

## Comment, THE CHILD AS WITNESS

The topic of child testimony has been the subject of heated debate and controversy from the time the rules of evidence began changing to lift the outright prohibition on child testimony.<sup>1</sup> Concerns are many, including the reliability of the child's testimony, the rights of the criminal defendant, and the potential traumatic and detrimental effects this nation's adversarial trial process might have on the child witness.<sup>2</sup> Still, there are often a number of reasons that a child may be called to the stand. The most common reason is in cases of child abuse and neglect, where the child victim is often a relevant, if not one of the only, sources of evidence. A child may also be called in civil cases of dissolution or modification to determine the child's wishes or to provide other relevant insight into family dynamics. In other cases, the child may be the accused. Regardless of the controversy surrounding child testimony, the fact remains that children are called to testify in court on a regular basis. Attorneys, courts, and families of the child witness should be cognizant of the peculiarities and complexities that arise when calling a child to the stand in order to protect the child's interests and wellbeing.

This comment navigates the current state of the law regarding child competency in both civil and criminal proceedings. The comment addresses the effects of testifying on the child as well as the practical concerns of those involved in the process. Part I outlines the development of evidentiary rules as they relate to children and gives an overview of current federal and state variations on determinations of child competency. Part II navigates proce-

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<sup>1</sup> See Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1021 (2000). See also John Christiansen, *Washington Survey: The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62 WASH. L. REV. 705, 705-08 (1987).

<sup>2</sup> See generally Josephine Bulkley, *Symposium on Child Sexual Abuse Protections: The Current State of the Art: Article: Introduction: Background and Overview of Child Sexual Abuse: Law Reforms in the Mid-1980's*, 40 U. MIAMI L. REV. 5, \*10 (1985); Christiansen, *supra* note 1, at 705-08; Laureen A. D'Ambra, *The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, 19 ROGER WILLIAMS U. L. REV. 323, 323-26 (2014).

dural differences between the federal and state systems, considerations for appeal, and specific protections given to child witnesses and defendants in criminal cases. Finally, Part III looks at current research on child testimony and outlines best practices for attorneys.

## **I. Development and Current State of Child Evidentiary Law**

### *A. Governing Law*

Historically, laws regarding competency of a witness to testify were largely based in common law and founded on religious principles that sought to prevent perjury by the witness.<sup>3</sup> Early rules of evidence reflected these principles by disallowing testimony by certain generalized groups. Categories of witnesses who were deemed incompetent “included atheists, agnostics, convicted felons, parties to the case and their spouses, persons with an interest in the case, children and the mentally ill . . . preventing the witnesses with the most knowledge of the case from testifying.”<sup>4</sup> While fragments of these principles remain in some states still relying on common law when making competency determinations, the rules of evidence have largely changed to no longer deem entire classes of individuals categorically incompetent.<sup>5</sup> The Model Rules of Evidence in the 1940s and the Uniform Rules of Evidence in 1953 started a trend toward codifying evidence law, cumulating in 1975 with the Federal Rules of Evidence (FRE).<sup>6</sup> Now, forty-four states operate under rules based

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<sup>3</sup> See 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 603.02 (Mark S. Brodin, ed. 2d ed. 1997); University of Wisconsin Law School, *Chapter Two: Competence of Witness*, <http://law.wisc.edu/evidence/ch02.html> (last visited Sept. 20, 2017).

<sup>4</sup> SYDNEY BECKMAN, EVIDENCE: A CONTEMPORARY APPROACH 397-482 (2d ed. 2012); WEINSTEIN & BERGER, *supra* note 3, at § 603.02; University of Wisconsin Law School, *Chapter Two: Competence of Witness*, <http://law.wisc.edu/evidence/ch02.html> (last visited Sept. 20, 2017).

<sup>5</sup> See University of Wisconsin Law School, *supra* note 3.

<sup>6</sup> See Virginia Committee on Evidence, *Report of Committee on Evidence* (Aug. 29, 2012), <https://c.yimcdn.com/sites/www.vba.org/resource/resmgr/imported/5.pdf>.

on the FRE.<sup>7</sup> Still, there are important differences between the federal and state laws, since some states adopted slight variations outright and other states have been slow to match updates to the FRE.<sup>8</sup>

Generally, competency to testify, whether for a child or an adult, is defined as a person's "legal fitness, or legal qualification, to give testimony."<sup>9</sup> Federal Rule of Evidence 601 sets out the general rule regarding competency, stating: "Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision."<sup>10</sup>

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<sup>7</sup> WEINSTEIN & BERGER, *supra* note 3, at § 6T Notes. States include: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. (Excluding California, District of Columbia, Kansas, Massachusetts, Missouri, New York, and Virginia).

