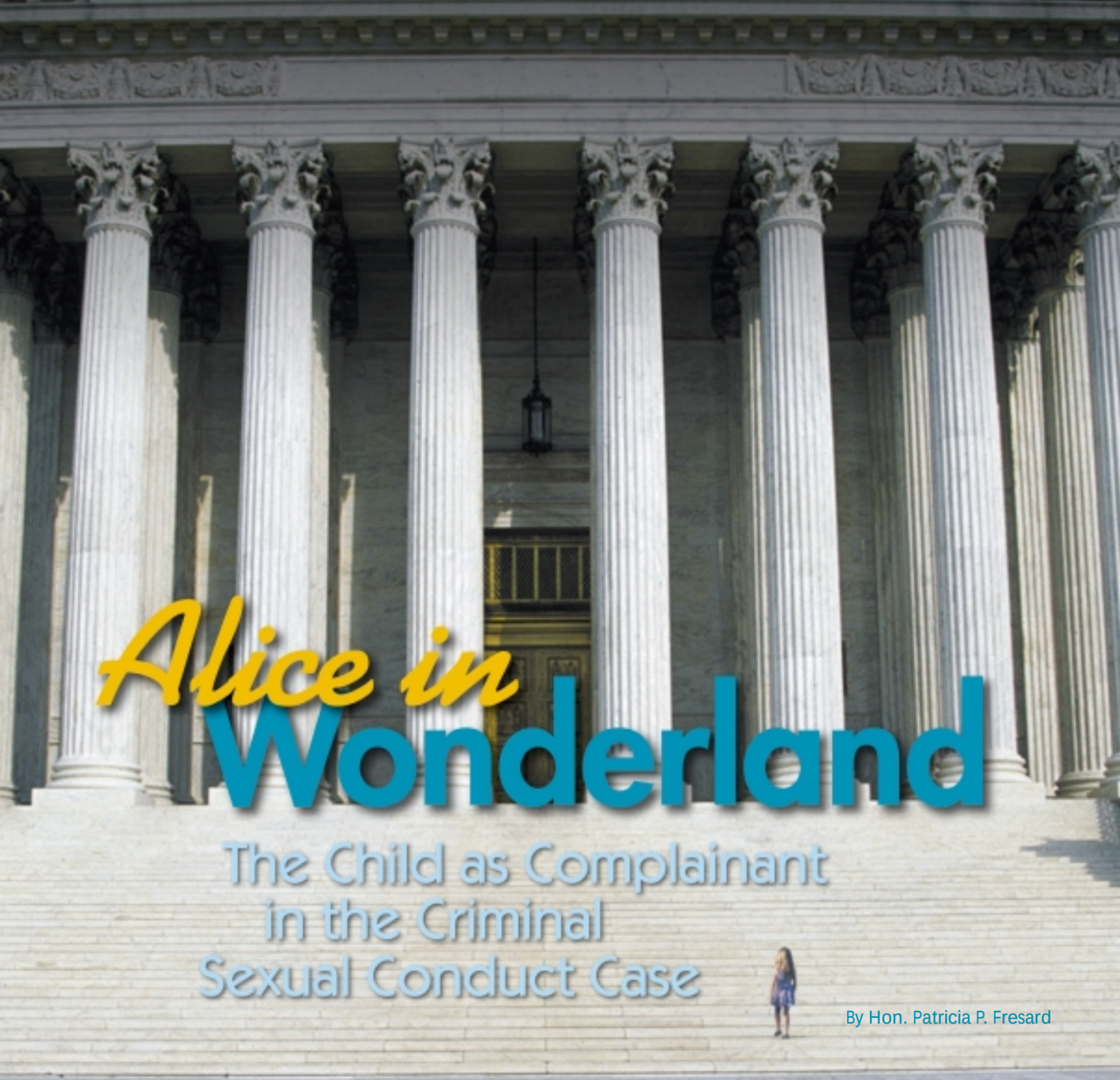

Alice in Wonderland

The Child as Complainant in the Criminal Sexual Conduct Case

By Hon. Patricia P. Fresard

FAST FACTS:

Historically, the law and court procedures in Michigan did not anticipate young children appearing in courts as complainants in criminal sexual conduct cases.

Rapidly escalating rates of reported child sexual abuse have changed society's perspective on what was formerly considered a minor social problem.

Changes in the law have been implemented including:

- The repeal of the requirement for a competency hearing for all children under age 10
- Allowing a support person to be in close proximity to a witness during his or her testimony
- Allowing special procedures to be used to protect children from trauma by altering traditional methods of confronting witnesses in court, i.e. closed circuit television
- Protecting the child from fear, embarrassment, or intimidation by people unnecessary to the proceeding
- Allowing for hearsay evidence of a child's first statement about a sexual act

"Alice had never been in a court of justice before..."

