PROTECTING CHILD WITNESSES WHILE UPHOLDING THE CONSTITUTION

AGENDA

- Children in the Courtroom
  - Culture of childhood
  - Refresher on "normal" development
  - Trauma response & influencing factors
- Alternate methods of testifying for children
- Uniform Child Witness Act
  - Application in New Mexico
- Other measures for facilitating testimony

CULTURE OF CHILDHOOD

- Unique phase of development
- Variability within spheres of influence
- Dynamic
- Versatility and adaptability not universal

CHILD DEVELOPMENT - PIAGET

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<th>Stages of Cognitive Development</th>
<th>Major Accomplishments</th>
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<td>Object permanence</td>
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CHILD DEVELOPMENT- OUR EXPANDED UNDERSTANDING

- Cognition develops in continuous, overlapping waves
- Young children, while egocentric, are not as egocentric as sometimes portrayed
- Children understand far more than adults give them credit for understanding
- Information processing abilities spur cognitive development
- Education and culture impact cognitive development

COMPETENCY OF CHILDREN

- By age 5, most children can identify truth
- More difficult to identify lie, define truth vs. lie or explain the difference
- Identification of truth alone does not assure witness competency
- Key is “do you promise to tell the truth”
- Not “do you promise me or…to tell me…”

COMPETENCY OF CHILDREN

• Lyon, Carrick & Quas, Right and righteous: Children’s incipient understanding of true and false statements. Journal of Cognition and Development (March 2012)
  • Earlier research showing children “accept true statements” and “reject false statements” before they are able to label the statements

COMPETENCY OF CHILDREN

• Lyon, et al. (cont.)
  • At what point do young children see “lying” as negative?
  • At what point do young children differentiate between intentional lies and mistaken statements?

COMPETENCY OF CHILDREN

• Child participants (101 children aged 2-5)
  • Implicit understanding of T/F develops into articulable understanding that T are “truth” and “good” while F are “lies” and “bad”
  • Ability to label T/F as “truth/lie” emerges in tandem with evaluation of “truth” as positive and “lie” as negative
  • Better at answering questions about “truth” than “lies”; better at assessing “true” statements than “lies” when asked to label as “good/bad”

COMPETENCY OF CHILDREN

• Child participants (128 children ages 3-5)
  • Performed better on fact than knowledge testing when assessing “mistake” vs. “lie”
  • Age 4 & above for evidence of understanding the ignorance underlying mistakes
  • Performed better using “right” or “wrong” vs. “truth” or “lie”
  • Factuality clearly predominates in initial understanding of truth/lie
COMPETENCY OF CHILDREN

- Child participants (128 ages 3-5) (cont.)
  - Consistent with studies that show children understand lies are false before they understand that lies are intentionally false
  - Ability to label T/F statements as “right,” “wrong,” “truth,” “lie,” and “mistake” emerge between 3 ½ and 4 years of age
  - By age 4, some children exhibit understanding that “mistake” is unintentional false statement

COMPETENCY OF CHILDREN

- Possible limitation
  - May have viewed false statements as joking thus contributing to stronger performance on “wrong” vs. “lie”
  - Although earlier research has shown contrary results with 5+ yoa
  - Young children’s association of badness with lying might create bias for all statements about wrongdoing as lies.
  - Further research on context is needed

COMPETENCY OF CHILDREN

- Possible limitation
  - Focus on labeling objects to assess T/F vs. children’s familiar association with wrongdoing; specifically denials of transgressions

COMPETENCY OF CHILDREN

- Rule favors presumption of competency for all witnesses
  - “A child witness, or any competent witness for that matter, need not know the consequences of perjurious testimony, or even what the term ‘perjury’ means; he or she need only know that lying is wrong.”
    - State v. Fairweather, 116 N. M. 456 (1993)
COMPETENCY OF CHILDREN

- As outlined in *Territory v. DeGutman* (1895) determined by:
  - Capacity to observe
  - Sufficient intelligence
  - Adequate memory
  - Ability to communicate
  - Awareness of difference between truth and falsehood
  - Appreciation of obligation to tell the truth in court

COMPETENCY OF CHILDREN

- Judge or proponent conducts
- Rules of Evidence do not apply, subject to exercise of discretion under 401/403
- Extrinsic evidence permissible
- Experts must be cautioned about their role
- Reversal only for showing of abuse of discretion
- Format for competency examination determined by child’s needs

COMPETENCY OF CHILDREN

- Close in time to trial
  - Preferably within a day or two of child’s trial testimony
  - Before jury sworn
  - Initially conducted outside the presence of the jury but may be repeated once sworn
  - Case facts, unless uncontested, not used
  - Assess ability to relay “real” information

