

February 26, 2010

14. Investigative interviewing of the child.

Thomas D. Lyon, *University of Southern California*



Lyon, Thomas D. (in press). Investigative interviewing of the child. In D.N. Duquette & A.M. Haralambie (Eds.) *Child Welfare Law and Practice* (2d Ed.). Denver, CO: Bradford.

Chapter 5 Investigative Interviewing of the Child

By Thomas D. Lyon¹

§ 5.1 Introduction

The research on children's abilities as witnesses has made great progress over the past few decades. In the 1980s a series of high-profile allegations of ritualistic abuse in day care centers uncovered highly coercive questioning methods. Researchers were inspired to mimic the methods in the laboratory, and a number of studies provided dramatic demonstrations of children's suggestibility, particularly preschool children.² The message was largely negative, telling interviewers what to avoid, without producing alternative interviewing approaches. Fortunately, subsequent research suggested that most forensic interviews are not as coercive as the infamous cases, but nevertheless concluded that most interviewers are unnecessarily direct in their questioning, and that they do little to encourage children to provide a complete narrative of their abusive experiences.³

More recently, researchers have turned their attention to finding means of questioning children that maximize productivity while avoiding suggestiveness.⁴ These researchers have demonstrated that children, if questioned in a supportive manner, are capable of providing enormous amounts of productive information in response to open-ended questions. The irony is that many direct and suggestive methods once thought necessary to overcome abused children's reluctance to disclose abuse have been found counterproductive in two ways: they minimize the number of details in true allegations at

¹ Thomas D. Lyon, J.D., Ph.D. is the Judge Edward J. and Ruey L. Guirado Chair in Law and Psychology at the USC Gould School of Law.

² Stephen J.Ceci & Maggie Bruck, *Children's Suggestibility: Characteristics and Mechanisms*, 34 *ADVANCES CHILD DEVELOPMENT & BEHAVIOR* 247 (2006).

³ Nadja Schreiber, Lisa D. Bellah, Yolanda Martinez, Kristin A. McLaurin, Renata Strok, Sena Garven and James M. Wood, *Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study*, 1 *SOCIAL INFLUENCE* 16 (2006).

⁴ See, e.g., Michael E. Lamb, Irit Hershkowitz, Yael Orbach, & Phillip W. Esplin, *TELL ME WHAT HAPPENED: STRUCTURED INVESTIGATIVE INTERVIEWS OF CHILD VICTIMS AND WITNESSES* (2008); Karen J. Saywitz, Thomas D. Lyon, & Gail S. Goodman, *Interviewing Children*, in *THE APSAC HANDBOOK ON CHILD MALTREATMENT* (John E.B. Myers, ed., in press).

the same time that they increase the risk of false allegations. If children are questioned suboptimally, it is more difficult to distinguish true from false reports.

Research on child witnesses is useful to attorneys who work with children in several ways. First, it enables attorneys to evaluate the quality of interviews conducted with children, in order to determine whether the reports are likely accurate. Second, it provides clear guidance for how attorneys can best interview children. Third, it suggests how attorneys can better elicit testimony from children testifying in court.

This chapter will emphasize how the research on child interviewing can help attorneys better question children.⁵ A great deal has been written about investigative interviewing, largely because of efforts to improve the quality of interviewing conducted by social workers, police, and therapists. The fact that the newer interviewing techniques can be used by attorneys, and even implemented in court, has largely been overlooked.

§ 5.2 Ask Open-ended Questions

If you could only change one thing about the kind of questioning you use with children, you should ask more open-ended questions and fewer closed-ended questions. Closed-ended questions include yes-no questions, forced-choice questions, and questions that can be answered with a single word.

§ 5.2.1 Question Types: Closed-ended vs. Open-ended

The first step toward avoiding closed-ended questions is to become more aware of question types, so that one can closely monitor one's questions (and the questions of others). Yes-no questions are, of course, questions that can be answered yes or no. If the questions start with "Did" or "Was", or if the child is nodding or shaking her head in response, the questions are yes-no. Forced-choice questions are questions that ask the child to choose among options, and one always uses the word "or." For example, one might ask "Was it inside or outside?"

Some questions are unintentionally yes-no. For example, if one asks a child "do you remember when it was," one is implicitly asking "when was it?" but literally one is asking a yes-no question. The same is true of questions that start with "Can you tell me." As we'll see, "tell me..." can be a very productive question, but by adding "can you," the interviewer makes it easy for the child to simply say "no." Interviewers often ask questions intended to clarify or elicit further information that are phrased as yes-no questions. For example, interviewers will paraphrase the child's words ("You said he hurt you?") or follow-up a denial with an "are you sure?"

Analyses of child interviews (and work we have done with court transcripts) reveals that most questions are closed-ended, and yes-no questions predominate. Other examples of closed-ended questions are more difficult to spot, because they require

⁵ Because this chapter designed to introduce attorneys to the area, I only selectively cite research. However, readers should be aware that the approach is research-based, and those interested in accessing the original sources should consult the sources cited *supra*, note 4.

consideration of the specificity of the information requested. Wh- questions are questions that begin with who, what, where, when, why, and how. Wh- questions move along a spectrum from open-ended to closed-ended as the information requested becomes more explicit. “What happened” is open-ended but “What color was his hat” is closed-ended.

§ 5.2.2 Why Minimize Closed-Ended Questions

Children tend to respond to closed-ended questions with no more information than the answer requires. As a result, they will provide very little information on their own, and the interviewer will do most of the talking. The more the interviewer talks, the more the interview is about the interviewers’ suppositions, rather than the child’s memory. If the words are almost all the interviewers’ the likelihood the child will be confused by the wording or structure of the questions increases. Finally, closed-ended questions increase the likelihood that the questions will be suggestive and that the answers will reflect response biases or guessing rather than the truth.

§ 5.2.2.1 Children often answer closed-ended questions with a single word, rather than elaborate with their own words and their own memories.