Consider the trepidation you might feel if you were called upon to testify in a court of law. Think about the anticipation surrounding the burden of the oath to testify truthfully to questions not yet asked. You are there to be judged and scrutinized concerning your knowledge, memory, and credibility. Two people will question you, one whose job it is to diminish the strength of your statement.

Now consider yourself as a small child. Think about the overwhelming formality and somberness of the setting. Consider further if the subject of the testimony was of a nature that is very difficult to speak about in the most private of settings, to the most trusted of listeners. Adults who are required to testify in court regarding a learned area of expertise are given special training to properly present themselves, as well as their subject, to a jury in a courtroom. And yet children traditionally have been treated more harshly than adults in their attempt to be heard on a complaint of criminal sexual conduct. How can they be afforded a voice, considering their limitations, while protecting those accused from having their constitutional rights violated in an attempt to accommodate the child?

"Curiouser and Curiouser!" cried Alice (she was so much surprised, that for the moment she quite forgot how to speak good English).[1]

Historically, the law and court procedures in Michigan did not anticipate young children appearing in courts as complainants in criminal sexual conduct cases. Until recently, they failed to address the most glaring issues involved in bringing such a case to a criminal trial. In the last few years, there have been changes that affect practice in this area. The most major of these is the repeal of the requirement of a competency hearing for all children under age 10. This article addresses that change and mentions four others. It reviews the history, the reasoning behind, and the effect of these changes. It also discusses some unique concerns, and the requisite preparation for trial practice in this area.

Over the past 15 years, rapidly escalating rates of reported child sexual abuse have changed society's perspective on what was formerly considered a minor social problem.[2] Until the 1980s, reports of child sexual abuse were rare and were handled primarily by the family or juvenile court. Public discussion of the topic was infrequent. Incest was a shameful secret, to be kept within the family. Reports of sexual abuse against children increased more than 300 percent between 1980 and 1986.[3] Nationwide, an estimated 84,320 new cases of child sexual abuse were accepted for service in 1997.[4]

Still, most cases of preschool children accusing adults of sexual misconduct were not authorized for prosecution in criminal courts. In most cases, the difficulties in prosecuting these crimes had been prohibitive. Under traditional rules and procedures, most preschoolers were not considered to have a sufficient attention span or communication skills to present themselves in a criminal trial. A complainant in a trial situation must generally enter into a very formal and unfamiliar setting to testify under oath about an often-traumatic incident. They must have the ability to testify for several hours. They must, in criminal sexual conduct cases, disclose personal and embarrassing details, using explicit language, in front of a large group of people, including their assailant. They are seated in a prominent position speaking into a microphone.

Under our adversarial system, they must respond to questions formulated by an attorney trained and experienced in

cross-examination. Questioning can be confusing and repetitive, in sometimes unfamiliar language, sprinkled with legal terms. They must sit for long periods of time with nothing to do, waiting until their appearance fits into the schedule of the trial. This is a most uncomfortable position to be in for any person but particularly for a small child, frightened and alone in an unfamiliar setting.

In order to present a charge to a jury, it is clearly necessary to afford a defendant the right to confront an accuser. The complainant likewise has a right to be heard. In most instances,

there is insufficient evidence without a complainant's testimony. Criminal sexual conduct cases do not commonly produce physical evidence or an eyewitness to the crime. Unlike most other crimes, it must usually be proven that a crime actually occurred. The strength of the case lies in the credibility of the testimony of a witness—who in the case of a child has, more often than not, delayed reporting the incident. The younger the child, the greater the concern surrounding the issues of ability and competency.

Sometimes a child's doctor or counselor will advise against putting a child through the ordeal of a trial, deeming it to be unacceptably traumatic. Children as young as four or five can have the ability to testify accurately; however, the younger the children, the more limited their testimony. They are also more susceptible to improper or inept questioning, which adversely affects the accuracy of their testimony. Also, their lack of attention span impedes their ability as witnesses.

As a result of the increase in reported cases, the issue of affording young complainants a voice in criminal courts has become a concern. Should those who choose very young victims be immune from prosecution? The courts have attempted to give these complainants a voice without violating defendants' rights, and as a result, some of the legal restrictions to children's testimony have been modified or repealed, and efforts have been made to improve forensic interviews with child witnesses.

Adults who are required to testify in court regarding a learned area of expertise are given special training to properly present themselves…and yet children traditionally have been treated more harshly than adults in their attempt to be heard on a complaint of criminal sexual conduct.