TRAUMA IN CHILDREN

- Trauma Models for Sexual Abuse
  - Child Sexual Abuse Accommodation Syndrome
  - Traumagenic model
- Other sources of trauma – not confined to sexual abuse
  - Family
  - Relationship with perpetrator
  - Psychological
TRAUMA IN CHILDREN

- How children may experience sexual abuse
  - Secrecy
  - Helplessness
  - Entrapment and accommodation
  - Delayed or unconvincing disclosure
  - Recantation

- Child Sexual Abuse Accommodation Syndrome—Summit (1983) NOT diagnostic

TRAUMA IN CHILDREN

  - Betrayal
  - Traumatic Sexualization
  - Powerlessness
  - Perpetrator methods
  - Stigmatization

- Also, NOT diagnostic

TRAUMA IN CHILD WITNESSES

- Continuation/Enhanced by
  - Family
    - Dysfunction
    - Pressure on child/child’s role in family
    - Lack of support
  - Relationship with perpetrator
    - Positive (love, security, support)
    - Negative (fear, anger, hate)
    - Ambivalent
  - Psychological
  - Legal Process

ALTERNATIVE METHODS

  - Requirement of particularized findings of trauma for alternative method to be utilized

- Maryland v. Craig, 497 U.S. 836 (1990), established three prong test for one-way closed circuit TV
  - Must have case specific findings of emotional harm
  - State must establish that the harm is related to child’s fear of the defendant, not a general fear of the court setting
  - The court must find that the child’s level of distress is more than de minimus
ALTERNATIVE METHODS

• Crawford v. Washington, 541 U.S. 36 (2004), found that “testimonial statements” must allow the defendant the opportunity for cross-examination if the witness is “unavailable.”

• Provided that the prongs of the Craig test are met, CCTV and/or recorded testimony would not offend Crawford.

ALTERNATIVE METHOD FOR PRESENTATION OF CHILDREN’S TESTIMONY - CURRENT

• Criminal and delinquency cases (30-9-17, Rule 5-504, Rule 10-243)-Taped deposition
  • Sexual penetration or sexual contact of a minor
  • Victim under 16 years of age
  • Motion by D.A. and notice to defense

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Definitions- Criminal Proceedings (38-6A-2)
  • “alternative method”
    • Child does not testify in full view of fact-finder
    • VT deposition presided over by district judge
    • Defendant represented by counsel (or waives)
    • Defendant was present
    • Adequate cross-examination subject to judge’s determination of necessary protections
UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

- Definitions - Criminal Proceedings (38-6A-2)
  - “alternative method”
    - Child does not testify face-to-face with defendant
    - VT deposition presided over by district judge
    - Defendant represented by counsel or waived
    - Defendant able to view deposition through closed-circuit TV or equivalent; defendant and counsel able to communicate during deposition through headsets, microphones or equivalent
    - Adequate cross-examination subject to judge’s determination of necessary protections

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

- Definitions – Non-criminal Proceedings (38-6A-2)
  - “alternative measures”
    - Testimony by closed-circuit TV, deposition, testimony in closed-forum or other method that does not include
    - Child’s testimony in open forum
    - Child’s testimony in presence and full view of finder of fact and presiding officer
    - Presence of all parties with their participation and ability to view the child and be viewed by child

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

- Definitions (38-6A-2)
  - "child witness"

- Criminal Proceeding
  - Alleged victim under the age of sixteen who has been/will be called to testify

- Non-criminal proceedings
  - Individual under the age of sixteen who has been/will be called to testify

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

- Definitions (38-6A-2)
  - “criminal proceeding”
    - Trial/hearing before court in prosecution of person charged with violating criminal law or delinquency proceeding pursuant to Delinquency Act
  - “non-criminal proceeding”
    - Trial/hearing before court or administrative agency having judicial or quasi-judicial powers in a civil case, administrative proceeding or any other case or proceeding other than criminal proceeding
UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Definitions (38-6A-2)
  • "presiding officer"
    • Person under whose supervision and jurisdiction the proceeding is being conducted; includes judge in whose court a case is being heard, quasi-judicial officer or administrative law judge or hearing officer

• Applicability (38-6A-3)
  • Does not preclude any other procedure permitted by law
    • For child witness to testify by alternative method, however denominated; or
    • For protecting the interests of or reducing mental or emotional harm to a child witness

• Hearing whether to allow testimony by alternative method (38-6A-4)
  • Criminal or Noncriminal
    • Presiding officer may order hearing
      • Presiding officer, for good cause shown, shall order upon motion of party, child witness or individual determined by presiding officer to have sufficient standing to act on behalf of child
      • Shall be conducted on the record after reasonable notice to parties, non-party movant and any other person specified by presiding officer
      • Child's presence is not required unless ordered by presiding officer