The basic difficulty in asking children closed-ended questions is that *if the question can be answered with one word, it almost always will be*. This is particularly true of young children, but it is also true with older children questioned in an intimidating environment, such as a courtroom. Children’s tendency to answer closed-ended questions with a single word is perhaps the most striking difference between conversations with children and with adults. When we speak with other adults, we often ask yes-no questions, but adults will elaborate rather than simply answer “yes” or “no.” For example, if at the end of the day one asks one’s spouse “did you have a good day today?” one would be quite surprised, and perhaps have reason to worry, if the response was a one-word “yes” or “no.” A single word response would be viewed as uncooperative, because although the question is literally a yes-no question, the questioner is implicitly asking “tell me about your day.” Children, however, without any apparent intention to be uncooperative, will frequently answer such questions with a curt response.

Single word responses have a number of obvious disadvantages. If the question is general (such as “did you have a good day?”) then a simple “yes” or “no” is relatively uninformative. If the question is specific (such as “did you play on the swings today?”), then a “yes” or “no” is informative, but provides no details beyond those contained in the question. In either case, the questioner is forced to ask a further question. Moreover, as we discuss below, the other problems with specific closed-ended questions (suggestibility, incomprehension, and response biases) come into play.

If the interviewer is asking a series of closed-ended questions, and the child is providing limited responses, then the interviewer is doing all the talking, and anyone

observing the interview (including the interviewer) is unable to obtain a sense of the child's capacities or attitudes or personality.

A number of studies have demonstrated that open-ended questions reliably elicit more details from children questioned about abuse than closed-ended questions. For example, Michael Lamb and his colleagues interviews conducted with children who were disclosing sexual abuse.⁶ The authors found that a particular type of open-ended question, invitations, elicited several times as many details per question as closed-ended questions. Invitations are among the most open-ended of questions, because they consist of requests for the child to "tell me more about" details that the child has produced. Even young children were more productive when asked invitations than closed-ended questions. This was somewhat surprising, because laboratory research had suggested that young children are deficient in recall memory, in which they must generate the to-be-remembered information, as compared to recognition memory, which is tapped through yes-no questions. Another important finding that was that when asked closed-ended questions, older children were about as unproductive as younger children. In other words, if one asked an older child a series of yes-no questions, that child would appear about as reticent as a younger child—probably not a good thing for courts and others asked to evaluate the child's credibility.

§ 5.2.2.2 Closed-ended questions state what the interviewer thinks rather than what the child knows.

Most of the information in a closed-ended question is contained in the question. That is why it is possible to answer such a question with a single word. The disadvantage of this fact should be obvious: the information the interviewer can obtain is limited to the facts that the interviewer brings to the interview. If the interviewer is basing questions on information already obtained, then the likelihood that the child will provide any new information is minimal. If the interviewer is speculating, then the kinds of information that can be obtained is limited by the interviewer's imagination. Moreover, many of the interviewer's speculations are likely to be incorrect, in which case the questions will be unproductive at best.

For example, imagine you are trying to find out about a child's day at school. If you ask a series of yes-no questions (e.g., "did you play soccer") or forced-choice questions ("did you go outside or stay inside at recess"), then you will learn about activities that you are already aware of. If something exceptional happened (e.g., a clown visited the child's school), you are unlikely to find out.

Before we address the next problem with closed-ended questions, it is important to stop and recognize that the problems thus far occur regardless of accuracy. That is, even if closed-ended questions elicit *accurate* responses from children, they are less likely than open-ended questions to elicit *complete* responses from children. Some

⁶ See Michael E. Lamb, Kathleen J. Sternberg, & Phillip W. Esplin, Effects of Age and Delay on the Amount of Information Provided by Alleged Sex Abuse Victims in Investigative Interviews, 71 CHILD DEVELOPMENT 1586 (2000).

interviewers have argued that closed-ended questions are necessary to overcome children's reluctance to disclose abuse. The problem with this argument is that reliance on closed-ended questions may actually *facilitate* reluctance. The fact that closed-ended questions may be answered with a single word means that a child who does not wish to provide details may more easily avoid doing so. And, as we shall see when we discuss accuracy problems, if the question is a yes-no question, then the reluctant child can simply answer "no."

§ 5.2.2.3 Closed-ended questions rely on the interviewer's words, and those words may be difficult or ambiguous.

If the interviewer asks a series of closed-ended questions and receives a series of single word answers, then the interviewer is doing almost all the talking. It follows that most of the words used are also the interviewer's. In any interview, it is a problem if the interviewee does not understand words that the interviewer uses.

This problem is magnified for children in three ways. First, children's vocabularies tend to be smaller than adults'. It is particularly hard for attorneys to speak to children, because attorneys have internalized a substantial amount of legal jargon that is second nature to them but alien to most children. Moreover, even if one simplifies one's word use, children can be hamstrung by difficult syntax (sentence structure) and lacking understanding of pragmatics (the implicit messages in language). Second, a child is less likely than an adult to inform you when he or she does not understand the words in a question. The child is particularly likely to fail to report incomprehension when the question is closed-ended, because one can easily provide answers to closed-ended questions (particularly yes-no and forced-choice questions) without fully understanding the question (e.g., one can simply answer "yes" or "no" and appear to be following the questioning). Third, very young children are not even aware of their own incomprehension. The ability to reflect on what one understands and does not understand is called comprehension monitoring, and developmental psychologists have shown that comprehension monitoring substantially develops during the preschool years.

One might object that open-ended questions may also contain words that children do not understand. However, simply by virtue of the fact that open-ended questions increase the proportion of words provided by the child, the dangers of incomprehension are reduced. (The child is less likely to say things the interviewer doesn't understand than vice versa). Furthermore, the best open-ended questions are questions like "tell me everything that happened" or "what happened next," which do not introduce potentially difficult vocabulary. Also productive are "tell me more" questions, in which the interviewer repeats an aspect of the child's report, and asks the child to "tell me more" (e.g. "you said he touched you. Tell me more about the touching"). Finally, because open-ended questions lead to multi-word answers, the interviewer is more likely able to detect incomprehension in the child.