As an intern assistant prosecutor in the early 1980s, I viewed the discomfort and frustration expressed by attorneys on both sides in dealing with these, then unusual, cases. Criminal sexual conduct cases with young children as complainants were unfamiliar, difficult, and nerve-wracking. Presentation of a child complainant was considered distasteful and risky by both sides, regardless of the merits of the case. In the days before vertical prosecution, the few cases authorized involving young children were usually dismissed or plea-bargained, after much delay, with the defendant serving little or no time of incarceration.

In my first such trial, as an assistant prosecuting attorney for Macomb County, the elderly, temperamental judge showed obvious irritation with the young witness and distaste for the details of her testimony of sexual acts with her father. Although two competency hearings had resulted in findings of her competence, he stopped the trial after hours of examination and dismissed the case. During lengthy and repetitive cross-examination, the little girl had begun to swing her legs and fidget in her chair, while still willingly answering the questions. The judge stopped the proceedings, not to give her a break, but to state: "this witness has the attention span of a toothpick. I will not allow this to continue in my courtroom." On his own motion, the judge made a new finding of incompetence based on leg swinging and dismissed the charges against the defendant. His action was subsequently upheld by the court of appeals, who found that jeopardy had attached and so retrial of the defendant was precluded under the law.

With the increase in cases, prosecutors realized a need to address some issues. They implemented policies of vertical prosecution—one attorney handling the case from authorization to conclusion. Having the child meet a different prosecutor at each court date had not been conducive to presenting testimony when necessary. The crime victim's rights act of 1985[5] prompted the hiring of victim advocates who could wait with complainants, explain procedures and delays, and act as intermediaries between the prosecution, complainants, and their families.

The frustration with the "system" that had caused many families to refuse to proceed with trial was being heard. In paraphrasing some families' viewpoints it has been said: "The child has been violated by the defendant, and yet again by this system, which proposes to terrorize him with personal confrontation by the assailant, while being harassed and intimidated by an attorney, cross examining on minute details, dates, times, and questions clearly beyond his capabilities. There is no opportunity for justice here."

Next, the prosecutors' offices created special units and assigned prosecutors who felt comfortable with children and could relate to them. These prosecutors soon realized the need for improvement in forensic interviews. Changing the number and quality of interviews was difficult and slow to implement. This type of crime is typically reported, if at all, to teachers, social workers, or police, and there was little special training for these interviewers.

The following is an example of such a situation, which happened about 10 years ago. An untrained road patrol officer attempted to interview a girl at 3:00 a.m. whose mother

had reported awakening to a scream and finding her live-in boyfriend with his pants off in the bathroom with her 10-year-old daughter. The officer's report indicated that the child was trembling and crying. At first she would not respond. Eventually, she said: "He put his thing in me." Question: "Did he have intercourse with you?" No response. Question: "Is his thing his penis?" Response: "yes." Question: "Did he ejaculate inside you?" No response. Question: "Did he come inside you?" Response: "yes." When subsequently questioned by the prosecutor, the child denied seeing or feeling any liquid in or on any part of her body. These appeared to be conflicting statements until further questioning revealed that she did not understand the difference between put it in and to come inside you.

Multiple interviews by different agencies were common. The language and possible bias of the interviewer was not monitored. By the mid-90s, interviews were generally conducted by properly trained interviewers. They are now commonly monitored for appropriate and unbiased questions and are used by an interdisciplinary team rather than subjecting a child to multiple interviews previously required by each agency's policy.

In Macomb County the solution was, and is, Care House. Opened in 1996, it is an independent nonprofit agency where interviews and some physical examinations are conducted on cases initiated throughout the county. Police agencies receiving a report of a child criminal sexual conduct case will schedule an interview at Care House. All agencies that may be involved can monitor through closed circuit television the interview conducted by an independent professional. The cases are then further processed depending on the statement, the age and ability of the child, and the best interests of the child and family. The Governor's Task Force on Children's Justice has formulated a statewide protocol for all forensic interviews of children.

With the changes in investigation and prosecution came responses in the law. Because it has the most prevalent effect on proceedings in these cases, the first of the five changes this article discusses is the repeal of MCLA 600.2163, MSA 27A.2163, which required a hearing on the competency of witnesses under age 10. 1998 PA 323 repealed this statute, effective August 3, 1998. Formerly, when a child under the age of 10 was produced as a witness, the court was required to conduct private or public questioning to determine whether the child had sufficient intelligence and sense of obligation to tell the truth prior to being called as a witness. In other words, the child was presumed to be incompetent to testify unless the court determined him or her to be competent after a hearing.

