CROSS-EXAMINING THE YOUNG CHILD IN A SEXUAL ABUSE CASE: SOME GENERAL THOUGHTS

"When are we going to give up, in all civilized nations, listening to children in courts of law?"
Psychologist J. Varondonck, 1911

"A witness wholly without capacity is difficult to imagine."
Advisory Committee Note on Rule 601, F.R.E.

As any parent understands, the young child's world is one where reality and fantasy often merge. And yet this same parent, when called as juror in a case alleging child sexual abuse, will often abandon her own common sense and participate in the prosecutor's call to engage in a mock exercise of civic virtue: protecting a child by presuming guilt in spite of the evidence. In the end, the goal of the defense attorney is to expose this approach for what it is: If adults are seeking to convict the defendant out of their own emotional needs, that's "bad touching", not civic virtue. (Paraphrased from a New York Times article.) Accordingly, it is essential the defense attorney understand, articulate and resolve the conflict jurors confront in these cases: an instinctive and understandable desire to protect the child so strong it can overcome reason while at the same time an appreciation of the importance of treating the accused fairly.

Thus, there is one theme around which the attorney must structure his defense: the child the government has brought into the courtroom is indeed a victim--but not a victim of anything the defendant has done. Rather, the child is victim of an investigative and pre-trial process which has so corrupted the reliability of her testimony that she has become the instrument of an adult agenda. The jury must understand that as harmful as it is for a 5 year-old girl to be sexually abused by her father, it may ultimately be even more harmful if she discovers when she is 18 or 19 that she is the reason her innocent father is serving a life sentence.

With this theme in mind, preparation for cross-examining the child involves extensive pre-trial investigation and discovery. It is important to understand, however, that the "real investigation" of these cases may not be found in police reports or transcribed interviews. In Pima County, Arizona, for example, the investigation and prosecution of cases alleging sexual abuse of children is governed by a protocol under which all of the agencies involved in such cases have agreed to operate as a "team". These agencies include:

1. The Pima County Attorney's Office
2. All police agencies in Pima County
3. Child Protective Services

4. The Southern Arizona Child Advocacy Center (where videotaped witness interviews and medical evaluations are conducted).

The existence of this protocol went for years undisclosed to defense counsel. When I learned about it in a case approximately two years ago, I discovered it had significance in 2 critical ways:

1. Each and every document generated during an investigation of a child sexual abuse case was freely available to each agency governed by the protocol. Thus, Child Protective Service records, deemed confidential by statute and previously disclosed at the whim of the agency, became fully discoverable under Brady and Kyles because shared with the police and the prosecutor during the investigation of the case.
2. Because of the confidentiality afforded Child Protective Services records, much of the investigation of these cases was delegated to Child Protective Service workers where critical information remained buried in their files. This allowed prosecutors to adopt the "I can't disclose what I don't know about" approach.

Attached is an “Agreement” which has been routinely used in Pima County, Arizona by Child Protective Service workers involving allegations of in-home sexual abuse for over 10 years and never disclosed to defense counsel. Testimony in a recent hearing established the wife or girlfriend of a man accused of allegations of in-home sexual abuse has been required as a matter of course to sign the agreement to retain custody of her child. Also attached are two motions addressing the use of the “Agreement” and the disclosure of all Child Protective Service records.

The importance of obtaining the complete Child Protective Services records discussed above cannot be overstated. Besides the substantive value of the information to the defense, the clandestine and coercive aspects of the investigation becomes apparent and can be powerful evidence supporting the defense theme of the child as the victim of an unfair and corrupt government investigation.