<sup>8</sup> See WEINSTEIN & BERGER, *supra* note 3, at § 603.02.

<sup>9</sup> M. L. Cross, Annotation, *Competency of Young Child as Witness in Civil Case*, 81 A.L.R. 2d 386, \*3 (2017).

<sup>10</sup> FED. R. EVID. 601. See also WEINSTEIN & BERGER, *supra* note 3, at § 603.02 (State variations include: Alabama, Similar to first sentence of F.R.E. 601; Alaska, Differs from F.R.E. 601, explains standards for witness competency; Arizona, Differs from F.R.E. 601, adds "or by statute," deletes second sentence; Arkansas, Similar to first sentence of F.R.E. 601; Colorado, Similar to first sentence of F.R.E. 601, adapted to state practice; Connecticut, Differs from F.R.E. 601, omits second sentence; Delaware, Similar to first sentence of F.R.E. 601, omits second sentence; Florida; Similar to first sentence of F.R.E. 601, see FLA. STAT. § 90.603 (2017) "Disqualification of witness"; Hawaii, Similar to first sentence of F.R.E. 601, omits second sentence; Idaho, Differs from F.R.E. 601; Indiana, Similar to first sentence of F.R.E. 601, adapted to state practice; Iowa, Provides only "unless otherwise provided by statute or rule, every person is competent to be a witness"; Kentucky, Similar to F.R.E. 601, "Minimal Qualifications" added by new subdiv. (b); Louisiana, Similar to first sentence of F.R.E. 601; Maine, Similar to first sentence of F.R.E. Rule 601, adds new subdiv. (b), "Disqualification of Witness"; Maryland, Similar to first sentence of F.R.E. 601, omits second sentence; Michigan, Differs from F.R.E. 601, phrase re court finding incompetence; Minnesota, Different rule on witness competency; Mississippi, Differs from F.R.E. 601, adapted to state practice; provides for marital privilege and bars eminent domain appraiser; Montana, Similar to first

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The rule was adapted following *Erie R.R. Co. v. Tompkins* to incorporate the court's holding that "a federal judge must now apply state competency restrictions when 'state law supplies the rule of decision.'"<sup>11</sup> Most states, however, follow the FRE's lead by no longer excluding those groups that were historically prevented from testifying, including children.<sup>12</sup> The rule has, in essence, "converted questions of competency into questions of credibility . . . 'in favor of hearing the testimony for what it is worth'"<sup>13</sup> In other words, instead of blatant disqualification of certain groups, "[c]ompetency now refers to the general qualities that a witness must possess, the minimum standard of credibility necessary to permit any reasonable person to put any credence in a witness's testimony."<sup>14</sup> The process of determining that minimum level of credibility is left to the trial court.<sup>15</sup> The trial court is tasked with making this determination, because it has the advantage of being in the courtroom to see, hear, and otherwise

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sentence of F.R.E. 601, adds subdiv. (b), "Disqualification of witnesses"; Nebraska, Similar to first sentence of F.R.E. 601; Nevada, Similar to F.R.E. 601, substitutes "this Title" for "these rules"; New Hampshire, Differs from F.R.E. 601, Adds provisions defining incompetence of witness; New Jersey, Consistent with F.R.E. 601, adapted to state practice; New Mexico, Identical to first sentence of F.R.E. 601; North Carolina, Subdiv. (a) similar to first sentence of F.R.E. 601; North Dakota, Identical to first sentence of F.R.E. 601; Ohio, Similar to F.R.E. 601, new subdivisions added; Oklahoma, Similar to first sentence of F.R.E. 601; Oregon, Similar in effect to F.R.E. 601, but language differs in its entirety; Pennsylvania, Subdiv. (a) substantively identical to first sentence of F.R.E. 601; Rhode Island, Similar to first sentence of F.R.E. 601; South Carolina, Differs from F.R.E. 601, Omits second sentence; adds subdiv. (b), "Disqualification of a witness"; South Dakota, Similar to first sentence of F.R.E. 601, adapted to state practice; Tennessee, Similar to first sentence of F.R.E. 601, adds "or by statute"; Texas, First sentence similar to first sentence of F.R.E. 601; Utah, Subdiv. (a) identical to first sentence of F.R.E. 601; Vermont, Subdiv. (a) similar to F.R.E. 601; Virginia, Similar to first sentence of F.R.E. 601, omits second sentence, adds subdiv., (b)"Rulings"; Washington, Similar to first sentence of F.R.E. 601, adds "by statute"; West Virginia, Similar to F.R.E. 601, adapted to state practice; Wisconsin, Similar to first line of F.R.E. 601, adapted to state practice; Wyoming, Similar to first sentence of F.R.E. 601).