MRE 601 states that every person is competent to be a witness unless a court finds after questioning that the person "does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably." This presumption of competence to testify now applies to all witnesses regardless of age. This change puts the burden of proving that a child is incompetent as a witness on the party challenging the competency, as has always been the case for witnesses 10 and older.

The change in the law arose from a recommendation by the State Bar of Michigan's Task Force on Children's Justice. The former requirement of a competency hearing resulted in inconsistencies of the admission of testimony of young children due to considerable disparity in judicial implementation of the requisite standards. As a practitioner, I have seen that findings of competency in young children could sometimes be predicted more by the assignment to the district court judge than by the differences in individual children's ability. Some judges refused to apply the proper standard, but instead applied their personal opinions that young children should not be witnesses in court. These judges expanded the requirements of the statute, seemingly to require a child to testify on an equal basis with an adult to be ruled competent.

When implemented properly, the former rule worked well to weed out testimony that should not be presented to a jury, but that by law should be excluded as unreliable due to inability to communicate sufficiently or lack of sense of obligation to tell the truth. Theory and practice in this respect often were not in accord. Harsh and demeaning questioning of children was sometimes permitted. It was commonly pointed

Trial by Intimidation

In the case that was to be my last trial as an assistant prosecutor, the defense counsel, at exam, questioned a six-year-old child about her ability to read. When she responded that she was able to read, she was presented with the *Wall Street Journal,* which was slammed fiercely down on the podium before her by opposing counsel, with a demand that she read a section aloud.* Such intimidation posing as cross-examination on the issue of competency often served to terrorize the child witness to the extent that the child refused further questioning. Without proper limitation, these hearings could and sometimes did, have a chilling effect on the minor's ability to bring charges on a complaint. The defendant in this case, Mark Curtin, had had a previous case dismissed at trial when the child who testified at exam would not testify at trial. He also had two others that were not authorized due to the young age of the complainants. While out on bond after this exam, Mr. Curtin was charged on a fifth investigation of criminal sexual conduct—this one, on a four-year-old boy. The last case was *nolle-prosequied,* after Mr. Curtin was convicted and sentenced in February of 1998 to 20 to 40 years on the six-year-old girl's case.

*The judge ruled that the journal was difficult for even him to read, and allowed the child to testify.

out that young children believe in Santa Claus. And so, it was argued, a child who believes in a nonexistent person should clearly be precluded from testifying as incompetent. That a child may know what she saw, felt, and smelled as a personal and traumatic assault and yet, may believe in a myth that she has not seen but has heard about and seen evidence of, was lost on some. In many, if not most hearings, children were quizzed on their ability to read, write, and tell time, none of which were ever legal requirements.

Competency hearings could also sometimes impact negatively on a defendant's right to an impartial jury. Often the hearings held in district court were repeated in circuit court before a jury. Although permissible, this action at times disadvantaged the defendant. The manner in which questions are presented to the child by the judge could impact a jury's perception of the witness. Judges were sometimes put in the difficult position of holding a hearing with a witness who clearly feared the person sitting up high and wearing a black robe. Sometimes, judges in their attempt to put a child at ease while fulfilling the requirement of the competency hearing gave a clear impression of sympathy toward the witness.

Attorneys should be careful not to allow the new rule to cause them to ignore the question of competency in a young complainant. The prosecutor's duty to see that justice is done precludes the prosecution from presenting a witness who they know does not have sufficient physical or mental capacity or sense of obligation to tell the truth. Likewise, the defense attorney's duty to the defendant should cause him or her to be vigilant in bringing the issue to the court's attention should it become a valid concern. The judge should be mindful of the issue and be prepared to handle the matter so as to insure just and unbiased treatment to both sides. Certainly, upon an offer of proof, a defendant should be entitled to a hearing to carry the burden of proving the witnesses' incompetence to testify, if such is the case.

The second change to be noted is a response to the difficulty that many very young children have in taking the stand unaccompanied. MCL 600.2163a(4),[6] allows a support person to be in close proximity to a witness during his or her testimony in criminal sexual conduct cases. Very often there are cases where a young child is too timid to proceed without the comfort of a familiar person nearby. The court and counsel again must be vigilant in insuring that there be no prompting of answers or any appearance of prompting by the support person.

Although rarely used in practice in Michigan, the third change allows special procedures to be used if the court determines a child witness to be psychologically or emotionally unable to testify, even with the benefit of protections afforded

under the law. The United States Supreme Court has held that the state's interest in protecting children from trauma can justify altering traditional methods of confronting witnesses in court.[7] MSA 27A.2163(1) (1998)[8] requires that the defendant can hear the testimony and consult with his or her attorney, but the defendant shall not confront the child during the child's testimony.

