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From the Mouths of Babes: Dc

By David Gurnick and Sue Bendavid-Arbiv

Kids are people, too. They see and hear, though not always like adults. Sometimes, they are witnesses. Sometimes, they are victims. Sometimes, children are involved in car accidents and have information relevant to who was at fault. Occasionally in a business dispute, a child may have overheard her mom or dad talking about the matter, making key admissions. Testimony of a child could help prove key facts or disprove key allegations at trial. Because of this, counsel sometimes may need to take the deposition of a child.

Depositions can be frightful to anyone, especially children who have even less an understanding of the process than adults. See *Reed v. Reed*, 734 N.Y.S. 2d 806 (N.Y. Super. Ct. 2001) (noting "children may be frightened and/or concerned about having to testify and speak in front of others in civil or criminal litigation"). The common desire to spare children from upsetting experiences means parents, guardians and courts want to protect children from stresses of a deposition. See e.g., *In re Transit Management of Southeast Louisiana Inc.*, 761 So.2d 1270 (La. 2000) (expressing concern for the stress but allowing deposition of a child, trial court could consider alternative ways to reduce stress to the child while preserving party's right to obtain evidence).

Some issues to consider before seeking to take a child's deposition are whether the particular child witness perceives what he or she sees and hears the same way as adults, whether his or her memory can be trusted, whether the child will be more susceptible to suggestive questions, and whether the child can articulate accurately what he or she saw or heard. Another consideration for many lawyers is a desire not to be seen as harsh. The result is that, even when children are witnesses to an incident, lawyers still may choose to avoid deposing them.

But what if a child is a key witness? Few counsel want to miss the chance to uncover and present helpful evidence. Moreover, because of a child's perceived naiveté and innocence, his or her courtroom testimony can have greater emotional impact to the fact finder and thus get greater weight. Conversely, what if an opponent has indicated he or she will seek to use the child's testimony at trial. Lawyers do not like their first meeting with a key witness, particularly someone who may emotionally impact the jury, to be at trial.

Some reported decisions make reference to deposition testimony of children. Most concern children's testimony in criminal, sex-abuse, domestic-violence and divorce cases. In those cases, a child's testimony can be central. Few decisions discuss setting and taking child depositions in typical tort or business litigation. Litigators can benefit from guidance, legal and practical, in this area.

California law permits deposing a child. The Evidence Code states, "Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness, and no person is disqualified to testify to any matter." California Evidence Code Section 700. The words "irrespective of age" were added by amendment in 1985. *In re Katrina L.*, 200 Cal.App.3d 1288 (1988). So it is clear the Legislature wanted witnesses of any age to be permitted to testify.

Though age cannot disqualify a child from being a witness, other factors may. A person is disqualified from being a witness if he or she is "incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him." Evidence Code Section 701. A child who, due to youth, education or any other reason, cannot be understood, may not testify. A witness who is "incapable of understanding the duty of a witness to tell the truth" is also disqualified. Evidence Code Section 701. Therefore, a child who is too young to understand this also would be disqualified.

However, even young children, of elementary-school age or younger, are able to be understood when speaking. Likewise, most children are taught to tell the truth and that it is wrong to lie. More often then

posing Children in Civil Suits

not, the requirements of being able to be understood and to understand the duty to be truthful will not preclude a child from testifying.

Many considerations other than competency to testify enter into the decision to depose a child. These include asking exactly what the child may have seen or heard, how clearly he or she can retell it and whether an inherent bias may impact what they say.

Where a child's knowledge or presentation of facts may favor the other side, the lawyer may consider whether the child is likely to be a witness at trial and whether a deposition will make this more likely to occur. For example, a child being questioned about something pertaining to her mother or father, naturally may tend to view and recall the situation in accordance with her own affection for a parent.

The lawyer also may consider how he or she will be perceived in taking the deposition. If the adversary is going to use the child's testimony at trial, there may be no choice but to take the deposition. Likewise, if the child was the sole witness to a conversation or incident, his or her testimony could be helpful or even crucial.

Additional steps and precautions may be needed in deposing a child. This involves considerations of practicality and cost. Compassion may even dictate that the lawyer and client consider the effects of a stressful deposition on the child.

The Code of Civil Procedure does not set state special procedures for setting or conducting a deposition of a child. One issue is how to compel attendance. Indicative of how rare it is for a child to be a witness or how rarely this is an issue, the code does not contain a special procedure for compelling the attendance of a child in a civil matter. Guidance may be found in the Penal Code, which provides, "If service [of a subpoena] is to be made on a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, unless the parent, guardian, conservator, or fiduciary or other specified person is the defendant, and on the minor if the minor is 12 years of age or older. The person served shall have the obligation of producing the minor at the time and place designated in the subpoena. A willful failure to produce the minor is punishable as a contempt pursuant to Section 1218 of the Code of Civil Procedure. The person served shall be allowed the fees and expenses that are provided for subpoenaed witnesses." California Penal Code 1328(b)(1).

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even acceptable to provide some level of suggestiveness to guide the witness to the subject matter of the deposition, without suggesting answers. In other circumstances, it may be preferable to ask straightforward "yes" or "no" questions.

In a deposition that will cover emotional topics, like death or injury to a relative, or sexually oriented matters, questioning should be developed that uses language and simple words appropriate to the witness's competence and experience.

Use of videotape may be more important at a child's deposition. Conversely, evaluation of the circumstances may lead counsel to conclude it is a better strategy to avoid videotape, especially if the deposition is to discover information from a potentially adverse witness who may have a significant emotional impact on the judge or jury. Then, preserving the testimony the traditional way, by a transcript, may be the strategy of choice. If the parties wish to spare a child from having to appear again, then one idea may be to stipulate that the transcript or videotape may be used at trial.

On occasion, a deposition of a young child may be needed in civil

Because of the lack of a civil statute parallel to this provision, some counsel believe it is prudent to follow this procedure for civil matters. However, the idea of a process server handing a subpoena to a young child on the schoolyard or at play can be unsavory. This makes it more productive to try to stipulate to the deposition.

Taking into account the youth of the child, counsel should be prepared and undertake to conduct the deposition with sensitivity to the witness's age and activities. This includes considerations like timing the deposition not to disrupt the child's school, athletics or summer camp. At the deposition itself, some witnesses and counsel can be absent to avoid unnecessarily intimidating the child. The examining attorney should be someone with a style more conducive to obtaining information from a child.

It is helpful if the judge and jury can tell that the questions were not done to confuse or suggest answers. More open-ended questions may be appropriate, though with a child, it sometimes may be necessary and young child may be needed in civil litigation. Whether to take such a deposition and the procedures to do so require even more attention than the usual discovery deposition. Careful consideration should be given to the decision to take the deposition, the procedures for obtaining the witness's appearance, and the conduct of the deposition itself.

David Gurnick specializes in intellectual property and franchise law and **Sue Bendavid-Arbiv** specializes in employment law at Lewitt, Hackman, Shapiro, Marshall & Harlan in Encino.

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