Some interviewers are aware of children's limitations but adopt ineffective means of attempting to avoid the problem of difficult language. First, interviewers may watch

for incomprehension in the child's expressions, and change their language if they spot signs of confusion. The problem is that children often fail to exhibit incomprehension, particularly if they misinterpret the interviewers' language rather than lack any understanding of the question's meaning. In other words, if the child mistakenly thinks she understands the question, she will not exhibit any signs of incomprehension.

Second, interviewers might test for comprehension, by pausing and asking the child if the child understands potentially difficult words. Because tests for comprehension are typically yes-no questions (e.g., "do you understand?" "do you know what a trial is?"), all of the problems with closed-ended questions arise. The child may answer "yes" without truly understanding. If the child answers "no," the interviewer often feels compelled to provide an on-the-spot lesson, which risks being long-winded and digresses from the purpose of the interview, which is to elicit information from the child. Alternatively, if the interviewer avoids the yes-no question and asks the child to define the term, then the child is put in the difficult position of providing definitions, but children are likely to understand words that they cannot define. Hence, the interviewer will underestimate the child's understanding.

Third, interviewers may try to learn guidelines describing the words that children understand or do not understand at various ages. For example, some interview guides suggest the ages at which children understand various prepositions (e.g. in, on, or under) or various concepts (such as words about time). This is a very difficult task, and is often of limited utility. First, children vary enormously in their understanding of concepts, so that age guides are only very rough guides to what any individual child will understand. Second, guides are likely to exaggerate children's understanding. When researchers in developmental psychology test children's comprehension, they work hard to make the tasks as sensitive to understanding as possible, and they often report ages at which some children exhibit understanding (rather than the age at which one can feel confident that most children, of whatever aptitude, will perform well). Finally, avoiding difficult words only scratches the surface of linguistic difficulties; as noted above, questions can be complicated because of their structure and their implications, not just because of their words.

The simplest means of avoiding difficult language is to ask questions in which the *child* does the talking, not the interviewer, and in which the follow-up questions rely as much as possible on information (and language) that the child has used. This can be accomplished through an emphasis on open-ended questions.

§ 5.2.2.4 Closed-ended questions tend to be more suggestive and more prone to response biases than open-ended questions.

We have just discussed one way in which closed-ended questions can increase error: if the child misunderstands the words used by the interviewer, then the child may be answering a different question than the interviewer intended. The interviewer will come away with a false perception of the experiences the child described.

Closed-ended questions also lead to other types of errors. From the interviewer's perspective, closed-ended questions are more likely than open-ended questions to communicate biases or suggestions. From the child's perspective, closed ended questions are more likely to lead to response biases, which reflect habits of responding to certain types of questions in certain ways, regardless of the accuracy of the response. Unfortunately, children are more suggestible to interviewer biases, and more subject to response biases.

Yes-no questions are not necessarily leading, but they often are. Interviewers tend to ask questions that they expect to be answered in the affirmative. If the questions are highly specific, they become more objectionable (compare "did you see the defendant do something" with "did you see the defendant murder the victim"). Yes-no questions can be made clearly leading by changing their structure. One can add a "tag" and turn "did he hurt you" into "he hurt you, didn't he?" Alternatively, one can place the tag at the beginning of the question: "didn't he hurt you?" (technically, this is a "negative term" question). Attorneys understand these distinctions; they will not object to all yes-no questions, but they will certainly recognize tag questions and negative term questions as leading.

Forced-choice questions are leading to the extent that they assume that one of the options provided is correct. Interviewers often overlook the possibility that there is a third option. For example, interviewers often ask children disclosing sexual abuse whether their clothes (or the perpetrator's clothes) were "on or off." The problem is that abuse often occurs with the clothes disheveled but not removed.

Wh- questions (who, what, where, when, why, and how) are generally considered less leading than yes-no questions (compare "what color was his hat" with "was his hat red?"). But wh- questions can be highly leading in a subtle way. They may be suppositional, in that they presuppose information that the child has not provided. "What color was his hat" would be very leading if the child hadn't mentioned that the person wore a hat!

There are several kinds of response biases often found in children. Forced-choice questions sometimes elicit a last response bias, in which the child chooses the last choice offered. This reflects the fact that whatever is mentioned last is easiest to recall. Some researchers have found that children exhibit a "yes" bias to yes-no questions, although the results are inconsistent. It seems fair to conclude that the risks of yes-bias increase among younger children and children who are cognitively less mature. The inconsistencies may be due to the fact that younger children initially use "yes" and "no" to reflect their desires rather than their beliefs. Hence, there is some evidence that young children will exhibit a "no" bias if asked about unpleasant topics.

If a young child responds to yes-no questions in line with his or her desires rather than reality, this wreaks havoc for the interviewer who relies on yes-no questions. If the questions are obviously unpleasant (e.g., if they involve physical abuse, or sexual touching that the child recognizes as inappropriate), then such a child would simply deny

abuse. If the questions are about apparently innocuous events (e.g., if they are about sexual touching under the guise of play) or ambiguous, then the child might appear to acknowledge abuse. In either case the truth is unclear.

If one restricts one's questions to open-ended questions, one both minimizes suggestiveness and reduces the likelihood that a child's response bias will lead one astray.

§ 5.2.2.5 Closed-ended questions encourage guessing and are less likely to be answered with "I don't know."

For a number of reasons children may be disinclined to tell you when they don't know the answer to a question. One reason is that they regard an interviewer's questions as analogous to questions they receive from other adults, such as parents and teachers, which are often less requests for information that the child is privy to and more tests of the child's knowledge. If one is taking a test, a reasonable strategy is to hazard a guess rather than leave the answer blank. This is a disastrous strategy if others are relying on one's answers as a key to the truth. Another reason is that younger children are less aware of what they know and do not know; in other words, they are less cognizant of the differences between knowing and guessing. This limitation is similar to children's problems with comprehension monitoring mentioned above; just as very young children have limited awareness of whether they understand, they have limited understanding of when they are knowledgeable.