Obviously obtaining the Child Protective Services records are just part of the pre-trial investigative and disclosure process. The immediate use of all of the information obtained about the child and the circumstances surrounding the allegations and the official investigation is to challenge the competency of the child by pre-trial motion. The pre-trial competency motion is essential where the state’s case is based on the child’s testimony

and is uncorroborated by medical testimony or other evidence. The focus of the competency hearing should be on the divergence between what the child first reported to have happened and what she now perceives to be the actual event. Obviously, coercion of the custodial parent, suggestive interviews, constant approbation, tendentious counseling and all other aspects of the state's "investigation" which have affected the child's current view of reality and have shaped her testimony are relevant to the competency issue. The purpose of this hearing is to convince the court that the state's "investigation" has not been an objective fact-finding process but a mere corroborative exercise where the "perpetrator's" guilt was presumed from the moment of "disclosure". And the real harm caused by the flawed investigative methods of the state's interviewers, physicians, counselors, et al is that no one can ever know what, if anything, really happened. The state has contaminated the crime scene-the child's view of reality- and the evidence from the scene is now unreliable. The argument is it violates due process, fundamental principles of fairness, to try a man with unreliable and uncorroborated evidence.

Assuming you lose the competency hearing, as you probably will, you will inevitably have to question the child at trial. How, then, do you cross-examine the 5 year old, dressed for court like Shirley Temple, accompanied

by her mother and a victim-witness representative, doted on by the judge and thoroughly prepared to tell the jury the horrible acts she now believes the defendant committed? My experience suggests the following approach:

1. With a gentle but serious tone. You must remember, and the jury must be aware, that you are probably the first adult to talk to the child since the time the accusations first arose who has not accepted uncritically her every word and praised her for her courage. Have the child acknowledge each and every time she has discussed the allegations. Talk to her about the circumstances of these contacts and the praise and support she has received. These are not unpleasant topics and she will likely discuss them freely.

2. The jury is unlikely to believe any defense suggesting the young child has the sophistication to develop a motive to fabricate the claims against the defendant. <u>Do</u> <u>not</u> cross-examine her. She is not an adult and "Isn't it true you told…" questions are inappropriate. Proving a 5 year old has given inconsistent statements is not going to impress a jury. And since your defense is the suggestive and confirmatory investigative techniques used by the state created the allegations

in the indictment, not actual events as related by the child, questioning the child about the specific allegations gives them a legitimacy inconsistent with your theory of the case. Obviously an exception to this rule exists where the child has made a clearly fantastic claim such as seeing a large tattoo of a bird on your client's penis (Note: Confirm before trial he has none) or that other specific individuals witnessed the event who didn't. But in the routine case where the facts are plausible and the alleged events unwitnessed, using the child's testimony to establish specific inconsistencies is unwise.

3. As you emphasized to the judge at the competency hearing, you must convey to the jury you are not attacking the "credibility" of the child in the traditional sense. A 4 year old is not a liar nor a hussy regardless of how many conflicting statements she has given nor how sexualized she is. If the moment ever arises during your cross-examination of the 4 year old when you sense you are about to lapse into anything approaching an attack, return to counsel table for a drink of water and regroup. As discussed below, even if you must question the child

concerning the evolution of her conflicting statements, your tone must be non-aggressive and non-judgmental.

4. It is critical the judge understands your defense is not based on the untruthfulness of the child's testimony but rather on the manner in which it evolved. For the inconsistencies in the child's statements should be elicited from the child's adult interviewers, not from the child herself. To do so, you must make it clear from the outset that you are challenging the methodology of those who have questioned the child and that her answers are evidence of the effectiveness of that methodology in contaminating her testimony and are not being elicited to prove the untruthfulness of the child's testimony. For if the judge perceives your questions of the adults as impeachment of the child's trial testimony, you may be required to confront the child with each of her prior statements.

5. There is a danger, however, in convincing the court the child's prior statements are not hearsay. The astute prosecutor may attempt to introduce as evidence the videotape of the child's interview or interviews. And if there is one thing you don't want in the jury room during deliberations, it's that videotape.

> For that tape will be played and replayed and will dominate the jury deliberations to the exclusion of all other evidence. Coming from a television screen, the impact of the evidence is subliminally enhanced. Thus, you should obtain a pretrial ruling that your attack on methodology will not permit admission of the videotape as an exhibit. Stress to the court that the impact of the videotape as an exhibit would be prejudice of the highest order. If necessary, call an expert before trial to establish this prejudice. If in spite of your efforts, however, the court indicates the videotape will be admitted if you elicit the child's answers from her adult interviewers, restructure your examination of the adult interviewers to avoid this problem. (Remember if the videotape remains hearsay and your claim is the child's first account wasn't fabricated but misinterpreted or elicited by suggestive questioning, the state can't introduce it to rebut a claim of recent fabrication. <u>Tome v. United States</u>, 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed 2d 574 (1995))

I have attached a portion of my cross-examination of a 6 year old. On page 119, I ask the child a potentially dangerous question -- was her

mother coaching her in the courtroom. The reason I felt safe asking the question was immediately after the child's direct examination, the court recessed for a short period. During the recess, an individual observing the trial whom I didn't know, but who appeared completely credible, told me he had watched the mother using finger signals from her seat in the back of the courtroom during the child's testimony. More importantly, he told me he had noticed 4 or 5 jurors who appeared to be watching the mother's coaching. Assuming this information to be accurate, I knew I would have the support of those 4 or 5 jurors when the issue came up during jury deliberations as it invariably did. On those rare occasions during trial when you can transform jurors into witnesses in your case as to a material issue, seize the moment. A juror who is your witness will soon be your advocate assuming your conduct during the trial has not detracted from your personal ethos- your presence in the courtroom as the person the jurors most trust. Jurors may respect the judge and like the prosecutor-but they should believe you. Once you have gained this trust, even the judge's hostility can be turned to your advantage if you challenge her respectfully while exposing her conduct as unfair.

Indeed, this notion of personal ethos is absolutely essential to your cross-examination of the child witness. It is an emotional bond you have

fostered with the jury (or at least some of them) which can help offset the strong sympathy the jurors will have for the child merely because she is being made to testify. Presumably you have already asked the jurors in voir dire if they will somehow be displeased with you when you must stand and ask a 5-year-old questions you don't really want to ask. At the same time, you had the prospective panel agreeing that Mr. Wright is entitled to a fair trial and only your questions could provide that fair trial.

Having thus prepared the jurors for what you are about to do, and now looked to by some of the jurors as the one individual who with subdued passion is fighting for what he truly believes-his client's right to be treated fairly (because innocent)-the child becomes a less formidable witness. Remaining constantly aware that the child is a victim (but not of your client) and that 5 year olds don't lie, your questions should be calculated to develop your theme -- for adults to use a child to convict your innocent client to satisfy their own emotional needs is the worst kind of "bad touching".

The defense attorney who fully comprehends what his adversaries are about in a child sex crime prosecution will necessarily be angered as he confronts a process fuelled by emotion, directed by intuition rather than facts and skewed by special rules and statutes. When this anger is real, it can arouse Ciceronian rage. But the rage is never misdirected: the responding

uniformed officer who reported what he was told is not the villain; the teacher who complied with the mandatory reporting laws is not the villain; the victim's siblings are rarely villains; indeed the mother now adamantly convinced of you client's guilt is not a villain given the Orwellian process of coercion and recruitment to which she was subjected; and never, ever, is the 4 year old the villain.

While the prosecutor will normally spend several minutes with the child talking about her favorite games and what she did during the summer, your cross-examination should omit this folderol. This is not a game but serious stuff. Often I will begin my cross-examination by discussing with the child her first witness interview where she sat in a room full of toys on the floor with her interviewer. She has toys at home. When she plays with her toys, does she sometimes "pretend"? It's fun to pretend, isn't it? And when you play with your doll you can pretend she is real and goes shopping? But you don't pretend your doll has a red dress when she really has a blue dress? That's not "pretend" is it?

The purpose of this line of questioning is two-fold:

1. The court will often ask the child if his black pencil is really yellow -- if the child says, no, she's competent. Your questions

about "pretend" will convey to the jury that knowing her colors has nothing to do with the matters at hand.

2. Initiating a critical interview in a setting which suggests play requires the child to shift gears once the interview becomes substantive. This can be developed with the adult witnesses.

Questions of this type should never be followed with questions which suggest their purpose or call for a conclusion. If the child says she plays "pretend" with her doll at home, stop. Your point is made. Discussing with the child if she knows when it's "okay" to pretend and when its not "okay" is one question too many.

Simple, short questions of fact are the best approach. Not only do you want the child to understand the question, you want the jury to know the child understood the question. A 4 year old probably isn't going to know when mommy and daddy took a trip to Las Vegas. She will remember the name of her babysitter; she will know she had a babysitter because mommy and daddy weren't home; and she will remember the present she got when mommy and daddy came home. If where and when mommy and daddy went is important, some other witness can provide this information.

Also remember, 4 year olds haven't reviewed their transcribed statements. Referring to transcripts, other than to direct the prosecutor to a

specific source for your question, is pointless. The best practice is to guide the child to recall the interview with simple facts she will remember. You went with your mommy? Another lady drove the car? You went to a big building? The big building was right beside Toy's R Us? In the big building was a room with dolls, and blocks and a little table? You talked to a lady in that room? After you talked to this lady, you watched yourself on television? You saw on television the room with the dolls and blocks and the little table? And you were on television in that room? And the lady you talked to in that room was on television too? How many times did you watch the television show? Did you see yourself leave the room? Do you remember where you watched the television show? Who was with you when you watched the television show?

The jury now knows the child has reviewed her statement -- but not with transcripts. Accordingly, questions and answers from that interview can be paraphrased if done so accurately. No one expects the child to remember the exact words. If the prosecutor is foolish enough to demand you confront the child with the exact wording from the transcript, do so while making it apparent to the jury this foolish exercise is the prosecutor's idea not yours.

Several years ago at one of these seminars I heard a psychologist observe that young children approach adults as omniscient. That is, the young child rarely is asked for information the child assumes the adult doesn't already have. Being the source of new information is a unique role for many young children who will accordingly look to the adult questioner for signs of the "correct" answers. Thus, it is not difficult when cross-examining a child to establish a rhythm of questioning which will lead the child to agree to virtually any question you ask, even to the point of acknowledging the preposterous. But my experience has taught me this is ineffective and can annoy juries. It is not the way to prove children are susceptible to suggestive questioning. This will be perceived by the jury as unfair and as inconsistent with your constant appeal to the jury's sense of fairness. Furthermore, implicit in your theory of the case is the child is your victim, not the state's, and you don't trick or manipulate your own victim.

While this paper has briefly discussed some general thoughts on questioning the child concerning the specific aspects of the investigation and statements she has previously given, this is not what you want to be doing. Cross-examining the child witness concerning details of the case occurs only because it must: the judge has ruled obtaining this information through the adults opens the door for the state to admit otherwise inadmissible evidence

to rebut your attack on methodology. He has considered and denied your argument that rebuttal of this kind is overkill and is so highly prejudicial it will turn the trial into a slow guilty plea.

When and if it is possible, your cross examination of the child is limited and designed to set the stage for your questioning of the true villains: those who purported to "investigate" the case but did so by:

1. Silencing the most important investigative resource, the mother, with a contract demanding acceptance of the state's preconceived notions of the defendant's guilt.
2. Subjecting the child to interviews designed to crystallize claims previously unclear or ambiguous and which often invite embellishment.
3. Rewarding the child's confirmation of her questioner's preconceptions with lavish praise which both reinforces the child's inclination to repeat this version of the events (whether accurate or not) and closes the window to recantation.
4. Calling child advocates, masquerading as physicians, as experts to claim the child's allegations are a "medical history" and that the normal findings in her physical examination "are not inconsistent with the history given".

None of this is fair. Fairness is visceral. It is felt. It is expected of the government by the jurors. And there are very few child abuse cases where the government hasn't disdained fairness by intentionally contaminating the crime scene -- destroying the reliability of what may be its only evidence, the child's testimony. This is unfair to your client. It is unfair to the child. Indeed, it is unfair to the jurors to ask them to make a decision of this magnitude based on what is really corroboration and not investigation. This is "bad touching" of the worst kind for it places us all at risk of being next.