• Standards for determining whether a child witness may testify by alternative method (38-6A-5)
  • Non-criminal proceeding –
    • Presiding officer may allow child witness to testify by alternative method if presiding officer finds that doing so is necessary to serve best interests of the child OR enable the child to communicate with the finder of fact
UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

- Standards for determining whether a child witness may testify by an alternative method (38-6A-5)
  - Non-criminal proceedings –
    - Presiding officer shall consider:
      - Nature of the proceeding;
      - Age and maturity of child;
      - Relationship of child to parties in proceeding;
      - Nature and degree of mental or emotional harm child may suffer in testifying; and
      - Any other relevant factor

- Criminal proceeding
  - Presiding officer may permit alternative method of testimony other than in open forum in presence and full view of finder of fact upon showing child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm; and

Factors for determining whether to permit alternative method (38-6A-6)

- Presiding officer determines a standard in Section 5 has been met, s/he shall determine whether to allow alternative method and shall consider:
  - alternative methods reasonably available for protecting the interests of or reducing mental or emotional harm to the child;
  - available means for protecting the interests of or reducing mental or emotional harm to the child without resort to an alternative method;
UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Factors for determining whether to permit alternative method (38-6A-6)
  • Nature of the case;
  • Relative rights of parties;
  • Importance of proposed testimony of child;
  • Nature and degree of mental or emotional harm child may suffer if an alternative method is not used;
  • Any other relevant factor

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Order regarding testimony by alternative method (38-6A-7)
  • Order allowing or disallowing testimony by alternative method shall state findings of fact and conclusions of law supporting the presiding officer’s determination

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Order regarding testimony by alternative method (38-6A-7) (cont.)
  • Order allowing testimony shall:
    • State method by which child is to testify;
    • List any individual or category of individuals allowed to be in, or required to be excluded from, child’s presence during testimony;
    • State any special conditions necessary to facilitate a party’s right to examine or cross-examine the child;
    • State any condition or limitation upon the participation of individuals present during testimony;
    • State any other condition necessary for taking or presenting the testimony

UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT

• Order regarding testimony by alternative method (38-6A-7) (cont.)
  • Alternative method ordered by presiding officer shall be no more restrictive of the rights of the parties than is necessary under the circumstances to serve purposes of the order and shall be subject to other provisions of the Act
**ALTERNATIVE METHODS**

- Testimony can be taken with:
  - Defendant screened from child’s sight and/or hearing
  - Defendant and jury can see child but child cannot see defendant
  - Defendant and child can both see and hear one another but are in different locations
- Defendant and his counsel must be able to communicate adequately regardless of which method is used

**UNIFORM CHILD WITNESS PROTECTIVE MEASURES ACT**

- **Right of party to examine child witness (38-6A-8)**
  - An alternative method ordered by the presiding officer shall permit a full and fair opportunity for examination or cross-examination of the child witness by each party, subject to such protection of the child witness as the presiding officer deems necessary

**SPECIAL COURTROOM PROCEDURES**

- Alternative methods of presenting testimony of child witness via technology
- Other accommodations to ease child’s in-court testimony
  - Courtroom modifications
  - Support person
  - Comfort item
  - Sidebar objections
  - Therapy dogs

- Other accommodations (cont.)
  - Closed/partially closed courtroom
  - Demonstrative items
  - Breaks/timing of testimony
  - Linguistically appropriate questions
  - Prohibit intimidating questions
- See Victor Vieth, A Children’s Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment
EXISTING NEW MEXICO CASE LAW

- Videotaped testimony - Criminal
  - Inadmissible where no particularized findings are made warranting the special protection (State v. Benny E., 110 N.M. 237, 794 P.2d 380 (Ct. App. 1990))
  - Admissible to protect child (State v. Herrera, 2004-NMCA-015, 135 N.M. 79, 84 P.3d 694) and testimony by doctor of severe reaction of child to abuse was substantial evidence warranting use of videotape (State v. Vigil, 103 N.M. 583, 711 P.2d 28 (Ct. App. 1985))

EXISTING NEW MEXICO CASE LAW

- Videotaped depositions – Criminal
  - State v. Ruiz, 2001-NMCA-097, 131 N.M. 241, 34 P.3d 630, accepted defense arguments that:
    - trial court failed to make findings of fact related to child’s mental or emotional harm
    - defense was denied discovery needed to contest the assertion of mental or emotional harm

EXISTING NEW MEXICO CASE LAW

- Videotaped deposition – Criminal (cont.)
  - Defense sought:
    - Production of child’s mental health records
    - Independent examination of child by court-appointed psychiatrist