If a child doesn't know the answer but doesn't want to appear ignorant, he or she must hazard a guess. Guesses are much easier when one is asked closed-ended questions, because one only has to produce a single word (or concept) in response. Yes-no and forced-choice questions are particularly subject to guessing, because it is so easy to simply choose "yes" or "no" or one of the choices offered by the forced-choice. Some types of closed-ended wh- questions are also quite susceptible to guessing, because children may answer with respect to their expectations or their general knowledge of the world. For example, in one classic study of children's suggestibility, children were asked "What color was the man's beard?" Despite the fact that the man did not wear a beard, most children responded "black," something obviously borrowed from their knowledge of beards in general.

§ 5.3 Begin the interview with interview instructions

In only two minutes, it is possible to provide children a bit of instruction on how investigative interviews work. Instructions are helpful because interviews are unlike other kinds of adult-child interactions. Children are accustomed to interactions with adults in which the adult knows the answer and the child is either being taught the answer, or should have learned the answer and is now being tested. If the adult knows the answer, and the child is expected to know the answer, then the child will be inclined to accept the adults' suggestions and to guess at answers rather than acknowledge incomprehension or ignorance. These are obviously dangerous inclinations in an

investigative interview in which the interviewer is sincerely interested in only what the child knows and remembers.

There are a few general rules for instructions. They should be worded as simply and as succinctly as possible. They should be provided one at a time. They should be given with feedback, to ensure that the child understands the instruction and so that the child recognizes that the interviewer truly wants the child to follow it. These general rules lead to the recommendation that interviewers follow a carefully scripted list of instructions that they become accustomed to giving in every interview. It is dangerous for an interviewer to think “I’m good with kids, and so I can wing this.” When interviewers ad lib, they tend to leave out instructions, or combine them, or use unnecessarily complicated words, or forget to provide feedback.

The Ten Step Investigative Interview, modeled after the NICHD structured interview, includes four instructions and elicitation of a promise to tell the truth.⁷ After a brief self-introduction (e.g., “My name is Tom and I talk to kids about things that have happened to them”), the interviewer then directly moves to the first instruction.

§ 5.3.1 Give the “I don’t know” instruction

The interviewer tells the child “If I ask you a question and you don’t know the answer, then just say ‘I don’t know.’” The interviewer then provides an example, “So if I ask you, ‘what is my dog’s name?’ what do you say?” When the child answers “I don’t know,” the interviewer responds, “O.K.! Because you don’t know.” The interviewer then provides a counter-example. “But what if I ask you, ‘Do you have a dog?’” After the child answers, the interviewer concludes, “O.K.! Because you do know.”

As discussed above (§ 5.2.2.5), children are often reluctant to answer “I don’t know,” particularly when asked closed-ended questions. Asking as many open-ended questions as possible is clearly the best strategy to avoid this problem, but the “I don’t know” instruction is also valuable. A number of studies have found that instructing children that “I don’t know” answers are acceptable reduces children’s suggestibility to misleading questions.⁸

It is important to emphasize that this instruction is different than simply telling the child that it is o.k. to indicate when they don’t know the answer. A simple “tell me when you don’t know” is likely to be ineffective, because the example (“what is my dog’s name”) both tests the child’s comprehension of the instruction and enables the interviewer to reinforce the don’t know response. In cases in which the child guesses the name of the interviewer’s dog, the interviewer can respond, “No, you don’t know my

⁷ See Thomas D. Lyon, TEN STEP INVESTIGATIVE INTERVIEW (available at <http://works.bepress.com/thomaslyon/5/>). For the NICHD protocol, see Michael Lamb, et al., *supra* note 4.

⁸ See, e.g., Susan Gee, Marian Gregory, & Margaret Ellen Pipe, *What colour is your pet dinosaur?* *The impact of preinterview training and question type on children’s answers*. 4 LEGAL & CRIMINOLOGICAL PSYCHOLOGY 111 (1999); Karen Saywitz & Susan Moan-Hardie, *Reducing the Potential for Distortion of Childhood Memories*, 3 CONSCIOUSNESS AND COGNITION 257 (1994).

dog's name. Remember that if you don't know you can tell me. Let's try another, 'what is my sister's name?'" Moreover, it is important to provide a counterexample—to reinforce giving an answer when the child does know. Researchers have found that children reinforced only for don't know responses overutilize the don't know response; in other words, they respond "I don't know" even when they do know.

The instruction is also different than waiting for the child to spontaneously respond "I don't know" during the course of the interview and providing reinforcement at that point. Some children will never spontaneously indicate ignorance, and they will obviously fail to benefit from an instruction. Worse, children will provide don't knows in cases in which the interviewer has no idea whether the child does or doesn't really know. Children's don't knows during the interview may evince reluctance rather than ignorance. Reinforcing the child for reluctant-based don't knows may reinforce evasive responding.

§ 5.3.2 Give the "I don't understand" instruction

The interviewer tells the child, "If I ask you a question and you don't know what I mean or what I am saying, you can say 'I don't know what you mean.' I will ask it in a different way." The interviewer provides an example, "So if I ask you, 'what is your gender?' what do you say?" When the child answers "I don't know" or something like "what's gender?" the interviewer responds, "Good, because 'gender' is a big word. So then I would ask, 'are you a boy or a girl?'"

As discussed above (§ 5.2.2.3), children often fail to indicate when they don't understand questions, particularly when they are asked closed-ended questions. The wording of the question is designed to avoid the word "understand," because of the ironic fact that young children may not know what it means. As with the don't know instruction, this instruction is more effective if provided with feedback, and it's important to reword the question so that the child understands that the purpose of their response is for the question to be rephrased (rather than avoided). In case the child knows the word "gender," the interviewer should have in mind a different example; one possibility is to ask the child "what is my orientation," and when they express incomprehension, follow-up with "Am I standing up or sitting down?"

§ 5.3.3 Give the "You're wrong" instruction

The interviewer tells the child, "Sometimes I make mistakes or say the wrong thing. When I do, you can tell me that I am wrong." The interviewer provides an example, "So if I say, 'you are thirty years old,' what do you say?" When the child answers "you're wrong" or something like "I'm not thirty years old" the interviewer responds "O.K. So how old are you?"

This instruction has some value in encouraging the child to resist suggestions from the interviewer. An example is particularly important to convince the child that it is indeed appropriate to contradict an authoritative adult.

