

The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Preparing the Young Child-Victim for Trial

*“And that’s the jury-box,” thought Alice, “and those twelve . . . I suppose they are the jurors.” She said this last word two or three times over to herself, being rather proud of it: for she thought, and rightly too, that very few little girls of her age knew the meaning of it all.*¹

Introduction

You have been a trial counsel for about six months, and you are feeling very good about the hotly contested barracks larceny case you tried yesterday. It is a Friday afternoon in early June. Your thoughts wander from your superb closing argument to the upcoming weekend and the trip to the beach you have planned. You can actually hear the pounding of the surf and feel the sun on your shoulders when the phone rings, jerking you back to the present. It is the Special Agent in Charge (SAC) of your Criminal Investigation Division (CID) office, who tells you that a five-year-old girl has made a sexual abuse allegation against her stepfather, a soldier assigned to your jurisdiction.

The SAC explains that the girl told her teacher about the alleged abuse, and soon afterwards repeated the allegation to the school counselor and to a state Child Protective Services (CPS) counselor. The state has already made arrangements to remove the child from the home and place her in foster care. The CPS counselor is enroute to the post hospital with the child, where a pediatrician will examine the girl. Special Agent (SA) I. M. Smart is meeting them at the clinic, and plans to interview the child after the examination. The SAC tells you that he thought you should know, and he asks if you have any special guidance for SA Smart. Cursing under your breath, you try to think of something intelligent to say. You remember something about these cases being difficult to investigate and try, and you also know that you do not want to squander this opportunity to shape the investigation. Where do you go from here?

1. LEWIS CARROLL, ALICE’S ADVENTURES IN WONDERLAND 61 (1865).

2. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 803(4) (2000) [hereinafter MCM]. This rule says that “[s]tatements made for purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment” are not excluded by the hearsay rule, even if the declarant is available as a witness. *Id.* The key to admissibility is the declarant’s expectation of receiving medical treatment. The exception is broadened in child sex abuse cases. See *White v. Illinois*, 502 U.S. 346 (1992); see also *United States v. Hollis*, 54 M.J. 809 (N-M. Ct. Crim. App. 2000); *United States v. Haner*, 49 M.J. 72 (1998); *United States v. Ureta*, 44 M.J. 290 (1996).

3. See *White*, 502 U.S. at 346; *Idaho v. Wright*, 497 U.S. 805 (1990).

The Doctor and the Examination

Your most immediate concern must be the potential admissibility of any statements the little girl makes as exceptions to the hearsay rule. Because the girl is enroute to the hospital for the examination, your initial focus should be on the medical treatment and diagnosis exception to the hearsay rule.² You must try to ensure that any statements the girl makes to the pediatrician during the examination are admissible under this exception. With this in mind, you should identify the pediatrician who will examine the child so you can briefly talk to the doctor before the examination begins.

Because of the pediatrician’s busy schedule, you will probably have to drop whatever you are doing to squeeze in some time before the examination starts. Once in the pediatrician’s office, you must explain who you are, what your role is, and that you want to ensure anything the girl tells the doctor is admissible at trial, should the case go that far. Understanding that the pediatrician knows more about interviewing children than you do, you must make sure that the doctor: (1) knows not to ask leading questions; (2) takes careful notes, paying particular attention to words the girl uses; (3) does not throw any of the notes away, and most importantly, (4) explains to the girl that he is a doctor, is there to help her, and to make sure that there is not anything wrong with her.³ You should also explain that you will interview the pediatrician later regarding the examination if the case goes to trial. Once you cover these points and answer the pediatrician’s questions, you should get out of the way.

The CID Interview With the Child-Victim

You must also talk to the CID agent to set a positive tone for the rest of the investigation and to establish open lines of communication. You should ask the agent to give you a copy of all statements made by other witnesses in the case, so that you know the facts as they are developing and can give appropriate advice. You must also talk to the SA about the interview with the little girl. As with the doctor, your goal is to ensure that any statement the child makes is admissible at trial, this time under the residual hearsay exception.⁴