<sup>11</sup> WEINSTEIN & BERGER, *supra* note 3, at § 601 (discussing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

<sup>12</sup> *See id.* at § 601.04(2)(a).

<sup>13</sup> *Id.* at § 601.02.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

observe the witness in person.<sup>16</sup> In sum, the court determines competency, defined in part by the child witness' minimum level of credibility to testify, while the jury is left to decide on the credibility of the child's testimony beyond that competency threshold.<sup>17</sup>

### B. *The Standard of Competency Generally*

For children, the key competency issues are whether the child witness understands his or her duty to tell the truth and whether the child can “observe, recollect, communicate, and appreciate the necessity of telling the truth.”<sup>18</sup> This holds true for states that have adopted statutes similar to the FRE and those that have not.<sup>19</sup> Many states have set out statutory presumptions, based largely on common law, that establish a presumption of competency for any child past a certain age, as discussed below. Still, case law has made clear that no precise age determines competency as a matter of fact.<sup>20</sup> In the landmark case, *Wheeler v. United States*, the Court found no error where a five-year-old boy was permitted to testify in the case against his father's alleged murderer.<sup>21</sup> The boy witnessed the homicide and had information relevant to the case.<sup>22</sup> During voir dire the boy established that he knew the difference between a truth and a lie, that the “bad man would get him” if he lied, and went on to answer more basic questions regarding his school and relationship to his father.<sup>23</sup> The Court held that the child was not, purely due to his age, disqualified from testifying.<sup>24</sup>

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<sup>16</sup> See Nora A. Uehlein, Annotation, *Witnesses: Child Competency Statutes*, 60 A.L.R. 4TH 369, \*2a (2017).

<sup>17</sup> *Id.* See also Caroll J. Miller, Annotation, *Instructions to Jury as to Credibility of Child's Testimony in Criminal Case*, 32 A.L.R. 4TH 1196, \*2 (2017).

<sup>18</sup> *State v. Rivera*, 987 A.2d 887, 898 (R.I. 2010). See also WEINSTEIN & BERGER, *supra* note 3, at § 601.04(2)(a).

<sup>19</sup> See WEINSTEIN & BERGER, *supra* note 3, at § 603.02.

<sup>20</sup> See Laurie Shanks, *Evaluating Children's Competency to Testify: Developing a Rational Method to Assess a Young Child's Capacity to Offer Reliable Testimony in Cases Alleging Child Sex Abuse*, 58 CLEV. ST. L. REV. 575, 581 (2010).

<sup>21</sup> See *Wheeler v. United States*, 159 U.S. 523, 523-25 (1895).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 524.

<sup>24</sup> *Id.*

### C. Age-Based Presumptions Regarding Competency

State law regarding child competency to testify is largely based in statute, though some states still rely on common law, which typically establishes the age of competency at fourteen years old.<sup>25</sup> The states that have statutory provisions typically follow one of two basic approaches. The first approach sets out a fixed, presumptive age of competency.<sup>26</sup> In these jurisdictions, the statutes that set out a presumptive age of competency can be further divided as either presuming competency at age twelve or at age ten.<sup>27</sup> Whether a child is, in fact, competent is determined through preliminary examination. Depending on the state, the examination may be discretionary or mandatory depending on whether the child is above the presumed age or whether the state sets out a presumptive age at all.<sup>28</sup> Children under the presumed age must often go through mandatory examination while children over the presumed age are examined at the court's discretion.<sup>29</sup> Even where the child is presumed competent, the court may require preliminary examination.<sup>30</sup> Furthermore, some courts will order a preliminary examination when an objection is made to the child testifying.<sup>31</sup>

The second type of statutory provision does not set any fixed, presumed age of competency and, instead, simply provides guidelines for making a competency determination.<sup>32</sup> In these states operating without a statutory or common law presumption about age of capacity, the court may find that the preliminary

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<sup>25</sup> See Uehlein, *supra* note 16, at \*2a, \*42.