§ 5.3.4 Give the ignorant interviewer instruction

The interviewer tells the child, “I don’t know what’s happened to you. I won’t be able to tell you the answers to my questions.” This simple instruction has been found to reduce children’s suggestibility. One of the reasons children are suggestible is that they assume adults are knowledgeable. Children may make this assumption for several reasons. First, as noted above (§ 5.2.2.5), children are accustomed to interactions where adults ask questions as a means of testing children, and already know the answers to their questions. Second, children involved in legal disputes may naturally assume that the questioner has spoken to the others and is aware of any prior statements that the child has made.

§ 5.3.5 Elicit a promise to tell the truth

The interviewer tells the child, “It’s really important that you tell me the truth,” and then asks “Do you promise that you will tell me the truth?” After the child responds, the interviewer asks, “Are you going to tell me any lies?” Research with children, including children who have been maltreated, has demonstrated that a promise to tell the truth increases children’s honesty, even if they have been coached to cover up a transgression or to make a false report.⁹

The wording of the promise is important. Young children are likely to know the meaning of the word “will” even if they do not know the meaning of the word “promise”; hence, asking the child “do you promise that you will” should have some meaning for even quite young children. Asking for both a “yes” response (to “do you promise”) and a “no” response (“are you going to tell me any lies”) reduces the likelihood that a child mindlessly replies “yes” to the questions. Furthermore, asking “do you promise that you won’t tell any lies” is not recommended; many children will respond “no,” probably intending to assert that “no, I won’t tell any lies.”

§ 5.3.6 Limitations of instructions

Interview instructions improve interviews, but they do not solve all problems, and their effect can easily be overridden by a suggestive interview. Because some of the instructions require the child to monitor his or her mental state (e.g., knowledge, understanding), they are likely less effective with younger children. When interview instructions are ad-libbed, they are often confusing, and likely to be forgotten by the child.

Consider the following instruction, which was given by a judge to a 10-year-old witness in a child sexual abuse criminal trial:

⁹ See, e.g., Thomas D. Lyon, Lindsay C. Malloy, Jodi A. Quas, & Victoria Talwar, *Coaching, Truth Induction, and Young Maltreated Children’s False Allegations and False Denials*, 79 CHILD DEVELOPMENT 914 (2008).

THE COURT: If you don't know the answer to a question, I don't want you to guess. I just want you to tell us if you don't understand, or if you don't know the answer. Okay?
THE WITNESS: Okay.¹⁰

Although the judge is well-meaning, the instruction is very likely to be ineffective. The judge combines the don't know and don't understand instructions, and provides no examples or feedback to the child. With a little patience, and a willingness to "follow the script," questioners can increase the likelihood that their interview instructions will make a difference.

§ 5.4 Use open-ended rapport building, including narrative practice, before moving to the interview topic

Interview instructions allow the interviewer to begin building rapport with the child, but the interviewer does almost all the talking. In order to increase the child's comfort level and to encourage the child to speak, it is helpful to discuss innocuous events in the child's life before introducing the topic of interest. It is during this phase of the interview that the interviewer begins to use open-ended questions, and in particular "tell me more" and "what happened next" questions.

The interviewer starts by asking the child, "tell me about things you like to do." At this point the interviewer should take care to give the child time to respond, and should restrain any impulse to step in and provide assistance should the child falter. For example, if the child falls silent, and the interviewer then suggests "do you like school?" the child is likely to simply respond "yes," and the interviewer has gotten off on the wrong foot. If the interviewer is patient, the child is quite likely to provide something, even if only a word or phrase. With just a few words (e.g. "I like soccer,"), the interviewer has an opening, and can follow-up with "you like soccer! Tell me about playing soccer." If the child provides a list, the interviewer can ask for a little elaboration of each item of the list in turn. The purpose is to communicate to the child that in this interview, the more the child says (and the less the interviewer talks) the better. In the Ten Step interview,¹¹ the interviewer also asks "tell me about things you don't like to do," and follows up in the same manner.

The interviewer then asks the child to provide a narrative of a recent event, an approach called narrative practice. For example, the interviewer asks the child, "Tell me everything that happened on your last birthday," following up with "tell me more" questions ("you said you hit a piñata. Tell me more about hitting the piñata") and "what happened next" questions ("you said you ate cake. What happened next?"). It is not essential that narrative practice ask about the child's last birthday, although we have found that this is routinely quite productive. The interviewer could ask about other recent events, even what the child had done on the day of the interview ("tell me everything that you did from when you woke up until when you came here").

¹⁰ People v. Hilaire, YA035220 (Los Angeles County Superior Court, 1998).

¹¹ See Thomas D. Lyon, *supra*, note 9.

Research has demonstrated that when children questioned about sexual abuse were asked open-ended narrative practice questions during the rapport-building phase (in contrast to closed-ended questions), they provided longer and more detailed responses to the first question about abuse.¹² Laboratory research has shown that the additional information is not less likely to be accurate. The narrative practice need not take long; five minutes appears to be optimal (and 15 minutes may be too long, because of fatigue).

§ 5.5 Introduce the interview topic with open-ended questions

In order to transition into the interview topic, the interviewer says to the child, “Now that I know you better, I want to talk about why you came to see me today. Tell me why you came to see me.” Remarkably, children disclosing sexual abuse (and questioned with open-ended rapport building and narrative practice) are likely to initiate their report of abuse at this point about half the time. If a child does mention the interview topic, the interviewer’s first follow-up is as general as possible. For example, if the child says something like “my uncle touched me,” the interviewer follows up with an open-ended question as possible, such as “Your uncle touched you. Tell me everything that happened, from the beginning to the end.”

Interviewers have to be very careful at this point not to step in with closed-ended questions designed to disambiguate the child’s initial statement. For example, one might worry about which uncle, or whether the touching was truly inappropriate. Many interviewers would ask “where did he touch you,” and, anticipating embarrassment, produce a drawing and ask the child to point. Some interviewers would ask for the uncle’s name, and ask where the uncle lived, before attempting to elicit any details. The problem with these strategies is that they entail asking closed-ended questions, and will undermine the purpose of the rapport building and the narrative practice, which is to enable (and encourage) children to provide a narrative of their experience. Moreover, closed-ended clarification questions at this point are unnecessary, because the child’s narrative will often provide the necessary details, and because clarification questions can always be asked, if necessary, after the narrative report.