EXISTING NEW MEXICO CASE LAW

- Held:
  - Child’s mental health condition was an “element” of the request to use videotape and thus was an issue for proper consideration subject to a showing by the defense that would override privacy concern; defense needed to show that the records might “reasonably be expected to provide information material to the defense.”
EXISTING NEW MEXICO CASE LAW

• Further held:
  • Defense was entitled to psychological evaluation of child after demonstrating a compelling need
    • First, the manner in which the allegations developed; and
    • The therapist’s statement that child’s fear, depression and anxiety about testifying in court were consistent with a child being untruthful about the allegations

EXISTING NEW MEXICO LAW

• Videotaped deposition-criminal (cont.)
  • Important considerations
    • Trial court should make findings regarding harm to child
    • Request for medical/mental health records should provide showing that such record may reasonably be expected to provide material information
    • Request for psychological evaluation should address issue of harm to the child

PSYCHOLOGICAL EXAMINATION FOR MENTAL ANGUISH

• Not required by statute
• Committee commentary to Rule 5-504: “rare case that a psychological examination is necessary to show good cause” for alternative method
• If ordered:
  • Only one psychologist or psychiatrist selected by the court
  • Evaluator may be used by either/both parties
  • If victim evaluated during investigation by evaluator selected in whole or part by law enforcement, psychological evaluation to be conducted by evaluator selected by court upon recommendation of the defense

PSYCHOLOGICAL EXAMINATION FOR MENTAL ANGUISH

• As with competency, court must ensure evaluator understands the scope and purpose of the examination
• Evaluator is to consider whether child will suffer unreasonable mental anguish
  • Not assessing child’s truthfulness
  • Not determining defendant’s guilt/innocence
• Report should cite basis for evaluator’s opinion of potential for unreasonable mental anguish or unlikelihood that such anguish will occur
EXISTING NEW MEXICO CASE LAW

• Confrontation – Criminal

• Child unable to testify in defendant’s presence resulted in his removal from the courtroom. Conviction was reversed because such a process, unlike a child’s videotaped testimony presented in court, is “less susceptible to neutral inferences.”

• To be excluded from the courtroom, the defendant must knowingly waive defendant’s right or have been sufficiently disruptive as to warrant removal to allow for the trial to proceed.

EXISTING NEW MEXICO CASE LAW

• Confrontation – Criminal (cont.)

• State v. Rodriguez, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992)

• Cited New Jersey Supreme Court, State v. Crandall, 120 N.J. 649, 577 A.2d 483, 487 (1990)

  “[I]f the child fears only the defendant, the trial court should order the use of a procedure in which the child testifies outside the courtroom unless defendant requests that the child testify before the jury. In that event, defendant should be informed of the possible adverse consequences of such a procedure, namely, that he or she could not be present in the courtroom during the child’s testimony and that he or she would be required to waive the right of presence. In essence, to insist that the child testify before the jury, a defendant must execute a knowing and intelligent waiver of the right to be present.”

EXISTING NEW MEXICO CASE LAW

• Hearsay Statements – Civil

• Due process violation alleged In the Matter of Pamela A.G., 2006-NMSC-019, 139 N.M. 459, 134 P.3d 746.

• Four hearsay statements regarding sexual abuse made to foster mother, social worker, forensic interviewer & therapist.

EXISTING NEW MEXICO CASE LAW

• Children’s Court judge ruled statements inherently reliable based on:
  • Child’s age
  • Manner in which statements were made
  • Consistency of the statements
EXISTING NEW MEXICO CASE LAW

- Hearsay Statements – Civil (cont.)
  - Supreme Court noted:
    - Statements were unambiguous as to details of abuse and abuser as well as consistent and spontaneous
    - Child’s terms consistent with her age
    - Foster mother & therapist testified as to inappropriate sexualized behaviors of child
    - Testimony that child suffered from nightmares, sleep disturbances and other behaviors associated with PTSD
    - Recorded safe house interview techniques could have been challenged by parents if deemed improper but no such challenge was made

EXISTING NEW MEXICO CASE LAW

- Hearsay statements – Civil (cont.)
  - Important considerations
    - Children’s Court judge made findings on reliability
    - Testimony as to why child should not testify in person
    - Parents failed to articulate why statements should be deemed unreliable
    - Parents failed to seek opportunity for cross-examination of child/only challenged hearsay statements admissibility (alternative methods)
    - Parents able to cross-examine hearsay witnesses

EXISTING NEW MEXICO CASE LAW

- Special Courtroom Procedures
- Comfort item
  - Child permitted to hold teddy bear while testifying. State v. Marquez, 1998-NMCA-10, 124 N.M. 409, 951 P.2d 1070
  - “The trial court questioned Victim, observed her demeanor, and made a finding that she would be more comfortable with the teddy bear during difficult testimony.”

Thank you!!
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