

Dealing Effectively with the Child Witness

By Norma M. Gant and David N. Lutz

As manufacturers and distributors of playground equipment, you are most likely to face a lawsuit brought by or on behalf of a child, arising from an incident in which the witnesses include children. Therefore, it is important for you, when dealing with pre-suit claims, and for your counsel, after litigation begins, to be able to deal effectively with child witnesses.

There often is reluctance to depose children. In playground equipment cases, it is imperative that you meet the child plaintiff and child witnesses who are fact witnesses to the incident before trial. Not only do you need to know what they will say on the witness stand, you need to be able to assess how they will perform as a witness as part of your evaluation of the case.

Whether your interactions with child witnesses occur during interviews or in depositions, your most important initial step is to make the child feel comfortable, in ways that are different from your interactions with an adult. Studies have shown that a child who feels more comfortable with the questioner will provide more correct answers. Whether you are a product manufacturer's representative, a lawyer, a claims person or someone working in product safety, there is a high likelihood that a child will perceive you as an intimidating person. A good way to make a child witness feel more comfortable is to find something that you have in common with the child, either you personally or perhaps your child. If your child witness plays the trumpet and you did too, or if your child witness plays soccer and your child does as well, that might present an opportunity to find common ground. Finding a way to relate to the child and to make the child feel less intimidated or nervous will facilitate a better discussion about the topics you really need to learn about.

A second way to make a child witness feel more comfortable is to engage them in conversation about things that are important to them and not merely things that are important to you. Certainly you want to know about the playground incident, but you may find them more willing to tell you about the incident if you first get them involved in a give and taken discussion about something to which they can relate that is totally unrelated to what you are really there to learn about. While it may take a little extra time, it will be time well spent.

A third way to make the child witness feel more comfortable with the process is to make it less formal. If you are interviewing a child witness, can it take place at her favorite restaurant rather than in a formal looking office that the witness has never seen before? If you are taking a child deposition, consider whether you have to dress for court or whether instead you can dress in a more casual way, again with the goal of making you look less intimidating and making the child feel more comfortable with you.

In addition, your communications with a child witness must be at a much more basic level than your communications with adults. During the deposition of an adult, the adult will be asked if she understands that she has just sworn under oath to tell the truth and whether she understands the meaning of that oath and how it could be used later in court proceedings if she fails to tell the truth. On the other hand, your child witness, particularly a young child, might very well not have a clue what an oath even is, much less understand what would happen if it is not followed. The questioner can accomplish the goal with a child, however, by simply asking, "Will you tell me the truth?"

Just as rapport is important with an adult witness, it is even more critical with a child witness. Studies show that children generally want to tell the questioner what they think the questioner wants to hear, regardless of whether that is really what happened. You are more likely to secure the testimony you are trying to elicit if you have first established a good rapport with the child witness, primarily by making them feel comfortable with the process. One way to do this is to have the court reporter read back the question and the child's answer during a deposition and then comment on how well the child is doing to give the child a boost of confidence.

Not only must conversations with children be more basic than conversations with adults, studies show that children are also more literal in their communications than adults; thus, the adult questioner must be mindful of them when formulating their questions. For example, when asked in a deposition whether they are in school, a child witness is more likely than an adult to interpret that question to

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mean are they physically present in the school right now, as opposed to what the question really intended is to confirm that the child attends school and is of school age. If the questions are not asked at a level that the child understands, communication errors will occur which could lead the questioner to conclude that the question was answered when, in fact, it really was not.

Any parent will recognize the “I don’t know” answer as a response routinely used by children to avoid answering a question, particularly a question that they are uncomfortable answering. A child will often give an “I don’t know” response to questions that make them feel threatened or “in trouble.” This type of response is also often given by a child when a child is given two choices and neither choice is correct. For example, if a child is asked whether he and his friend who got hurt were told by Mr. Smith and Ms. Jones to stay off the broken swing and the children were actually given that direction by Principal Kersten, the child may respond with an “I don’t know,” rather than telling the questioner that his choices were wrong. A child who is more comfortable with the questioner would be more likely to disregard the only two choices given and answer the question with the information he recalls than a child who is not. Even when the questioner thinks that she knows the response, she must be careful not to limit the answer choices as that may lead to miscommunication and nonresponsive answers.

Children do not have as good a sense of time as adults. Efforts to establish timeframes can more accurately be accomplished by the questioner associating an incident with other events that are known to the child witness. Rather than directly asking how long ago something happened, relate the incident to key times that may be important to the child: The questioner could ask: Was the swing broken during summer vacation from school or was it already broken during baseball season. Did Kaitlin fall off the slide before or after your birthday; those are examples of ways to obtain the same basic information in a way that a child will be more likely to relate to and, consequently, to respond to in an accurate way.

Finally, the questioner must be able to speak language that is comfortable to the child witness to have a productive conversation with him. That means simple sen-

tences that begin with the main idea of the sentence. No convoluted sentences with negatives and double negatives that stereotype lawyers. It means using names rather than pronouns and either first name or “Mr.,” “Mrs.,” or “Ms.,” depending on how the child would refer to that person. The child would know his principal as Ms., but he would know his classmate by first name. It also may mean less use of negative questions and less use of more traditional cross-examination questions. “Isn’t it true that . . .” questions may be less effective with, and understandable to, a child witness. “You didn’t report the incident to your teacher, did you?” might have to yield to, “Did you tell your teacher that David fell?”

Just as interviewing or questioning a child witness can be more challenging than questioning an adult, preparing a child witness for an interview or a deposition also has its challenges. This may be why there is often reluctance to produce a child to be questioned. A lawyer or family member presenting or defending a child witness will have greater difficulty preparing the child witness because children are not as savvy to the process of how to answer a question (or not) in a light most favorable to a particular theory and are less aware of the issues and interests of the people involved. The child witness is not likely to have a particular cause to promote. The child witness, who can be made to feel at ease, will also be less inclined to limit her responses to the exact question asked and may be more likely to voluntarily share more information, whether favorable to a particular party or not.

It is up to the questioner to understand that children are not “little adults.” It takes more than just “any good lawyer” or “any good questioner” to properly interview and depose children, and following these guidelines will lead to a successful process that yields accurate responses and reliable information from the child witness.

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