As you look at Military Rule of Evidence (MRE) 807, remember that if the little girl is unavailable to testify at trial and you try to admit the statement she makes to SA Smart, you must also address the Confrontation Clause implications raised. A large body of case law identifies factors that the military judge will consider to determine whether a residual hearsay statement has “particularized guarantees of trustworthiness.”⁵ The case law also sheds light on the “do’s and don’ts” of child interviews.⁶ The interview must be reliable, which means that SA Smart must have a plan. Your job is to help SA Smart formulate this plan in a way that maximizes the possibility that the military judge will admit the interview into evidence at trial. Ideally, SA Smart has been trained in child interview techniques, and you are simply refreshing his memory on some of the finer points. If not, SA Smart should consult with someone familiar with child development and interviewing children for assistance before conducting the interview.⁷

At a minimum, the child interview plan must include:

- (1) who will be present in the interview room;
- (2) who will ask the questions;
- (3) who will video tape the interview;
- (4) how questions will be formulated;
- (5) what props are necessary, such as crayons and paper;
- (6) when and where the child will take breaks;
- (7) who will remain with the child during these breaks; and

(8) how the rapport session will be conducted.⁸

The entire interview must be videotaped, to include the rapport session. This makes it much easier for the military judge to determine the reliability of the interview and the resulting statement by the child, should you attempt to admit it into evidence at trial under the residual hearsay exception.⁹

Your Preparation for Trial

Weeks have passed, and your trial date is looming. Although the earlier medical examination and the CID interview were fruitful, you have still not interviewed the little girl yourself. Since making the allegation against her stepfather, the little girl has been removed from the home by the state CPS and is in foster care. After spending about a month with a strange foster family, she was placed in foster care with her grandmother. This is the fifth time in her short life that the little girl has been placed in foster care for various reasons, and she wants to go home.

The little girl has also been assigned a guardian-ad-litem, a local civilian attorney who is unfamiliar with and very suspicious of the military justice system. The girl is receiving weekly counseling from a child counselor employed by the state. Child Protective Services refuses to allow you to interview the girl without the guardian-ad-litem’s consent. Both the counselor and the grandmother, also unfamiliar with the military justice system, support that position.

4. MCM, *supra* note 2, MIL. R. EVID. 807. Military Rule of Evidence 807, Residual Exception, states that

[a] statement not specifically covered by Rule 803 or 804 *but having equivalent circumstantial guarantees of trustworthiness*, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. (emphasis added).

5. *Lilly v. Virginia*, 527 U.S. 116 (1999).

6. Although a full discussion is beyond the scope of this article, practitioners should note the difference between the constitutional and statutory analysis. When the declarant does not testify and the Confrontation Clause is implicated, an out of court statement must either fall into a firmly rooted hearsay exception, or it must have particularized guarantees of trustworthiness, shown from the totality of the circumstances surrounding the making of the statement, such that adversarial testing would add little or nothing to its reliability. *Id.* at 116; *see also Wright*, 497 U.S. at 805; *United States v. Cabral*, 47 M.J. 268 (1997).

7. If no CID agents are trained in child interview techniques, your Chief of Military Justice should discuss this problem with the SAC. Training is available and it is essential that at least one agent in the local field office is prepared to deal with the unique requirements associated with investigating child abuse and child sexual abuse cases.

8. Factors that the military judge will consider to determine the reliability of a residual hearsay statement include, but are not limited to,

(1) spontaneity, (2) mental state of the declarant, (3) terminology used by declarant, (4) motive to fabricate, (5) consistent repetition, (6) open ended questions, (7) emphasis on truthfulness, (8) declarations against the declarant’s interest, and (9) whether the declarant understood the significance of telling the truth.

See Wright, 497 U.S. at 805; *United States v. Hughes*, 52 M.J. 278 (2000); *United States v. Ureta*, 44 M.J. 290 (1996).

9. *See Cabral*, 47 M.J. at 268.

You are pondering this state of affairs when the phone rings; it is the civilian attorney. He is willing to discuss your potential interview with the girl and also has some questions for you about the military justice system. You set an appointment to meet him in his office later in the week.

You are more nervous about interviewing the little girl than you are about the actual trial. How are you ever going to be able to talk to her? You have no children, do not know any children, and the thought of interviewing a child makes you break out into a cold sweat. The truth is, children scare you, and you do not like them. What do you do?

