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PREPARATION AND PRESENTATION

OF THE CHILD WITNESS

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I. INTRODUCTION

Regardless of the amount of time that a trial attorney spends preparing witnesses to testify, no one escapes the occasional surprise. Whether the preparer is the youngest neophyte or a skilled advocate he/she is likely to hear something during the testimony that didn't come up at preparation. Witness the dilemma of Brendan V. Sullivan, Jr. while his client, Lieutenant Colonel Oliver L. North, testified before the Senate Select Subcommittee on Secret Military assistance to Iran and the Nicaraguan opposition:

> **Arthur L. Liman (for the Senate):** You are looking at a book there. What is the book sir?
>
> **Lieutenant Colonel Oliver North:** The book is made up of notes that I have made in trying to prepare with counsel for this hearing...
>
> **Mr. Sullivan:** Don't tell him what it includes.
>
> **Mr. Liman:** Well, I think that if a witness is looking at something, that I, as counsel, am entitled to see what he is refreshing his recollection with.
>
> **Mr. Sullivan:** I think you are wrong. This is a product of lawyers working with clients...That is none of your business!

Remember that this was an unknown Marine Officer who during his testimony so wowed the public that posters and even a Barbie type doll were made in his likeness!

As the Oliver North testimony illustrates, even preparation of the best of witnesses can be difficult. When your witness is of tender years, the challenge involved in competently preparing and presenting the child is magnified at least three fold.

II. SHOULD THE CHILD BE CALLED AS A WITNESS?

Probably the first lesson in dealing with child witnesses is to avoid calling them if at all possible. If during the initial investigation of your case you discover that the testimony of a child would be cumulative to another adult witness, opt for the adult. Depending on the case, the psychological strain of testifying can be devastating to a young child. While most adults are probably a bit nervous about testifying at trial, it is highly unlikely that they will freeze up and refuse to respond to even the simplest question. A young child, on the other hand, can never be counted on to deliver as he/she did in your office.

Even if you conclude that a child must testify either because he/she is your client or because he/she is the exclusive source of a given fact, other witnesses should still be interviewed before the child. If the attorney is aware of what the child's testimony "should be" prior to the meeting, he/she is in a better position to

evaluate what the child saw or heard and to assess the child's ability to communicate these observations.

III. PREPARATION

When you plan pretrial or pre-discovery preparation, remember that a young child's attention span is significantly shorter than an adult's. It's probably going to take several different meetings to adequately prepare a child witness. Your first meeting should take the form of an open-ended chat. That is, after talking to the child for a period of time such that the child is comfortable with you and his/her surroundings, direct the conversation toward the incident in question. Never begin the meeting with, "You're here to discuss the..." Likely at this first meeting there is an adult, usually a parent, present. They want to see how you interact with little "Billy" or little "Betty". If "Billy" or "Betty" regresses into a shell, intimidated by you, your office, and the nature of the first meeting, don't be surprised if the parents balk at future attempts to schedule interviews. If you're right before trial and the child is out of state, the result of such a bad first meeting can be devastating. Once a certain degree of comfort is attained, let the child talk without interruption. After he/she has finished telling you in his/her own words what happened, only then should you go back and address what may have been overlooked.

The commentators widely differ when considering whether or not to have a third person, such as a parent or relative, present with the child during preparation. Some argue that preparation should

be done under a cloak of secrecy so as to not jeopardize the privacy of one's trial preparation. The other, more practical, view is to have an adult who is trusted by the child present during the early meetings. Realistically, the child's guardian will insist upon being present until he/she has gained confidence in your ability to interact with the child. While some of your trial preparation may be compromised, a review of Pennsylvania Superior Court decisions reveals but a handful of cases where opposing counsel sought more than a superficial inquiry into what went on during witness preparation. This is so partly because of the double-edged nature of this sword, but primarily because there is nothing wrong with preparing a witness for trial.

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves time.

State v. McCormick, 298 N.C. 788, 791, 259 S.E. 2d 880, 882 (1979)

Just as with any other witness, the child should be thoroughly acquainted with the evidence about which he/she will testify and the scene of the incident, including specific landmarks and other points of reference.

When deciding at what point witness preparation should begin, two dates immediately come to mind; the date of the incident and the date of trial. Unfortunately these dates also represent the

chronological extremes. One meeting immediately after the incident or just before trial is not enough. It is imperative that contact be made with the youthful witness as soon as possible after the incident which gives rise to the cause of action. At a minimum, a statement should be taken. Careful consideration should be given to whether the statement should be recorded or even videotaped. This way, the tape can be played to assist in refreshing the child's memory during pretrial preparation. The more time that elapses prior to the first interview and between interviews, the more likely details will be forgotten. Accordingly, intermittent conversations need to take place throughout the pendency of the case. Concrete trial preparation meetings with the child should take place no more than ten (10) days before trial and no less than five (5) days. You do not want the child to be stale but at the same time you do not want to be rushed if the child takes more time than you think.

IV. PRESENTATION

A witness is presumed competent to testify unless proven otherwise. Commonwealth v. Riley, 458 Pa. 390, 326 A.2d 389 (1974). However when the witness is under fourteen years of age, there must be a judicial inquiry as to mental capacity. Commonwealth v. Short, 278 Pa. Super. 581, 420 A.2d 694 (1980). The Supreme Court mandated in Rosche v. McCoy, 397 Pa. 615, 156

A.2d 307 (1959) that in evaluating competency, the Court must be satisfied that the witness has:

> (1) Such capacity to communicate, including as it does both an ability to understand questions and to frame and express intelligent answers,
>
> (2) Mental capacity to observe the occurrence itself and the capacity of remembering what it is that [the witness] is called to testify about, and
>
> (3) A consciousness of the duty to tell the truth.

Element (2) rarely causes any problems in the courtroom because if the child did not see the occurrence and does not remember it, it is doubtful that you will call the child as a witness in the first place. The child's intelligence, (or lack thereof) and your preparation, (or lack thereof) will determine whether or not element (1) (the child's ability to understand questions and communicate answers) is satisfied. Element (3) has undoubtedly caused the most litigation and justifies particular attention.

The court possesses and grants wide latitude in adjudging whether or not the child witness is conscious of a duty to tell the truth. For the most part, understanding a divine oath to tell the truth is not necessary. The majority of Pennsylvania courts seem to require only that the child be sincere, understand the importance of telling the truth, and feel that lying is wrong and may have adverse consequences. See Commonwealth v. Short, 278 Pa. Super 581, 420 A.2d 694 (1980); Commonwealth v. Mangello, 250 Pa. Super 202, 378 A.2d 897 (1977). Following is a sample foundation to qualify a child witness.

1. <u>Regarding the Capacity to Communicate</u>

What is your name?

How old are you?

Do you have any brothers and sisters?

What are their names? Is (he,she) bigger than you or littler than you?

Do you go to school? (If so) what school?

What is your teacher's name?

What grade are you in?

Did (mother, father, aunt, uncle, etc.) come with you to court today?

2. <u>Regarding a Consciousness of Duty to Tell the Truth</u>

Is giving your (mother or father, etc.) a present a good thing to do or a bad thing to do?

Have you ever played with a puppy?

Is kicking a puppy a good thing or a bad thing to do?

Is telling the truth a good thing or a bad thing to do?

Is lying good or bad?

What happens if you lie to (mother or father)?

I'm going to ask you some more questions and that lady there might ask you some questions. Will you tell the truth?

3. <u>Regarding the Mental Capacity to Observe the Occurrence</u>

Do you remember the day your mother got hurt in the kitchen?

Was it day time or night time?

Was your mother fixing your lunch when she got hurt?

Were you standing in the kitchen?

Was anyone else at home besides you and your mother?

What was your mother doing when she got hurt?

A word of caution. It is possible to prepare yourself out of a case if the child is unable to distinguish between what he/she saw and what he/she has been told by you in preparation. Be conscious of this fact. One method to test the witness is by offering facts you know to be untrue during preparation. If the child does not readily question at least some of the falsities, you should question his/her overall competency to testify.

While competency questions are often asked outside the presence of a jury, do not pass up the opportunity to again qualify the child in the presence of the jury. Such questioning tends to remind the jury of the child's innocence as well as his/her understanding of the duty is to speak truthfully.

While the examining attorney should talk at the child's level, he/she should never talk down to the child. Avoid legalese and try to incorporate the child's vocabulary into your questions. Your questions should, depending on the complexity of the topic, be closed. That is many should call for a yes or no answer. Prior to trial, the child must be acquainted with the courtroom. If at all possible, take him/her to another room with court in session. Someone the child knows and trusts should be in his/her line of vision at all times during testimony. Just as you rehearse direct

examination, cross-examination must also be practiced. Remind the child that someone else may have a question to ask. Cross-examination of a child is normally brief and of little consequence but you should be ready for it nonetheless.

IV. CONCLUSION

While courts often make special accommodations for young children, they are not made unconditionally. Whenever a child is to be called as a witness, everything from the wording of a question during the initial interview to the question at trial must be carefully weighed. The attorney must realize that calling a child to testify mandates lengthy preparation and careful planning.