<sup>26</sup> See *id.* at \*2a.

<sup>27</sup> *Id.* Age ten states include: California, Colorado, Idaho, Indiana, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, Ohio, Oklahoma, Oregon, Utah, Washington, and Wyoming. Age twelve states include: Louisiana, New York.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.* See also WEINSTEIN & BERGER, *supra* note 3, at § 601.04. States without age presumptions include: Alabama, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, New Hampshire, New Mexico, North Carolina, Oklahoma, Tennessee, Texas.

examination is either mandatory or discretionary depending on the state.<sup>33</sup>

For purposes of establishing the presumption, a child's age is determined at the time that the witness is offered, though the child's competency at the time of the subject matter event is also an important consideration.<sup>34</sup> Still, "it may still be necessary to qualify a child that has passed the presumptive age if the subject of the litigation took place at a point in time when the child had not yet reached the presumptive age of competency."<sup>35</sup> It is important to remember, however, that even presumptions may be questioned by a party or by the court. If questioned, the court may require a determination of competency by the court through *voir dire* regardless of statutory provisions.<sup>36</sup>

## II. Procedural Concerns in Trial, Appeal, and Criminal Cases

### A. Parties Present and Content of Examination

Whether the defense attorney, prosecuting attorney, parents, court reporter, or jury may be present during preliminary examination depends on state law, though at minimum, the judge, child, and court reporter must generally be present to keep an adequate record.<sup>37</sup> On the other hand, juries are mostly not allowed to witness the child's examination, since it may prejudice the jury.<sup>38</sup> Evidence other than live, in-court testimony is also subject to competency rules; this includes hearsay, where both the child declarant and the child witness must be competent.<sup>39</sup> Furthermore, depositions of children require a finding of competency.<sup>40</sup>

Where a child's competency is in question, the evaluation of a child witness can be broken into five components:

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<sup>33</sup> See Uehlein, *supra* note 16, at \*2b.

<sup>34</sup> Cross, *supra* note 9, at \*2.

<sup>35</sup> Uehlein, *supra* note 16, at \*2b.

<sup>36</sup> See Cross, *supra* note 9, at \*2.

<sup>37</sup> See Uehlein, *supra* note 16, at \*2a.

<sup>38</sup> See *id.*

<sup>39</sup> See *id.* at \*28.

<sup>40</sup> See *id.* at \*29.

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(1) the mental capacity, at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (2) a memory sufficient to retain an independent recollection of the occurrence; (3) the capacity to express in words his memory of the occurrence; (4) the capacity to understand simple questions about it; and (5) an understanding of the obligation to speak the truth on the witness stand.<sup>41</sup>

Only when the trial court finds that the child’s testimony does not have probative value may the court reject the testimony.<sup>42</sup> Still, the substantive content of the preliminary examination itself varies widely among jurisdictions and cases. Some states adopt the “oath understanding” approach to voir dire, focusing on the child’s ability to understand the importance of an oath.<sup>43</sup> Other states take the “full inquiry” approach to voir dire, allowing inquiry into all aspects of the child’s life and development.<sup>44</sup> Finally, the federal system utilizes the “no inquiry” approach to voir dire, allowing only general objections to the testimony.<sup>45</sup> Those objections may be to relevance, lack of personal knowledge, or prejudicial effect.<sup>46</sup>

However, voir dire of the child witness, in many cases, mirrors the following “red pen/black pen” format:

“Can you tell us your name?” the prosecutor begins. “Suzi,” the child responds in a barely audible whisper. “Don’t be afraid. Where do you go to school?” No answer. “Do you know your teacher’s name?” “Miss Cindy,” Suzi mumbles. “Very good,” the attorney smiles and nods. “Is Miss Cindy nice?” Nod of head. “How old are you?” Holds up her hand, palm out, with all five fingers extended. “Five—what a big girl you are!” “Can you count to ten?” Suzi does so, and the prosecutor praises her effusively.