Thus, certain methods could be allowed in Michigan to keep the defendant out of the child witness's view, such as using a closed circuit TV, or putting a screen between the defendant and the witness. These methods keep the defendant's face away from the child's view but allow the defendant to hear the testimony. Although the federal legislation has been held constitutional on this issue,[9] some state courts, including Arizona,[10] and Massachusetts,[11] have stricken down their state's legislation as violating the defendant's right of confrontation under state constitutional law.

In the fourth change, MSA 27A.2163(1) (1998)[12] protects the child from fear and embarrassment or intimidation by people unnecessary to the proceeding. It allows the courtroom to be closed during the child's testimony in some instances. It provides that, ''If the court determines it necessary to protect the welfare of the witness, the court shall order all persons not necessary to the proceedings excluded from the courtroom during the witness's testimony. In the case of a preliminary exam, upon request and payment of fees, a transcript of the testimony shall be made available.''[13] For trial, the witness's testimony must be broadcast by closed circuit television to the public in another location out of sight of the witness. The latter requirement tends to preclude common use of this rule for trial at this time.

The fifth and last change in law is MRE 803A. Adopted effective March 1, 1991, it is not as recent a change as the others, but is important to trial practice in this area. MRE 803A restates the Michigan common law ''tender years rule,'' which allows hearsay evidence of a child's statement about a sexual act.[14] The child must be under the age of 10 when the statement was made. The statement must corroborate testimony given by the child-declarant during the same proceeding. The statement must be spontaneous and without indication of manufacture. Also, the child-declarant must make the statement immediately after the incident. However, if there was any delay, it may be excusable if caused by fear or other equally effective circumstance.

Under this rule, if the child made more than one corroborative statement about the incident, only the first is admissible. The proponent of the statement is required to notify the adverse party of the intent to offer the statement and its particulars sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare in dealing with the statement.[15]

Trial practice in child criminal sexual conduct cases is a unique and demanding area of practice. Attorneys must be vigilant in their awareness of and preparation for its special issues. In addition to competency, which has been discussed above, suggestibility and influence of the witness must be addressed. Use of appropriate language, expert witnesses, and trial procedures is also discussed briefly.

The reliability of a child's statement can be affected by improper questioning. Possible influence of the child, intentional or not, must be considered. A major concern in a criminal sexual conduct case involving a young child is the improper forensic interview and its possible effects on the reliability of a child's statement. A few celebrated cases of children subjected to repeated and highly leading and coercive interviews have resulted in a great increase in skepticism in children's testimony during the last decade. The highly publicized McMartin trial, concerning allegations of sexual abuse at a preschool center in Manhattan Beach, California, illustrates the grave consequences of inadequate training and biased interview procedures. The trial lasted six years and cost 15 million dollars, yet at its conclusion the defendants were acquitted.

Although seven of the jurors believed that some abuse had taken place, they could not determine what portion of the children's testimony had been fact and what portion fancy. The jury did agree that the original interviews were so poorly conducted that conviction was not possible. In fact, it was apparently the investigative interviews of the children that

"proved to be the undoing of the prosecutors case."[16] These interviews conducted in the mid 1980s highlighted the need for trained and unbiased interviewers for young children alleging sexual abuse.

The courts must be vigilant in their awareness of the issues and in addressing them so as to protect both the rights of the defendants and complainants. Clearly, improper interviews of young children are dangerous and unjust to those accused of the crime, to the children interviewed, to future cases, and to the ends of justice. The protocol manual on forensic interviews of young children, produced by the Governor's Task Force on Children's Justice, and the plethora of resources now available for obtaining guidance in this area make it inexcusable that anything but professional forensic interviews be currently conducted.

Just as an improper forensic interview can taint and distort the child's statement, so too can inappropriate questions at trial. Questions should be prepared in advance to use language that will be understood by the witness. This must be done while also bringing to light all the issues important to your case and doing so without casting a negative light on yourself or your client. Most jurors are not going to think highly of a defense attorney who appears to be tricking or bullying a small child. Nor will they trust a prosecutor who is

feeding testimony to a witness. Attorneys in criminal trials tend to shoot from the hip in formulating questions, as is often necessary in responding to the other side's case. Attorneys also tend to use language that is formal and stilted.

From the prosecution's standpoint, it is important to avoid leading questions on important issues. Such questions can taint a witness's testimony, making it unreliable, and destroy a witness's credibility by providing answers on crucial issues. Leading questions should also be used with care by the defense. Although generally allowed in cross-examination to prod admissions, the form of these questions is often long and confusing. They will often be viewed as unfair and beyond a child's capabilities. An attorney should not ask questions that a witness clearly cannot understand. Questioning by the prosecution should begin as open ended as possible and proceed with only as much prompting as necessary to bring to the child's attention the nature of the information being sought. One must take care to be understood by the child and to understand the child.