First, you must remember that witnesses are at the heart of every criminal case, and poorly prepared witnesses are a tremendous liability to the trial advocate. This is as true for child witnesses as it is for adults. Effective witness preparation requires a great deal of thought, planning, preparation, and strong communication skills.¹⁰ The importance of good witness preparation and the challenges trial advocates face increase exponentially when the witness is a child abuse or child sex abuse victim. Because of the invasive nature of the crimes, the associated embarrassment and emotional trauma, and a child's age-associated limitations, child victims pose special problems. These problems are compounded when the abuser was a family member or trusted adult, as is often the case. Even if it is unlikely that the child-victim will ever take the stand, an effective interview and witness preparation are crucial because it is always possible that the child will testify. Given this possibility, both the child and the advocate must be prepared. Ultimately, you must either reach a level of comfort in dealing with child-victims or risk further traumatizing these already fragile witnesses and losing the case. The rest of this article focuses on some helpful strategies for preparing a child-victim for trial.

Preparing for the Interview

Regardless of the specific situation, preparation is always necessary before interviewing a child-victim. In this case you will have to speak with the civilian guardian-ad-litem and gain his trust before you will be able to interview the little girl. This is not uncommon in cases involving children. While you could fight the problem and attempt to end-run the guardian-ad-litem, this could unnecessarily complicate the situation and cause hard feelings. The best approach is to set aside some time to discuss the guardian's concerns, and explain to him the military justice system, your role, the status of the case, and where you see it heading.

When engaging in this discussion, you must never make promises that you might not be able to keep, sugarcoat the facts, or say things that you do not know to be true. The most effective approach is to communicate genuine concern for the child by honestly and forthrightly answering the guardian's questions. You must understand and acknowledge that the guardian-ad-litem's priorities and concerns, while different than your own, are legitimate. You should also offer to keep the guardian apprised of the case's progress. Such an open approach will establish good lines of communication and will ultimately be worth your time. Bear in mind that if you fail to gain the guardian's trust, you will likely be unable to interview the child before trial, if at all. Further, if you establish a good relationship with the guardian-ad-litem, the guardian may be able to facilitate your access not only to the child, but also to the child's counselor, if there is one.

Given the importance of your meeting with the guardian-ad-litem, you must know your case before the meeting. Before you meet, ask the guardian-ad-litem to identify his concerns and questions so that you can prepare to answer them. Additionally, you should thoroughly review the CID case file, interview any un-interviewed witnesses, and review your notes from previous witness interviews. Ensure you interview social workers and law enforcement personnel who talked to the child, any doctors who examined the child, and the child's teachers. In addition to preparing these witnesses for their own testimony at trial, your goal during these interviews is to learn as much as you can about the child. You must do this legwork before meeting with the guardian-ad-litem because your preparedness, or lack thereof, will impact the success of the meeting.

Once the guardian clears you to interview the child, you must decide how to proceed. You should strongly consider meeting first with the child's counselor or psychologist, if there is one, to get advice on how to best interview the child. If you understand the child's cognitive ability and communication skills, and know her favorite books, hobbies or interests, habits, problems, disabilities, likes and dislikes, family situation, and other personal details, you will better understand the child, and the first interview will be easier. Your understanding will enable you to establish rapport more readily, and you will be more comfortable, which will help the child relax. If you are able to interview the child's counselor or psychologist, you should ask for help with how to approach the child. The degree of trauma that the child has suffered because of the abuse and how the child is coping with that trauma will also strongly influence the way you approach the interview.

10. See Major Timothy MacDonnell, *The Art of Trial Advocacy: It Is Not Just What You Ask, but How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 65.

This interview with the child's counselor also presents an excellent opportunity to discuss the child's ability to testify in open court against the accused and to identify measures necessary to accommodate the child's in-court testimony, if that is possible. If it appears that the child will have to testify from a remote location, under MRE 611(d) an expert must testify regarding the child's inability to testify in open court in the presence of the accused.¹¹ This means that before you talk to the counselor or mental health care professional, you must be familiar with MRE 611(d), *Maryland v. Craig*,¹² and the military case law dealing with remote testimony, the necessary findings of fact, and measures that can be taken to facilitate a child's testimony in or outside of the courtroom.¹³