With the preliminaries over, the prosecutor now straightens, takes out a black pen and waves it in front of Suzi. “What color is this pen, Suzi?” “Black.” “You’re right! Good girl. Is that the truth?” “Uh-huh.” “You’re right, it is the truth. You are very smart.” The prosecutor pauses for a moment and asks in a serious tone, “Okay, Suzi, now if I tell you that this pen is red,” holding up the same black pen, “would that be the truth or a lie?” “A lie,” replies Suzi. “That’s right!

<sup>41</sup> Cross, *supra* note 9, at \*3.

<sup>42</sup> WEINSTEIN & BERGER, *supra* note 3, at § 604.04(2)(a).

<sup>43</sup> Lucy S. McGough, *Asking the Right Questions: Reviving the Voir Dire for Child Witnesses*, 5 GA. ST. U.L. REV. 557, 560 (1989).

<sup>44</sup> *Id.* at 566.

<sup>45</sup> *Id.* at 569.

<sup>46</sup> *See id.* at 570-71.

Perfect! You are doing such a good job,” the prosecutor beams, as he nods and smiles. He then frowns and deepens his voice. “Now,” he says, “is it a good thing or a bad thing to tell a lie?” “A bad thing,” Suzi says sinking a bit lower in the chair. Again, the prosecutor is all smiles. “That is exactly right. You are such a smart girl.” He takes a dramatic pause, frowns, and with a gloomy voice adds, “What would happen if you told a lie?” “Mommy would be mad and put me in time-out, and God would be sad,” Suzi whispers, again to accolades from the prosecutor.<sup>47</sup>

Regardless of the state’s adopted method of preliminary examination, scholars have criticized traditional methods of voir dire. For example, the questions involved in the “oath understanding” approach often emphasize language ability more than conceptual development.<sup>48</sup> The result is an exclusion of reliable witnesses and an inclusion of unreliable ones based on language development.<sup>49</sup>

As for the “full inquiry” method, the questioning is far too over-inclusive.<sup>50</sup> The method emphasizes inquiry into all facets of the life.<sup>51</sup> By allowing questions about the child’s age, grades in school, likes and dislikes, etc., the court is venturing into irrelevant territory that bears only loose association to the child’s ability to recall and communicate valid testimony regarding the subject matter of the litigation.<sup>52</sup>

Finally, scholars criticize the federal “no inquiry” test for multiple reasons.<sup>53</sup> The method eliminates preliminary examination entirely and, as a result, “[c]ompetency issues are thus converted into credibility issues.”<sup>54</sup> Subsequently, normal procedural safeguards are left to the task of examining the child’s competence, resulting in an assumption of effective cross-examination where it often does not exist, reliance on attorney screening of witnesses, and too little guidance in the decision to produce a child witness at all.<sup>55</sup>

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<sup>47</sup> Shanks, *supra* note 20, at 576.

<sup>48</sup> McGough, *supra* note 43, at 566.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 568.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 558.

<sup>55</sup> *Id.* at 570.

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Beyond mere interview of the child, some states will allow psychiatric examination in cases where it is helpful.<sup>56</sup> An expert may sometimes be used to perform “developmentally appropriate testing” of the child.<sup>57</sup> For example, one court allowed reports from two separate psychiatric examinations where the request was made prior to trial.<sup>58</sup> In cases where competency is established without psychiatric examination, however, courts have denied such motions.<sup>59</sup> Corroborating evidence, including testimony by parents, bystanders, or neighbors, and physical evidence, is often allowed to support a child’s testimony.<sup>60</sup> Furthermore, attorneys are generally permitted to instruct the child witness regarding what will happen during preliminary examination and the purpose of such examination, including the need to tell the truth and the consequences for lying.<sup>61</sup>

B. *The Oath Requirement*

Following a successful preliminary examination, the child will be required to take an oath or affirmation to tell the truth; however, no specific oath, in the traditional sense, is required.<sup>62</sup> As Rule 603 states: “[b]efore testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.”<sup>63</sup>

The committee’s comment reiterates the rule’s flexibility: “[t]he rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.”<sup>64</sup> Furthermore, the child is not required to understand the word “oath” itself.<sup>65</sup> The child, in other words, need only understand

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<sup>56</sup> See Uehlein, *supra* note 16, at \*2a.

<sup>57</sup> Shanks, *supra* note 20, at 601.

<sup>58</sup> Uehlein, *supra* note 16, at \*18a (citing *State v. Garner*, 569 P.2d 1341 (1977)).

