coupled with the presence of factors such as postevent suggestion or long delay, the utility of expert testimony is increased. In some cases, principles of due process may require the receipt of such evidence.

N. Contradiction

Impeachment by contradiction takes the form of disproving the testimony of the witness under attack.⁴⁶² The theory is that evidence which contradicts the witness's testimony raises questions about the witness's memory or veracity, or both.⁴⁶³ Contradictory evidence

461. See *id.* at 377, 690 P.2d at 724, 208 Cal. Rptr. at 251. See also *People v. Schaening*, 177 Cal. App. 3d 385, 222 Cal. Rptr. 907 (1986) (Court affirms trial court decision to exclude expert psychological testimony regarding reliability of eyewitness testimony in a sex offense case involving a five-year-old eyewitness victim).

462. C. McCormick provides the following classic illustration of contradiction:

Statements are elicited from Witness One, who has testified to a material story of an accident, crime, or other matters, to the effect that at the time he witnessed these matters the day was windy and cold and he, the witness, was wearing his green sweater. Let us suppose these latter statements about the day and the sweater to be "disproved." This may happen in several ways. Witness One on direct or cross-examination may acknowledge that he was in error. Or judicial notice may be taken that at the time and place it could not have been cold and windy, e.g., Tucson in July. But commonly disproof or "contradiction" is attempted by calling Witness Two to testify to the contrary, i.e., that the day was warm and Witness One was in his shirt-sleeves.

C. McCORMICK, *supra* note 8, § 47, at 109. See also M. GRAHAM, *supra* note 8, § 607.8, at 438-39; 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 343, at 495-502; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[05], at 607-61 to -72. See also *Bixler v. Commonwealth*, 712 S.W.2d 366 (Ky. Ct. App. 1986). In this sex offense case involving an adult victim, the victim testified that prior to the assault she had never engaged in sexual intercourse with the defendant. The defendant offered to contradict the victim's testimony with evidence that he and the victim had engaged in sexual intercourse. The trial court excluded the proffered evidence. The trial judge's decision was held to be reversible error. The defendant should have been permitted to contradict the victim's direct testimony.

463. See C. McCORMICK, *supra* note 8, § 47, at 109-10 ("What impeaching value does the contradiction have . . . ? It merely tends to show [that the witness] has erred or falsified as to certain particular facts, and therefore is capable of error or lying, and this should be considered negatively in weighing his other statements."); 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 343, at 495; 3 J. WEINSTEIN, *supra* note 8, ¶ 607[05], at 607-62 ("Impeachment by contradiction rests on the inference that 'if the witness made a mistake on one fact, perhaps he made mistakes on other facts,' and therefore all of his testimony may be untrustworthy.").

may be extracted from the witness during examination, in which case the contradicting evidence may be a prior inconsistent statement of the witness. Alternatively, the impeacher may use extrinsic evidence—usually a second witness—to disprove the first witness's testimony.⁴⁶⁴

The collateral fact rule applies to impeachment by contradiction.⁴⁶⁵ The impeaching attorney cannot admit extrinsic evidence to impeach on collateral matters, and must "take the witness's answer."

O. Impeachment of a Hearsay Declarant

In child abuse litigation, hearsay statements by children often play a key evidentiary role.⁴⁶⁶ The party against whom an out-of-court statement is offered must have an opportunity to impeach the credibility of the declarant. If the declarant testifies at trial for the party offering the hearsay statement, there are few barriers to impeachment. In some cases, however, the proponent of a child's hearsay statement does not call the declarant to the stand.⁴⁶⁷ In these cases, the opponent may subpoena the child if the youngster is available. In some cases, however, the child is unavailable or incompetent. In others, counsel decides for tactical reasons not to call the child. Can counsel impeach a child's out-of-court statements when the child does not testify at trial? Under rule 806 of the Federal Rules of Evidence the answer is definitely yes.

Rule 806 provides that when a hearsay statement is admitted in evidence, "the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." The impeaching attorney may employ any of the five modes of impeachment: Inconsistent statements, character, bias, defects in capacity, and contradiction.⁴⁶⁸ Rule 806 eliminates the foundation requirements which are often required for impeachment.⁴⁶⁹

464. See 3 D. LOUISELL & C. MUELLER, *supra* note 8, § 343, at 496.

465. See *supra* subsection (IV)(B) for discussion of the collateral fact rule.

466. For in-depth discussion of hearsay evidence in litigation involving children, see Myers, *Hearsay Statements by Child Abuse Victims*, —BAYLOR L. REV. —(1986).

467. For discussion of the circumstances under which the proponent of a child's hearsay declaration must call the child as a witness, see *id.*

468. For an excellent discussion of rule 806 see 3 D. LOUISELL & C. MUELLER, *supra* note 8, §§ 500-501, at 1236-56.

469. See 4 J. WEINSTEIN, *supra* note 8, ¶ 806[01], at 806-5.

V. CONCLUSION

Litigation is the search for truth. When children take the witness stand, the search is facilitated by the frankness and honesty of most youngsters. Blackstone wisely observed that "infants of very tender years often give the clearest and truest testimony."⁴⁷⁰ Yet, the very psychological characteristics which enhance the reliability of children's testimony also create difficulties for bench and bar. The proponent of a child's testimony grapples with the developmental and linguistic immaturity of the young witness. The cross-examiner faces the formidable task of undermining the credibility of a child's testimony without incurring the wrath of the jury. Both sides adjust their examination to the ubiquitous possibility of improper suggestion. The trial court fulfills the unenviable role of arbiter, protector, and impartial judge. All concerned find it necessary to add a healthy dose of child psychology to the legal armmentarium. Like adults working with children in other settings, judges and attorneys accommodate their goals to the needs and capabilities of children. When the witness is a child, the search for truth proceeds, but justice is not blind to the reality of childhood.

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