Additional resources are available to help you prepare to interview the child-victim. These include the child's caregiver, mental health professionals in your community, pediatricians, elementary school or pre-school teachers, or as a last resort, the child's parents, all of whom can give you tips about talking to children. Another valuable resource is the National District Attorneys Association (NDAA)/American Prosecutors Research Institute Web site.¹⁴

The most important point to remember is that you should have several plans for how you will conduct the child interview so that you have the flexibility to adjust based on the child's reactions. You must also be willing to put yourself on the child's level, while remaining neutral, firm, and interested in what the child has to say. Additionally, you must never tell the child that you are going to do something without following through. Failure to do what you say you are going to do will be perceived as a broken promise to a young child, even if you have a legitimate reason for the failure, and will severely undermine your credibility.

Initially you should meet the little girl in a place where she is comfortable and able to relax, with another trusted adult present, such as the counselor or a parent. If the child is under a counselor's care and trusts the counselor, the counselor's office may be a good place for this first meeting. If you take this option, discuss in advance with the counselor how the meeting will proceed. The counselor should explain to the child in advance who you are and why you need to see her. At the initial meeting, the counselor can introduce you to the child and start a dialogue. Expect the little girl to be nervous because you are a stranger. This nervousness may manifest itself in different ways; the child may be silly and obnoxious, or may not be willing to talk at all. Regardless of the child's behavior, you must relax, project confidence, be interested, and talk on the child's level so that the child's experience is positive. Most children will quickly perceive any nervousness and will react accordingly.

Do not expect to discuss the abuse with the child at this first meeting. Rather, your purpose during the initial interview is to meet the child on the child's terms and establish some level of trust. You must do this with body language and with words, without touching the child,¹⁵ and you must be approachable, relaxed, and interested in the child. To that end, it may help to sit on the floor with the child, to talk to the child about her interests, to play games, color, or to allow the child to ask you questions, which you then must answer. During the interview, you should explain to the child, in simple terms, who you are and why you are there. You should finish the interview by explaining to the child that you will talk to her again and by asking the child if she has any questions for you.

11. MCM, *supra* note 2, MIL. R. EVID. 611(d)(3). Military Rule of Evidence 611(d)(3) states that

[r]emote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused for any of the following reasons:

- (A) The child is unable to testify because of fear;
- (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;
- (C) The child suffers from a mental or other infirmity; or
- (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

Id. See also *Maryland v. Craig*, 497 U.S. 836 (1990) (holding that the preference for face-to-face confrontation may give way if it is necessary to further an important public policy, but only where the reliability of the testimony can otherwise be assured). Because MRE 611(d) does not fully incorporate the *Maryland v. Craig* standard, counsel must consider both when laying the foundation for remote testimony.

12. 497 U.S. 836 (1990).

13. This is beyond the scope of this article; however, trial counsel must consider these issues early in the court-martial process. See *Craig*, 497 U.S. at 836; *United States v. Anderson*, 51 M.J. 145 (1999).

14. The NDAA Web site at <http://www.ndaa.org> includes online updates addressing various issues associated with investigating and prosecuting child abuse cases. Two articles especially helpful to trial and defense counsel are Jennifer Massengale's *Facilitating Children's Testimony*, APRI HIGHLIGHTS NEWSLETTER, vol. 14, no. 6, 1998, available at http://www.ndaa.org/publications.newsletters/update_index.html, and Mary-Ann Burkhardt's *Preparing Children for Court*, APRI HIGHLIGHTS NEWSLETTER, vol. 11, no. 8, 1998, available at http://www.ndaa.org/publications.newsletters/update_index.html.

15. While this applies when interviewing any victim, refraining from contact is particularly important when interviewing children who have been physically abused. Child-abuse victims are powerless against the "offensive touching" of their assailants. If you reach out and touch the child during your interview, you become just another adult invading the child's space, once again rendering the child powerless. One of your goals in the interviews is to empower the child.

While this can seem a daunting task, especially for an attorney who has little or no experience with children, it is surmountable. First, remember that children are simply little people with more limited experiences, vocabularies, and attention spans than most adults. You must also bear in mind that most children below the ages of nine or ten do not have the cognitive ability to understand the concept of time-ordering events, are very literal in their understanding, and have a very egocentric view of the world.¹⁶

Specifically, how should these characteristics influence your use of language during the interview with the child? When you talk to the child, use small words; use simple, single-idea sentences, and avoid negative sentence construction, which can easily confuse a child. You should avoid using ambiguous words, as well as technical terms and legal jargon. Rather, use concrete language; specific geographical and anatomical terms, and people's names instead of relationship words. Never assume that a child knows what a term means, even if she uses it. Further, avoid shifting subject matter or time frame without specifically orienting the child to the new topic or time frame of conversation.¹⁷ These general rules will make your interview of the child much more fruitful.

Your work does not end with the initial interview, however. Now that you have met the child and, hopefully, established some rapport, you need to prepare the child to testify at trial. This involves talking with the child about the abuse, familiarizing the child with the courtroom, and explaining to the child what to expect when she does testify. Ideally, you should conduct the next several interviews in the courtroom, so that the child becomes more familiar with and comfortable in those surroundings. The amount of access you are given to the child by the guardian, the child's reaction, and the child's attention span will dictate the number of meetings necessary.

You should have the child meet you at the courtroom when it is quiet and you will have no interruptions. It is a good idea to ask the child to bring her favorite game or toy or coloring book, and you should also have some crayons and blank paper on hand as a fallback. Once the child arrives, have her sit down in a comfortable place. Spend a few minutes talking with her about your last meeting and about what you are going to do during this interview. To get her loosened up and talking, let the child know that you are happy to see her again, and ask her about school or hobbies. If that fails, ask the child to draw a picture for you of her favorite thing, or play for a while the game the child brings, so that she relaxes and gets engaged. Have several back-up plans for all of these interviews in case one approach does not work. You must also be prepared to stop

the interview and try again another day if the child gets upset or is having a particularly bad day. You must remain relaxed and flexible in your approach, or you will sabotage your efforts with the child.

Once the child relaxes and is talking to you, you should orient her to the courtroom and what happens there. Make sure the child understands that she will probably have to come in and testify in front of people about what happened. Advance coordination with the child's counselor is helpful so that the counselor can talk with the child about court before your meeting. When you discuss this with the counselor, explain the court-martial process and the various court-martial personnel to him so that the child gets consistent information from both of you. If you are able to work with the counselor in this manner, then you will be building on what the child already knows, rather than starting from scratch. When you are explaining these ideas to the child in the courtroom, encourage her to ask questions, and make sure that you use simple language so that she can understand.

You should explain to the child what everything in the courtroom is, who will be in the room, and what they will be doing. One extremely effective approach is to move from one place to another in the room with the child—for example, from the defense counsel table to the trial counsel table, to the court-reporter box, to the panel box, to the military judge's bench, to the gallery—sitting with the child at each place and explaining who sits in each seat and what they do.¹⁸ Try to get the child interested by making a game out of it or by letting the child ask and answer questions. Children like to pretend, so it may work well to allow the child to put on the military judge's robe and pretend to be the judge, asking you questions. Then you can take your turn, asking the child questions. The key is to keep it interesting. If you start to lose the child's interest, take a break or save the rest of the interview for another day. Later, when you are going over the child's testimony, you can use this technique again in combination with asking her questions from wherever she will be seated to testify during the trial. This is one way to keep the child engaged throughout the preparation.

At some point, you must also educate the child about her role in the case, the requirement for an oath, and the necessity that she tell the truth. Again, it is helpful if the counselor, after talking to you about the process, first broaches these subjects with the girl to lay a foundation for your discussion. You can then build on that foundation with a combination of role-play and discussion with the child during your courtroom orientation.

16. Massengale, *supra* note 14; see also ANNE GRAHAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 4, 10 (2d ed. 1999).

17. Mindy F. Mitnick, The Use of Language in Interviewing Children, Address at the 1998 Investigating and Prosecuting Child Abuse Cases Course (address materials on file with author).

18. See Burkhart, *supra* note 14.

Conclusion

While none of these techniques will make it easy to prepare a young child-witness for trial, they will make it easier on you, and most importantly, on the child. In cases such as this, the testimony of the child-victim can be vital to success or failure.

Even if you think that the child will not testify, you must be prepared, for the sake of the case and for the sake of the child. The above suggestions should enable the trial practitioner to better communicate with a child-victim and thereby facilitate the truthful testimony of this often-unpredictable witness. Major Ekman.