Anyone who has experience with young children has a sense that they view the world from a very different perspective than adults. I once asked a child to point out the man who touched her and to tell me what he was wearing. As she pointed to the defendant, the five-year-old said, "There he is, the man in the tuxedo." The defendant was of course, not wearing a tuxedo; however, she had never seen the defendant in a suit. She had probably rarely seen anyone in a suit and may have heard similar attire described as a tuxedo.

Compound questions should not be put to young children. Children tend to answer only the last question or only the part that they understood. This can of course, affect the reliability of the answer. An attorney should immediately object to any attempt by the other side to use compound questions on a young child. Lawyers who have limited experience in dealing with small children may have difficulty in wording questions in a form comprehensible to a young child. There is often a clear mismatch between the language of the lawyers and the language capacities of the children. As the questions become more courtroom specific and more combative, the less likely it is that children will be able to respond in a meaningful way. With preparation and desire, it is not difficult to ask questions appropriate for anyone. A trial lawyer preparing for a criminal sexual conduct case involving a child should prepare for the demands that go beyond the purely legal and that require special skill.

Behavioral expert witnesses for both sides were, at one time, in vogue. I have seen much less of them recently. I believe that in many cases, their performance demonstrated the need to limit their use. Questions of fact and of credibility are solely for the jury to decide. Experts in this area often impede on the province of the jury. The courts have ruled that an expert witness may not function as a "human lie detector." An expert may not give an opinion as to a witness's credibility.[17] Court's do allow, in cases of child sexual abuse, a qualified expert to testify whether the particular behavior of a child is or is not generally characteristic of child sexual abuse victims. Such testimony by the prosecution is allowed to rebut an

inference that the victim's behavior following the incident was inconsistent with that of an individual who was abused.[18] That requirement has been expanded by case law to include cases where certain acts, such as delayed disclosure, may be presumed to be inconsistent with valid allegations but are actually common characteristics in valid complaints.[19]

Case law has specified restrictions in this testimony. An expert may not testify that the victim's allegations are in fact truthful or not.[20] Child abuse accommodation syndrome evidence is considered unreliable as an indicator of abuse and is inadmissible. The Frye-Davis test is inapplicable to expert witnesses in the behavioral sciences.[21]

There are limited circumstances in which a professed expert in the area of child sexual abuse can be properly presented before a jury. Such testimony is only admissible when there is a real fact in issue regarding a behavioral indicator of sexual abuse. This limitation very often has not been adhered to. Another problem is that there is little consensus in this area. Behavioral indicators or lack thereof vary widely. Common sense supports that a child's circumstances, personality, and relationship to the perpetrator are only a few of the factors affecting response to an assault. Many of the indicators are also common to other causes.

Trial practice in child criminal sexual conduct cases is a unique and demanding area of practice. Attorneys must be vigilant in their awareness of and preparation for its special issues.

This testimony is especially prone to bias, as the witnesses are usually either child advocates or experienced defense experts. Testimony on this issue, if not properly limited, can be clearly prejudicial and may seriously interfere with justice being served. When only one side presents an expert, the jury can be swayed by a person with an impressive sounding résumé, who generally leaves no question of their opinion of the merits of the case. When both sides present experts, the jury is focused on the battle of the experts and which one to rely on, and away from their actual duty to be the judges of the facts and to personally asses the credibility of the complainant.

Prosecutors started using experts on child sexual abuse indicators in the 1980s to explain the delayed disclosure that is common among children who have been sexually abused. Because these factors are not common among victims of most other types of crimes, the defense would often argue or present an expert to claim that these were indicators of a fabrication of charges. Thus, the prosecution would rebut the defense expert or argument.

The problem was that in many cases, the testimony would go beyond that which was permissible under the law. The expert was usually a counselor, a child advocate, who saw firsthand the pain and devastation such an assault can cause. The expert would sometimes vouch for the credibility of the complainant. Although impermissible, at least on one occasion, the appeals court opined that strong proofs made the error harmless. This case was subsequently reversed and remanded.[22]

It is difficult to see how having a person qualified as an expert in court tell the jury that a young child's allegations of sexual abuse are truthful would not prejudice a defendant's case. On the other hand, defense experts in this area can make a living by testifying for, and lecturing on, the defense of sexual abuse allegations. For a defendant on trial, who has paid a large fee, successful testimony is that which results in an acquittal. Some witnesses are blatant in their manipulations. Great effort is put into preparation of testimony designed to cast doubt into the jury's mind.