<sup>59</sup> *Id.* at \*18b (citing *State v. Jerousek*, 590 P.2d 1366 (1979)).

<sup>60</sup> See *id.* at \*2a.

<sup>61</sup> See Cross, *supra* note 9, at \*2.

<sup>62</sup> See *id.*

<sup>63</sup> FED. R. EVID. 601.

<sup>64</sup> *Id.*

<sup>65</sup> Uehlein, *supra* note 16, at \*2a.

that it is wrong to lie and that lying will result in punishment.<sup>66</sup> The child's ability to do so should be established during preliminary examination.

### C. Common Points on Appeal

The sufficiency of preliminary examination is often a point on appeal and courts have taken different approaches addressing the issue across states. In every state, however, it is clear that trial courts receive great deference on the issue of child witness competency because the judge is thought to have a better understanding of the child's state at the time of testimony, by virtue of the child's presence in the courtroom, than that of the appellate court, which is limited to the record.<sup>67</sup> Even with this deference, there is "one reversal to every four affirmances" on the issue.<sup>68</sup>

Many appeals fail on the appellate court's finding that the issue is one of credibility and not one of competency.<sup>69</sup> For example, appellate courts have deemed confusion regarding dates and the passage of time, hesitancy or unresponsiveness, and inconsistent statements all as matters of credibility.<sup>70</sup> Other unsuccessful points on appeal include the use of leading questions, since children often require more guidance during direct examination.<sup>71</sup> Another common issue is whether a psychiatric examination was permitted or whether preliminary examination was limited to *voir dire*.<sup>72</sup>

As for jury instructions, some courts state that instruction should only occur when the child is testifying to material facts in sexual abuse cases.<sup>73</sup> Other courts state that allowing child testimony is purely within the trial court's discretion because the court is most able to determine whether instruction is necessary, having viewed and listened to the child in real time.<sup>74</sup> Still other

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<sup>66</sup> Cross, *supra* note 9, at \*4. Note that there is a gray area regarding the requirement that a child believe in divine punishment as a consequence for lying on the stand.

<sup>67</sup> See Uehlein, *supra* note 16, at \*2a .

<sup>68</sup> Cross, *supra* note 9, at \*2.

<sup>69</sup> See Uehlein, *supra* note 16, at \*2a.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See Miller, *supra* note 17, at \*2.

<sup>74</sup> See *id.*

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courts have held that instructions should never be given as to the credibility of the witness, because that is purely a question for the jury.<sup>75</sup> The actual content of the jury instructions can vary between cases. Some instructions provide in-depth discussion of potential issues regarding the child's credibility while others merely mention the issue.<sup>76</sup> On appeal, instructions depend less on the exact words of instruction and more on the particular circumstances of the case and of the child.<sup>77</sup>

D. *Criminal Cases: High Complexity and High Stakes*

Generally, most state competency statutes apply in both civil and criminal cases. Criminal cases involving children are often complex and highly emotional due to the nature of the crime. The case may prove difficult for everyone involved for a number of reasons. Often, there is no physical evidence to corroborate testimony; this is especially true in sexual assault cases.<sup>78</sup> At times, the physical evidence that does exist, such as medical reports, is insufficient due to passage of time after the crime and prior to the exam, the child's increased healing capacity following sexual assault, or the nature of the assault itself.<sup>79</sup> Child sexual assault cases are also more likely to involve accused defendants that are family members or close friends of the family, increasing tension and hostility both inside and outside of the courtroom.<sup>80</sup> Furthermore, independent corroborating testimony is often not available due to the isolated and secluded nature of sexual assault crimes.<sup>81</sup> To further complicate matters, criminal cases involve more constitutional implications, specifically the defendant's Sixth Amendment right to confront witnesses and to a speedy trial.<sup>82</sup>

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<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *See Shanks, supra* note 20, at 575-76.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See id.*

<sup>82</sup> U.S. CONST. amend. VI.

E. *Child Victims' and Child Witnesses' Rights Act and the Sixth Amendment*

The Child Victims' and Child Witness' Rights Act (CVCWR)<sup>83</sup> was enacted following an increase in child abuse and neglect cases across the nation.<sup>84</sup> The Act's purpose was to provide protection to children involved in abuse and neglect cases who would be called to testify against their alleged perpetrator.<sup>85</sup> Protections include rules maintaining the confidentiality of records relating to the child, closing the courtroom during the child's testimony, utilization of multidisciplinary child abuse teams and a guardian ad litem, support for the child from an adult throughout testimony, guidelines for speedy trial, an extension of the statute of limitations through the age of twenty-five years old, and the use of aids such as dolls or stuffed animals during testimony.<sup>86</sup> None of these protections have been held to violate the defendant's right to a fair trial, public trial, or the public's First Amendment right to access criminal public proceedings.<sup>87</sup>

The Act provides two alternative methods for a child to give testimony including "live testimony by two-way closed-circuit television and videotaped depositions."<sup>88</sup> Both alternative methods require a court order.<sup>89</sup> To be eligible for two-way television testimony, a child must be "'unable to testify in open court in the presence of the defendant,' because of fear, a substantial likelihood of emotional trauma, mental or other infirmity, or because conduct by the defendant or his or her counsel causes the child to be unable to continue testifying."<sup>90</sup> As for videotaped depositions, the court must make a finding that "'the child is likely to be unable to testify in open court in the physical presence of the defendant, jury, judge, and public' based on the same reasons

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<sup>83</sup> 18 U.S.C. § 3509 (2017).

<sup>84</sup> See Scott M. Smith, Annotation, *Validity, Construction, and Application of Child Victims' and Child Witnesses' Rights Statute (18 U.S.C.A. § 3509)*, 121 A.L.R. FED. 631, \*2 (2017).

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> *Id.*

<sup>89</sup> See *id.*

<sup>90</sup> *Id.*

supporting the closed-circuit television testimony.”<sup>91</sup> It is important to note, however, that the child’s fear or likelihood of emotional trauma must be directly related to testifying in the physical presence of the witness; otherwise, the court may not order alternative testimony.<sup>92</sup> Furthermore, courts have construed the term “unable to testify in open court” to mean “unable to effectively communicate” in court.<sup>93</sup> The videotaped deposition is conducted in the same manner as testimony would be during trial; all parties who would otherwise be present during trial are allowed to be present for the deposition and the judge must preside over the deposition.<sup>94</sup> Neither method provided under CVCWR is considered an infringement on the defendant’s rights under the Sixth Amendment Confrontation Clause.<sup>95</sup>

### III. Effects on the Child and Best Practices

#### A. *Impact on the Child*

It is no surprise that a child’s involvement in a trial can be overwhelming and confusing for him or her.<sup>96</sup> One study points to short-term decline in positive behaviors for children during the court process, though the child’s behavior evens out following the resolution of the trial.<sup>97</sup> Another study found slower development for children who testified compared to those who did not.<sup>98</sup> Stress levels created from the adversarial process often affected child witnesses’ recall and memory.<sup>99</sup> On the other hand, some research has found that children may feel a sense of control after testifying and experience contentment in having been heard.<sup>100</sup> Overall, researchers have not come to any definitive

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<sup>91</sup> *Id.*

<sup>92</sup> *See id.*

<sup>93</sup> *Id.* See also Janet L. Richards, *New Perspectives on Child Protection, Protecting the Child Witness in Abuse Cases*, 34 *FAM. L.Q.* 393, 393-99 (2000).

<sup>94</sup> See Smith, *supra* note 84, at \*2.

<sup>95</sup> *See id.*

<sup>96</sup> See ABA TASK FORCE ON CHILD WITNESSES OF THE ABA CRIMINAL JUSTICE SECTION, *THE CHILD WITNESS IN CRIMINAL CASES* 3 (2002).

<sup>97</sup> *See id.* at 4.

<sup>98</sup> *See id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

conclusion on whether a child's experience testifying in court is harmful.<sup>101</sup>

Researchers have identified some factors, however, that may contribute to negative outcomes for the child, including:

delays, multiple interviews, lack of communication between system and families, fear of public exposure, face-to-face contact with the defendant, lack of understanding of complex and confusing procedures, practices that are insensitive to developmental needs, sequestration of witnesses who may be supportive to the child, inadequate preparation for role as witness, [and] lack of evidence other than testimony of child.<sup>102</sup>

### B. *Reliability of Child Testimony*

Current research may provide practical guidance on the reliability of child witness testimony. One study found that accuracy of a child's testimony is often context-dependent and will result in a wide variance of accuracy depending on both the child and the circumstances of the abuse.<sup>103</sup> Research clearly shows that age alone is not a reliable source of determining the accuracy of a child witness' testimony.<sup>104</sup> While some children follow the stereotypical trend of increased accuracy according to increased age, other children show a reversal of the trend, becoming less reliable witnesses as they age.<sup>105</sup> Furthermore, a child's age is not correlated to a child's level of honesty.<sup>106</sup>

Though less important in sexual abuse cases, a child's concept of time may also vary greatly between developmental milestones and it is important to determine how exactly the child thinks of time prior to questioning.<sup>107</sup> One technique is to use markers the child will remember more clearly, such as whether the event happened before or after the child's birthday, if there was snow on the ground, whether the child was in school, and other similar markers.

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<sup>101</sup> See *id.* at 3.

<sup>102</sup> See *id.* at 5.

<sup>103</sup> Debra A. Poole, et. al., *Sources of Unreliable Testimony from Children*, 19 ROGER WILLIAMS U.L. REV. 382, 391 (2014).

<sup>104</sup> See *id.* at 384.

<sup>105</sup> See *id.*

<sup>106</sup> See McGough, *supra* note 43, at 565.

<sup>107</sup> See Shanks, *supra* note 20, at 585.

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A common error, especially for younger children, is that of “source monitoring” error, where a child will “confus[e] something that was only mentioned by an adult with something that actually happened.”<sup>108</sup> In many ways, “it is impossible for a child to tell the truth, the whole truth, and nothing but the truth.”<sup>109</sup> This notion supports the task of the judge to determine whether the child shows the minimal level of credibility required to establish competency and serves as a good reminder of the child’s limitations for everyone involved in the preliminary examination process.

C. *Best Practices*

Attorneys can take steps to alleviate the potential for trauma to the child in the court process as well as on a systematic level. In 1985, the American Bar Association (ABA) published its *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged*. The guidelines emphasize: a team approach, speedy trial, procedural reforms, legislative initiatives, and media responses as a means “to address special problems and needs of children who, with increasing frequency, were and still are appearing the nation’s courts as victims and witnesses, without offending the rights of the accused.”<sup>110</sup> If possible, allowing the preliminary examination to occur outside of the courtroom may lead to a better evaluation of the child’s current developmental state, thus contributing to more reliable answers while also insuring that a child is not unnecessarily subjected to the process of testifying.<sup>111</sup> In some cases, video examination outside of the courtroom may lessen the child’s fear of the unknown court environment.<sup>112</sup> Another option is for court appointment of a neutral guardian to interview and assess the child’s competency.<sup>113</sup>

Attorneys can also take steps to insure that the testimony they elicit from the child is more reliable. One recommendation

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<sup>108</sup> Poole, et. al., *supra* note 103, at 386-67.

<sup>109</sup> Shanks, *supra* note 20, at 588.

<sup>110</sup> ABA TASK FORCE ON CHILD WITNESSES OF THE ABA CRIMINAL JUSTICE SECTION, *THE CHILD WITNESS IN CRIMINAL CASES* 1-86, 6 (2002).

<sup>111</sup> *See* Shanks, *supra* note 20, at 597-98.

<sup>112</sup> *See id.* at 601.

<sup>113</sup> *See id.* at 600.

is to focus more on the language of the child and less on the child's actual substantive intelligence.<sup>114</sup> Doing so will help to determine whether a child has memory of an event and can actually communicate that memory.<sup>115</sup> Other experts call for increased time allowed for questioning, if at all possible. Finally, some courts have utilized videotape to both memorialize meetings with the child and to avoid, or keep record of, any coaching that may occur and subsequently impact the reliability of the child's testimony.<sup>116</sup>

### Conclusion

While the decision to call a child to the stand is never an attorney's first line of action, the fact remains that children are often needed to try a fair case. At every level of representation, the use of a child as a witness is complex. In navigating the state's standards and conducting an appropriate preliminary examination, the attorney must ensure that the child is appropriately protected. The child must be closely guarded during testimony and alternatives must be utilized to the maximum extent provided under the law in order to safeguard the child's wellbeing. It is clear that even with research lacking clear conclusions as to the effects of testimony on children, there is at least anecdotal evidence that the experience can be overwhelming and potentially traumatic. However, given current federal and state protections, along with standards that are slowly evolving toward the ABA's guidelines, the child may be appropriately safeguarded throughout the adversarial process.

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<sup>114</sup> See *id.* at 582.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 601.