It is also important to give the child plenty of time to respond to one’s questions, particularly at the beginning of the interview. Teachers are taught to use “wait-time,” in which they allow children plenty of time to think about a question before they assume the child doesn’t know the answer. Wait-time is also effective in enabling children to build up the courage to discuss unpleasant subjects.

Although the “tell me why” question is effective for about half of children who do disclose, it is necessary to ask further questions in order to elicit disclosures from the other half. Furthermore, it is important to acknowledge that the research proving the efficacy of the “tell me why” question in interviews with abused children assumes that children know why they are being interviewed, which in turn depends on the child having

¹² See Kathleen Sternberg and Michael E. Lamb, *Effects of Introductory Style on Children's Abilities to Describe Experiences of Sexual Abuse*, 21 CHILD ABUSE & NEGLECT 1133 (1997).

discussed abuse at some prior time. In sexual abuse cases, this is not a problematic assumption, because abuse tends to be suspected and substantiated on the basis of a disclosure by the child.

Indeed, other interview topic questions, which are asked only if the “tell me why” question is unproductive, take advantage of any prior disclosures by the child. The interviewer refers to a person to whom the child disclosed (preferably an impartial recipient, if there was one): “I heard you talked to a police lady. Tell me what you talked about.” This question can be used with multiple recipients; the point is to cue the child to the topic without overtly suggesting that something untoward occurred. The interviewer only gradually moves toward more direct suggestions; for example, in sexual abuse interviews, the interviewer may ask if adults are “worried about” the child and if “somebody did something that was wrong.” These questions are necessarily less desirable; they are not only more direct, but by being yes-no, they are less productive (they risk a curt “yes” and a recanting “no”).

An obvious problem is that an interviewer cannot rely on a child’s prior words if the child has never disclosed any information. It is extremely common, however, for children to have said *something* about the allegation in question. In sexual abuse, for example, abuse is most often discovered because the child makes some sort of disclosure. A good investigative interviewer will find out as much about the child’s prior statements as possible. Those statements can be referred to obliquely in the allegation phase of the interview, if necessary to cue the child to what the interview is about, and at the end of the child’s initial narrative, the interview can also refer to details to probe for additional details and to assess possible inconsistencies.

§ 5.5 Use optimal interviewing strategies in court

Although interviewing protocols were largely designed for investigative interviewing, there is no reason why attorneys could not utilize the protocols in order to elicit testimony from children in court. Research has documented what experienced attorneys already know: children are less productive when questioned in a courtroom than in a less formal setting. Testifying in an open courtroom, particularly in criminal cases in which the witness faces the jury and the accused, is extremely stressful, even for adult witnesses.

Indeed, attorneys frequently attempt to build rapport with child witnesses before introducing the topic of their testimony. Although the opponent might argue that such questions are irrelevant, these questions can be justified in several ways. First, the court has a responsibility to ensure that witnesses are not unduly intimidated by questioning. Under Federal Rule of Evidence 611(a), a version of which has been adopted by most of the states, the court is required to control the mode of questioning so as to “protect witnesses from harassment or undue embarrassment.” The propriety of preliminary questioning with child witnesses alleging abuse seems self-evident, making it difficult to find opinions even addressing the practice. In the single case I have been able to locate, the appellate court approved a “series of questions concerning whether [child witness]

had pets, what kind of dog she had, what she liked to do in her spare time, who she played softball for, what kind of music she liked, what kind of subjects she liked in school, and what kind of food she preferred” that “were asked to help [the child] feel comfortable on the stand, before delving into the sexual conduct at issue in the case.”¹³ Second, preliminary questions about a child witness’ background are relevant in that they assist the fact-finder in assessing the credibility of the witness.¹⁴ Third, in states which require a preliminary finding of testimonial competency (not to be confused with oath-taking competency, which entails understanding of truth and lies), questions about recent events in the child’s life are relevant in determining if the child can answer questions and relate past experiences.

The problem with attorney-conducted rapport building is that attorneys tend to ask a series of closed-ended factual questions (such as “how old are you,” “what school do you go to,” “what is your teacher’s name”) that are demonstrably poor in increasing children’s subsequent productivity. Indeed, the reader may have noticed that the questions asked in the appellate case approving introductory questions, although about the child’s likes, were quite specific and likely to have been asked as yes-no (“do you have pets?”) or closed-ended wh- questions (“what is your pet’s name”). Hence the challenge is not to obtain the right to ask rapport-building questions, but to ask the questions in the right way.

Attorneys can also elicit children’s substantive testimony through open-ended questions. One often hears the objection, “calls for a narrative,” but there is nothing inherently objectionable about narrative questions.¹⁵ Indeed, legal commentators have recognized the virtues of narrative testimony: “Truth can be promoted because a witness who testifies in the form of a narrative has not been prompted by specific questions suggesting which facts are important. Time can be saved since the cumbersome back and forth of numerous questions and answers is economically replaced with a single question and answer.”¹⁶ The potential disadvantages of the narrative question are that the witness may make statements that are irrelevant or prejudicial.¹⁷ However, these risks are slight in a proceeding in which a child is questioned about abuse. Virtually everything the child reports will be admissible, since the child’s responses will enable the court to assess the child’s competence and credibility. The child’s reports of the statements of the perpetrator will generally be admissible as party admissions or as non-hearsay statements that explain the child’s actions. Second, any statements that are irrelevant can be struck. In bench trials (which of course are most common in child welfare cases) one worries little about prejudice, since the court knows what is inadmissible.

§ 5.6 Case studies

¹³ State v. Hanna 2003 WL 22843592, at 2 (Ohio App. 5 Dist. 2003).

¹⁴ See State v. Brewer 549 P.2d 188, 195 (Az. App. 1976) (“It is commonly accepted that a person may be examined about his background, occupation and the like for the purpose of aiding the jury to evaluate his testimony and credibility”).

¹⁵ State v. Abril 76 P.3d 644, 648 n. 1 (N.M. Ct. App. 2003) (“There is no per se rule against narrative testimony”).

¹⁶ Wright and Gold, 28 Fed. Prac. & Proc. Evid. § 6164 (1997).

¹⁷ *Id.*

§ 5.6.1 Narrative practice and young children's responses to open-ended questions: 4-year-old J.

Interviewers with extensive experience with children, particularly child abuse victims, are often extremely skeptical when given advice to move away from closed-ended questions. They are likely to have had experience with children who refused to talk, or appeared incapable of responding to questions, particularly when the children were very young and the allegations extremely serious.

Consider 4-year-old J. J. was a potential eyewitness in a double homicide case. The victims were J.'s great grandmother (J. knew her as "Gramma Great") and the grandmother's caretaker. Gramma Great and her caretaker were found stabbed to death in Gramma Great's one bedroom apartment. Gramma Great's body was found next to an exercise bike in the living room, and the caretaker's body was found in the bathtub. The chief suspect was K., Jana's mother, who had been staying with Gramma Great, but who had moved out of the apartment at about the time the murder occurred. If questioned, K. was likely to acknowledge that she had an argument with Gramma Great, which led her to leave with J. (and her other children, a 6-year-old, P., and a 2-year-old, A.), but that the murders occurred after K. had left. She might have pinned the blame on her mother, Gramma Great's daughter, who also stayed in the apartment. Hence, J.s' testimony might prove crucial. J. was questioned by two homicide detectives the day after the bodies were discovered.

Q: Let me ask you something J., you're a very smart girl and because the other police officers were telling me you're very smart, we wanted to know what happened yesterday at the house, at the apartment on C. avenue there. Can you tell me in your own words what happened yesterday?

A: Hm?

Q: Can you tell me what happened?

A: [Nods]

Q: What happened?

A: Hm?

Q: What happened yesterday? At the apartment. Did somebody get hurt?

A: Hm?

Q: Did somebody get hurt yesterday?

A: [Nods]

Q: Who got hurt? Who got hurt?

A: K. [J.'s mother].

Q: K. got hurt. How did she get hurt?

A: 'Cause she was fight Gramma Great.

Q: She got in a fight with Gramma Great?

A: [Nods]

Q: What happened?

A: Hm?

Q: What happened?

A: Hm?
Q: What did you see?
A: K.
Q: What did, what, what happened though? What happened between K. and [trials off]
How did she get hurt? [3 second pause] Do you remember how she got hurt?
A: [Nods]
Q: Can you tell me?
A: Hm?
Q: Could, could, can you tell me what happened?
A: Yes.
Q: Okay, what happened? [child fiddles with ring in her hand] Can I see that for a sec?
[detective takes object from the child] Okay, I'll give you that in just a second.
Wondering what happened?
A: Hm?
Q: What happened yesterday?
A: Huh?
Q: [Second detective] Can you, can you show us what happened?
A: Hm?
Q: Well, did you hear what happened?
A: [Nods]
Q: What did you hear?
A: Hm?
Q: Did you hear some noises?
A: [Nods]
Q: Oh, what kind of noises?

One might conclude that J. was obviously traumatized from witnessing the stabbing death of her great grandmother and another adult. She appeared stymied by the general nature of the questions; perhaps “what happened” was too open-ended for a child who is extremely young, frightened, and inarticulate. Many interviewers would conclude that direct (and perhaps some leading) questions are required. However, J. responded to the yes-no questions with nods or non-committal “hm”s. The “hm” is particularly worrisome, because J. may have been using the “hm” to reflect acknowledgement, but she may also have been expressing incomprehension. A series of yes-no questions outlining the detectives’ theory of the case would be very hazardous.

The reader should also take note that open-ended questions phrased as yes-no questions also elicit a single word response: for example J. responded “yes” to “can you tell me what happened.” Finally, the reader should consider how many of the detectives’ words may have been incomprehensible to a young four-year-old child; is it likely that J. understood that she was staying in an “apartment” and that it was on “C. avenue”?

The interview continued for several minutes in the same vein. The detectives were quite conscientious in avoiding any overtly leading questions (e.g., they never asked “did you see K. kill Gramma Great?”), but had little success in eliciting details using

open-ended questions (such as “what happened”). Many interviews would not have been so patient.

The reader should notice that the detectives did little to build rapport with J. or to get J. talking before moving to the interview topic. How would J. have responded to open-ended questions after rapport-building and narrative practice? Less than a week later, I questioned J. using the Ten Step interview (which, as noted above, is a modification of the NICHD structured interview protocol). After interview instructions, I asked J. about her last birthday as part of narrative practice:

Q: Tell me everything that happened on your last birthday.

A: You remember I had ice cream and chocolate and cake.

Q: You had what?

A: Ice cream and chocolate and cake.

Q: Oh. Ice cream and chocolate and cake. Tell me more about...

A: K. made it for me.

Q: K. made it for you.

A: Yes. K. put chocolate on the cake, ‘cause it wasn’t sweet when it was no chocolate on it.

Q: Oh, it wasn’t sweet when there was no chocolate on it. Tell me what you did before-

A: A.’s two now!

Q: What?

A: A.’s two now.

Q: A.’s two now, Oh who’s A.?

A: He’s two.

Q: Um hmm. But who is he?

A: He’s just A.

Q: Oh he’s just A. But you were telling me about your birthday. Tell me what you did before you ate the ice cream. What’d you do before the ice cream?

A: First I just mixed it up and ate it.

Q: First you just mixed it up and ate it.

A: Yes.

Q: Oh okay. Now what else did you do for your birthday?

A: I just...I just shared A. and P. some.

Q: You shared?

A: Yes, they had their own bowls, and...

Q: They had their own bowls and you...Now what did you do after you had ice cream and cake? What’d you do after for your birthday?

A: I did turn into...[holds up four fingers].

Q: Oh you turned into four, okay. Okay, alright. Did you get anything for your birthday?

A: I just got cake from the store.

Q: I see. Okay, okay.

After narrative practice was complete, I introduced the interview topic:

Q: Now that I know you a little better, J., tell me why you came to talk to me. Tell me why you came to talk to me.

A: Hm?

Q: Tell me why you came to talk to me.

[9 second pause]

Q: Tell me why.

[6 second pause]

Q: Well, I heard, I heard something about, I heard something about K. Tell me what happened.

A: Hm?

Q: Tell me what happened.

A: I heard K. fighting Gramma Great.

Q: Oh.

A: Yes. K. was killing her. By the bike, Yes. My grandmother's bike. That's what K. was doing.

Q: Ok. So you said you heard K. was killing her? Tell me everything you heard.

A: K. was killing her by Gramma Great's bike...

Q: Mmkay, So you said you heard K. killing her. What was she doing? What was K. doing?

A: She was killing her by the bike.

Q: I see. And how did she kill her?

A: With a sharp knife.

During narrative practice, J. clearly showed that she could comprehend the questions and that she was capable of providing multi-word responses (sometimes even in response to yes-no questions). She was also obviously engaged, and she spontaneously mentioned both her brothers (A. and P.), which facilitated asking about their whereabouts during the murders later in the interview. Knowing that she was comprehending my questions and capable of providing a great deal of information made it easier for me to provide some wait-time at the beginning of the interview topic.

I can be criticized for first mentioning K., because K. was a suspect. A better question might be "I heard something about Gramma Great." Indeed, it is simple to construct topic questions for homicide interviews because merely mentioning the victim is frequently sufficient to elicit a report. On the other hand, I mentioned K. without suggesting that K. had done some wrong. Indeed, J. had told the detectives that it was K. who had been hurt (which probably reflected the cuts on K.'s hands that K. received from the murder weapon).

J. remained difficult to interview, providing relatively cursory responses. She was, after all, a 4-year-old child. However, she was clearly responsive to open-ended questioning. Once the child disclosed the murder, it was no longer necessary to introduce outside information. The key was to build the child's own words into the follow-up questions, which were open-ended, preferably "tell me more" questions, and open-ended wh- questions (such as "how did she kill her?").

§ 5.6.2 Older children's narratives: 11-year-old A.

Whereas younger children are often somewhat reticent even under the best of conditions, older children are impressively productive in response to open-ended questions. Consider 11-year-old A., who watched her father kill her mother while her mother was in the driver's seat and A. was in the passenger seat of their car. I interviewed A. because the D.A. was concerned that A. was too traumatized and would not be able to testify at the father's murder trial. She was also concerned that the father might claim self-defense, claiming that he thought the mother was reaching for a gun in the car when he shot her. She was specifically interested in proving that the mother was in fact reaching for a cell phone and attempting to dial 911.

After interview instructions and rapport building (during which A. described a recent basketball game in which she played), I moved to the interview topic.

Q: Now that I know you a little bit better, I wanna talk to you about why you came to talk to me today. Tell me why you came to talk to me today.

A: 'Cause my dad shot my mom.

Q: Uh-huh. Okay, now I need you to tell me *everything* that happened, from the beginning to the end.

[16 second pause]

A: Do I have to?

Q: It's really important that we know everything that happened. Okay? So I need you to tell me everything that happened.

[10 second pause]

A: I was coming back from my Uncle Sammy's, 'cause I went to spend the night over there. And then I went with my mom, and when I came back, my mom was there with my brother, and my brother was sick. And then we went to the store to go buy him Gatorade. And then we seen my mom's car up the hill where my dad go'ed. And my mom went to the corner, she stopped, she went around the block, stopped at the corner, and got the license plate number, 'cause the police officer said to get it. And when she got the police officer, she called my grandma and told her. And then we went to the store to go buy Gatorade, and then when we parked, we were gonna get out the car, but then we seen him, and he blocked us in, and we couldn't get out. And then he comed and shouted to my mom to get out the car, get out the car. And he told me to get out the car, and I said, "No." And then after, he got a little rock, he threw it at the window and cracked the window. He got the bottom part in the front and hit it. He hit the window and then broke the window. And my mom got out of the car. When she was getting out of the car [trails off] When, no, when. When after he broke the window, he went to the car, to his car to go get bullets for the gun, 'cause it didn't have any. And then, he came back, and my mom was getting out of the car, and he started shooting my mom, and that's when I got out of the car and went into the store and told them to call the police. And then after, I came back outside and started screaming at him, and he told me to shut up and get in the car. And then after, I told him, "Why did you do it?" And he said 'cause my mom was a whore and a slut. And then he took me to my grandma's house. And he

told my grandma that he had shot my mom. And then my grandma said, “You freakin’ liar, you freakin’ son of a [trails off] bitch.” And then [trails off] And then he shot her, and my grandma was holding my baby cousin, and then after, he shot her two times, I got out the car, and I hid behind my mom’s van. And then after, my grandpa was coming outside with my uncles, and he was shouting at my grandpa, and he hit the door, and it skinned him in the arm, and then that’s when he left and I ran up the stairs, and everybody went to go see what happened.

Wait-time appeared effective for A. She seemed to gather her courage during this time. When she asked, “do I have to?” I refrained from a long-winded explanation (for obvious reasons, it was inadvisable to say something like “you can help us keep your dad in jail”), but simply emphasized the importance of knowing everything.

Although I did not ask any questions during A’s narrative, I was not silent. In addition to taking careful notes, after every sentence or so I would let her know that I was listening by uttering an “uh-huh” or an “o.k.” These utterances are called facilitators, and they are known to increase children’s productivity.

The reader may have noticed that A. did not mention her mother’s cell phone or a 911 call. I recall being tempted to interject this question during A.’s initial narrative, knowing this was a detail the D.A. was particularly interested in, but I refrained from doing so as not to interrupt the narrative. Significantly, A. then provided an unexpected detail that would rebut any self-defense claim; her father’s own explanation for the shooting. With respect to the cell phone, it was easy to come back to this point in the follow-up questions, when I asked “I heard something about a phone. Tell me about that,” and A. confirmed the fact that her mother was attempting to make a call when the defendant shot her. This was a detail that was also easy to corroborate, because the police found the cell-phone in the car, and 911 was the last number dialed.