For example, one commonly seen defense expert endeavors to present himself as scholarly but yet sincere as he methodically attempts to tear down a jury's confidence in their ability to judge the credibility of children. He promotes that small children are highly suggestible and cannot be believed in allegations of sexual abuse. There are many tools that he consistently uses. One is a story he tells the jury of the allegations of a very bright and sincere young child that had great detail of sexual abuse by her father. The tale goes on that, there being no motive to fabricate, she was believed by all, until it was realized that the specific dates that she gave were the very same dates that the father (and apparent hero) was fighting for the safety of our nation in the Gulf War. The moral of the story is Jury, do not trust your own judgment of this child, children cannot be believed. This is improper testimony under the applicable restrictions.

Another psychologist has been known to sit at the counsel table during preliminary exams and audibly laugh and scoff at a child's testimony. He then appears at trial prepared to rebut what he heard at exam. His response to a demand for an offer of proof in one case confirmed his intent. His testimony was barred pursuant to a motion *in limine*. These so-called experts are prime examples of why all attorneys facing notice of a behavioral expert from the other side should file in writing a demand for an offer of proof, and in some cases

demand a hearing. The proper way to deal with improper testimony is by motion *in limine* prior to trial. The judge is then made aware of the content of the testimony to be offered and the limitations that affect it. The testimony can be appropriately limited, or disallowed as evidence for trial.

There are three areas that require special attention from the court in child complainant cases. They are *voir dire,* treatment of the witness, and use of language. *Voir dire* is especially important to all parties in criminal cases where the complainant is a child. It has been demonstrated that bias is common for, and against, the acceptance of a child witness's testimony by the general public, and therefore must be an issue for some prospective jurors. Jurors have as diverse perceptions of children as they do of police officers as witnesses, depending on personal experience, opinion, and exposure to media. These may slant some prospective jurors' views and make them feel that this type of witness either always can or never can be believed. *Voir dire* should minimally identify that these people are unable to keep an open mind and judge a child's testimony fairly and impartially.

If a judge treats the child witness with either impatience or obvious sympathy, there is a greater than usual chance that the jury will be affected in their ability to impartially assess the credibility of a witness, especially in child sexual abuse cases where the testimony will be the heart of, if not the entire case. The judge must ensure that the child is neither pampered nor bullied by anyone in the courtroom.

Language is the third issue that judges must actively control in this type of case. The child's developing ability to understand and use language is a factor that should not be ignored in a court of law. The courts do not ignore a foreigner's limited ability with the English language, but instead assign a qualified interpreter to ensure that he understands the questions asked and that the fact finder understands his answers. So too, the court must act to ensure that questions are asked of a child in a manner appropriate to the developmental stage of that child. Undue leading and inappropriately worded questions can stand in the way of the fact finder's right to be presented with the intended testimony of the witness.

Some skill and experience is helpful in the examination of a child witness. Any novice in this area should certainly consult an expert or treatise on language and developmental ability of children prior to attempting such a feat. At the very least, extra preparation is required in order to ensure that questions are clear, concise, and simply worded. Locating or ordering exam or trial transcripts of an experienced child criminal sexual conduct prosecutor or defense attorney can prove invaluable.

The judge presiding over a criminal case where a child is complainant must address the problem before any testimony is taken. If the ground rules are well understood by both sides, there will likely be less argument and confusion. Leading questions should be avoided except in preliminary and foundational matters. If the elements of the crime are fed to a child witness, the result is an injustice to all involved. Just as with compound questions, unfamiliar words and confusing or hostile mannerisms should be disallowed. This, of course, is easier said than done. Attorneys are prone to fall back on habit in wording their questions. However, if they are made aware of the issue before and during the trial, the end result will most likely be an improvement in a just and understandable presentation of testimony to the jury.

In conclusion, in criminal sexual conduct cases involving children, the child should be treated in a straightforward appropriate manner. Questioning should be suitable to the child's age. Competency and reliability of a child's statement are issues that must be considered. The judge should require that questions be framed so they justly present the witnesses' testimony to the fact finder. A child's limitations should be properly handled. For example, the court should consider that a five-year-old might require more rest breaks than an adult. These cases are more adversely affected by delay, so trial dates should be promptly set and adhered to. The prosecution may want to consider filing a speedy trial motion.[23] The judge must make it clear to the jury that although the witness may require some special treatment, sympathy for the child's age should not enter into their decision in any way. Only then can the defendant be afforded due constitutional rights and the jury be given a real opportunity to assess the credibility of the witness. ✦

Hon. Patricia P. Fresard was elected to Wayne County Circuit Court in 1998. She was the first Hispanic woman to become a judge in Michigan. After graduating cum laude *from Detroit College of Law in 1986, she served as an assistant prosecuting attorney for Macomb County from 1986 until 1998. As chief of sex crimes for Macomb County, she participated in a meeting of the Governor's Task Force on Children's Justice, which developed a statewide protocol on forensic interviewing of children.*

FOOTNOTES

1. Alice in Wonderland, Carroll, 1873.
2. Child victim's child witnesses, Goodman Bottoms.
3. National Center on Child Abuse and Neglect, 1988.
4. National Committee to Prevent Child Abuse.
5. MCL 780.751, Crime Victim's Rights Act, eff. Oct 9, 1985.
6. MCL 600.2163a(4), a witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be filed with the court and shall be served upon all parties to the proceeding. The court shall rule on any motion objecting to the use of a named support person prior to the date at which the witness desires to use the support person.
7. 18 USCA 3509(b) (West Supp 1999).
8. MCL 600.2163A(12)(b), in order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.
9. *United States v Carrier*, 9 F3d 867 (CA 10, 1993).
10. Held unconstitutional as applied under both the state and federal constitutions in *State v Vess*, 756 P2d 3339, Ariz CA 1988) (statute held unconstitutional because state failed to show a particularized need to use cctv).
11. Held unconstitutional in *Commonwealth v Bergstrom*, 524 NE2d 366 (Mass 1988) (adopting a literal interpretation of the state constitution, which states every subject shall have a right to "meet the witness against him face to face").
12. MCL 600.2163a(10)–(12), (10), if the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (9), the court shall order both of the following:
    (a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the preliminary examination is held. Upon request by any person and the payment of the appropriate fees, a transcript of the witness's testimony shall be made available.
    (b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be located so as to allow the defendant to hear and see the witness and be able to communicate with his or her attorney.
    (11) If upon the motion of any party made before trial the court finds on the record that the special arrangements specified in subsection (12) are necessary to protect the welfare of the witness, the court shall order those special arrangements. In determining whether it is necessary to protect the welfare of the witness, the court shall consider all of the following:
        (a) the age of the witness.
        (b) The nature of the offense or offenses.
        (c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public.
    (12) If the court determines on the record that it is necessary to protect the welfare of the witness and grants the motion made under subsection (11), the court shall order one or more of the following:
        (a) All persons not necessary to the proceeding shall be excluded during the witness's testimony from the courtroom where the trial is held. The witness's testimony shall be broadcast by closed circuit television to the public in another location out of sight of the witness.
        (b) In order to protect the witness from directly viewing the defendant, the courtroom shall be arranged so that the defendant is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The defendant's position shall be the same for all witnesses and shall be located so as to allow the defendant to hear and see all witnesses and be able to communicate with his or her attorney.
        (c) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand.

    Also, *People v Garland*, 393 NW2d 896 (1986) (exclusion of defendant from competency hearing regarding his seven-year-old daughter was proper).
13. MCL 600.2163a(10)(a).
14. Rule 803A. Hearsay Exception; Child's Statement About Sexual Act. A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
    (1) the declarant was under the age of 10 when the statement was made;
    (2) the statement is shown to have been spontaneous and without indication of manufacture;
    (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
    (4) the statement is introduced through the testimony of someone other than the declarant.

    If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. This rule applies in criminal and delinquency proceedings only. Also, *People v Baker*, 251 Mich 322 (1930).
15. *Infra*.
16. Goodman, Bottoms, Carlson, 1990, p 32.
17. *People v Miller*, 165 Mich App 32, 418 NW2d 668 (1987). *People v Stricklin*, 162 Mich App 623, 413 NW2d 457 (1987). *People v James*, 182 Mich App 295, 451 NW2d 611 (1990).
18. *People v Beckley*, 434 Mich 691, 456 NW2d 391 (1990).
19. See *People v Smith*, 205 Mich 69, 517 NW2d 255 (1994) (no requirement that child abuse syndrome evidence be admitted only in rebuttal).
20. *People v Peterson*, 450 Mich 349, 537 NW2d 857 (1995).
21. Gillespie, Mich Crim L & Proc Deskbook.
22. *People v Draper*, 188 Mich App 77, 468 NW2d 902 (1991), MCLA 750.520b(1)(a).
23. MCL 780.759, victims of child abuse or sexual assault: speedy trial motion. As provided in subsection (2), speedy trial may be scheduled for any case in which the victim is declared by the prosecuting attorney to be a victim of child abuse, including sexual abuse or any other assaultive crime. (2) The chief judge, upon motion of the prosecuting attorney for a speedy trial for a case described in subsection (1), shall set a hearing date within 14 days of the date of the filing of the motion. Notice shall be made pursuant to the Michigan court rules. If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing.