A New Protocol to Determine the Competency of a Child Witness

By Christopher Musulin and Matheu D. Nunn

On Feb. 9, 2021, without publicity or fanfare, the Hon. Glenn A. Grant, J.A.D., Acting Director of the Administrative Office of the Courts, issued a Notice to the Bar containing the report and recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (Joint Committee).[1]

The Joint Committee's Dec. 23, 2020, report establishes a new protocol to determine the competency of child witnesses (Report and/or Protocol) under N.J.R.E. 601.[2] The Protocol was created by a nationally recognized expert in conducting child interviews, Thomas D. Lyon, Ph.D., and was subsequently peer-reviewed and validated by three distinguished professional colleagues of Lyon (after Lyon made revisions to address their comments).[3] Although the impetus for the Report was the New Jersey Supreme Court's decision in a criminal law case, *State v. Bueso*,[4] the Protocol recommended has important implications for New Jersey family law practice. Indeed, the Protocol established in the Report provides valuable insight and guidance for both judicial interviews of children and other situations where a child may be called as a witness. When the Report is viewed through its stated goal–to assess competency–and not through the prism of assessing accuracy or reliability of later proffered testimony–we believe the Protocol should be looked to as a best practice employed by judges to establish baseline competency of child witnesses.

Impetus for the Report

In 2016, the Supreme Court decided *State v. Bueso*, a case involving a five-year-old child victim (referred to in the opinion as M.C.) who alleged sexual abuse by a family member who also served as a babysitter.[5] The child initially reported the abuse to her mother.[6] The child's mother contacted the state Department of Child Protection and Permenancy, which in turn contacted the local prosecutor's office.[7] The child subsequently provided a statement to law enforcement, which was videotaped.[8] Prior to trial, the court denied the defendant's motion to dismiss the indictment and also denied defendant's motion to suppress the child's statement to her mother and the videotape of the detective's interview of the child.[9] During a competency hearing, the prosecutor probed whether the child understood the importance of telling the truth:

> [Prosecutor]: Now, if you forgot to do your spelling homework—you didn't do your spelling homework—and you told your teacher you did the spelling homework, would that be a lie?
> [M.C.]: Yes.
> [Prosecutor]: And what would your teacher do if you told her you did your spelling homework—
> [M.C.]: He's going to—
> [Prosecutor]:—but you didn't do your spelling homework?
> [M.C.]: He's going to put me an X in the homework.
> [Prosecutor]: She's going to do what?
> [M.C.]: Put me an X.
> [Prosecutor]: She's going to make you do the next homework?
> [M.C.]: No. She—he's going to put an X.
> [Prosecutor]: Oh. Put an X? So, he—your teacher's a man? Yes? You just have to say out loud—
> [M.C.]: Yes.
> [Prosecutor]:—yes or no. So, your teacher, who's a male, would put an X?
> [M.C.]: Yes.
> [Prosecutor]: Is the X good or bad?
> [M.C.]: Bad.
> [Prosecutor]: What happens if you get a lot of X's?
> [M.C.]: You probably not play with that—be alone.
> [Prosecutor]: You'd be alone?[10]

Then, at trial, the state introduced the subject of tell-

ing the truth in court in its examination of the child:

> [Prosecutor]: Everything you do today in court, you have to tell the truth. Do you understand that?
> [M.C.]: Yes.
> [Prosecutor]: So, is it good to tell the truth?
> [M.C.]: Yes.
> [Prosecutor]: And is it bad to tell a lie?
> [M.C.]: Yes.
> [Prosecutor]: And do you understand bad things happen if you tell a lie in court. Do you understand that?
> [M.C.]: Uh-un. No.
> [Prosecutor]: Do you understand that bad things happen if you tell a lie in school?
> [M.C.]: Yes.
> [Prosecutor]: So, just like if you tell a lie in school, if you tell a lie here in this place, the court, bad things happen. Do you understand that?
> [M.C.]: Yes.
> [Prosecutor]: Okay. So, everything you talk about today has to be the truth. Do you understand that?
> [M.C.]: Uh-huh.

The trial judge then offered defense counsel the opportunity to ask questions. Defense counsel responded, "[n]o objection, Judge." The judge then briefly questioned the child:

> [The Court]: All right. Let me just ask you a question. See that book there?
> [M.C.]: Uh-huh.
> [The Court]: If I told you that that book is round, would that be a truth or a lie?
> [M.C.]: A lie.
> [The Court]: Why?
> [M.C.]: Because it's a rectangle.
> [The Court]: Because it's a rectangle. Okay. So, you know the difference between telling what is and what isn't, right? What really is and what really isn't? Truth or a lie, right? Okay. Thanks.[11]

The court then permitted the child to testify regarding the substance of the criminal charges.[12] The child proceeded to testify and described the abuse; she was partially consistent with her prior video-recorded allegations and statements to her mother.[13] After hearing additional testimony from, among other people, the defendant and an expert on pediatric sexual abuse, the jury convicted the defendant.[14]

On appeal, the Appellate Division reversed, holding that the trial judge was "required to question M.C. personally and directly to ascertain her comprehension of a witness's duty to tell the truth and her conceptual awareness of truth and falsehood and that the judge improperly delegated that responsibility to the prosecutor."[15] The panel also criticized the state's use of leading questions to question the child.[16] On certification to the Supreme Court, the Court held that "the inquiry conducted in this case was well short of ideal."[17] Although the Court ultimately reversed and remanded to the Appellate Division to further address the case, it added:

> A thorough and detailed examination of the child might have established a more compelling record. When M.C. offered her unclear comment about the consequences of a misstatement about spelling homework—indicating that she may not have understood the import of the question—the prosecutor should have shifted to alternative examples of falsehoods that a child might tell in the familiar setting of her school. The trial judge's brief questioning about a hypothetical lie concerning the shape of a book was instructive, but the judge's inquiry would have been more effective had it extended beyond a single topic.[18]

As part of its decision, the Supreme Court also directed that "courts and counsel should develop the record on the question of competency by means of thorough and detailed questioning of the child witness."[19] In a footnote, the Court stated: "[w]e suggest that to assist trial courts and counsel, the Criminal Practice Committee consider developing model questions for use in competency determinations involving child witnesses."[20]

Joint Committee Report

In response to the directive by the Supreme Court, the Joint Committee was established. It is comprised of members of the Supreme Court Criminal Practice, Evidence Rules, and Family Practice committees. The Supreme Court authorized the Joint Committee to

consult with child development and psychology experts. The Joint Committee consulted with Lyon, who is the chair in law and psychology at the University of Southern California (USC), Gould School of Law. He also serves as the Director of the USC Child Interviewing Lab.

After completing his exhaustive investigation and defining revised protocols, his work was peer-reviewed by three additional experts in the field: Gail Goodman, Ph.D., Michael E. Lamb, Ph.D., and Jodi A. Quas, Ph.D.[21] The Joint Committee recommended that the Court adopt the Protocol described by Lyon, as set forth more fully herein, for use when the issue of the competency of a child witness has been raised.[22] The Joint Committee also advised:

The Joint Committee recommends use of the carefully worded oral questions that would be posed to children aged nine and older and use of the picture-based method of questioning younger children and children affected by developmental delays, disabilities, and trauma.

The Joint Committee further recommends that adoption of this [P]rotocol include direction to trial courts to use only the oral questions or the picture-based methods set forth in the protocol to assess the competency of child witnesses.

When the competency of a child witness has been established, the Joint Committee also recommends use of the oath alternative ('Do you promise that you will tell the truth?').[23]

Lyon's Protocol

The Protocol established in the Report creates a distinction between children aged nine and older, and children younger than nine years old.[24] Specifically, for children aged nine and older, questions would be posed *orally* to determine the child's understanding of: (1) the difference between telling the truth and telling a lie; and (2) the negative consequences of telling a lie.[25] Under this approach, the interviewer asks: "If someone says something that didn't really happen, is that the truth or a lie?" The interviewer would then ask: "And if someone says something that really did happen, is that the truth or a lie?" If the child answers "lie" and "truth," then the child has demonstrated an understanding of the distinction.[26] If the child does not answer the question correctly, the interviewer would administer picture-based tests designed for younger children called the "Meaning Task" and "Consequences Task" because these tasks provide a more sensitive test of understanding.[27]

For younger children or those unable to sufficiently respond to the oral questions, a picture-based model is used to assess understanding of: (1) the difference between telling the truth and telling a lie; and (2) the negative consequences of telling a lie.[28] Under the Meaning Task approach, the person assessing competency asks the child a total of four questions about two scenarios set forth in pictures in which one child correctly labels an object and the other child incorrectly labels the object. For each of the two scenarios, the interviewer asks which child told the truth, and which child told a lie.[29] According to the Report:

If a child answers four of four Meaning Task questions correctly, this is strong evidence of understanding (approximately 6% of children responding at chance would answer 4/4 correctly). If a child answers three of four questions correctly, this is weak evidence of understanding (approximately 25% of children responding at chance would answer ¾ correctly). Answering two or fewer questions correctly suggests the child is guessing.[30]

The Meaning Task approach accomplishes seven goals: (1) it accounts for sensitivities associated with young children who are asked to identify truth-telling and lying; (2) it avoids problems encountered in *Bueso* with identification questions; (3) it avoids asking children "what-if" questions that ask them to imagine themselves or the questioner telling a lie; (4) it avoids confusing lies with immoral actions; (5) it avoids "do you know" questions, which can lead to high rates of false negatives; (6) it avoids requiring children to define the words "truth" and "lie;" and (7) it avoids requiring children to explain the difference between the truth and lies.[31]

Under the Consequences Task, the goal is to discern whether the child understands the *negative* consequences of telling a lie.[32] The interviewer asks the child four questions about scenarios in which one child tells a lie and the other child tells the truth. For each scenario, the interviewer asks which child correctly labels an object and which child incorrectly labels the object. For two scenarios, the interviewer asks which child told the truth, and for two scenarios, the interviewer asks which child told a lie. The child can be asked to choose which of two child story characters "is going to get in trouble," a child described as lying or a child described as telling the truth.[33]

Although this is a different approach than the Meaning Task, it shares a similarly important overall goal: to determine whether the child understands the importance of telling the truth and the negative consequences that

can result from a lie. It accomplishes this goal by: (1) recognizing that asking children to identify consequences is most sensitive to early understanding; (2) avoiding asking children "what-if" questions that ask them to imagine themselves or the questioner telling a lie; (3) avoiding asking children if they have ever told a lie; (4) avoiding confusing lies with immoral actions; (5) avoiding "do you know" questions; and (6) avoiding requiring children to believe in specific types of punishment.[34]

This section is not complete without addressing two other broad points discussed in the Report. First, Lyon rightfully cautions in the Report that: "[t]he model questions are designed to test children's ability to articulate their understanding of witnesses' duty to tell the truth, and *not children's honesty or reliability*."[35] In fact, he notes recent research which suggests that children with "an incipient understanding of truth and lies are better able to make false statements . . .[and] it is more difficult for the child who does not know the difference between 'truth' and 'lie' to tell a lie."[36] Second, he concludes that "[q]uestioning in a courtroom rather than in a private room is likely to impair children's performance" because "high arousal" in children reduces their ability "to communicate and impairs their accuracy."[37] To avoid this impairment, Lyon recommends that interviews be conducted in a private room after the interviewer has built a rapport with the child, which may take more than one interview to engender before administering the Protocol.[38]

Comments

The Report has been met with appreciation but also opposition. Most of the opposition stems from concerns about the dichotomy between a child's ability to understand the need to "*tell the truth*" versus the child's *accuracy* or *reliability* during subsequent testimony. While a child certainly may be able to do both, the comments expressed concern that a court may conflate veracity with accuracy and reliability. These concerns appear to be well-founded (and are actually addressed by Lyon in his report, including through revisions he made after receiving comments from Goodman and Quas).[39]

For example, although the New Jersey Office of the Public Defender's Office of Parental Representation (OPR), noted: "[i]n general, the NJOPD/OPR supports model questions for assessment of truth telling competency and agrees that the proposed two-part age specific protocol of both oral and picture-based models, consistent with New Jersey law, may be an effective method to assist the court in assessing child competency[,]" it also concluded that the Protocol has "the potential to result in the Court's adoption and utilization of an assessment model that inadvertently conflates issues of competency and accuracy," leading to determinations on child competency that may be more prejudicial than probative.[40]

In a similar vein, the Office of the Public Defender's Office of Law Guardian (OLG), noted its objection to use of the new Protocol in Children-in-Court (CIC) cases:

> The OLG suggests that the Protocol may undermine a child's statutory right to express his or her views in Titles Nine and Thirty proceedings, and, as written, it is impractical given the nature of child involvement in CIC cases. First, if competency is raised as per the Protocol, a child who testifies multiple times will be presented with the same pictures or questions each time. Second, a child may be discouraged from testifying, or even attending court proceedings, when faced with the competency threshold each time, or after the first time. This may have the unintended consequence of further traumatizing children who have experienced past trauma, through their involvement with our judicial system. Finally, use of the Protocol may lead to a more adversarial proceeding, which is counterproductive to a family-driven court system.
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> . . .
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> The OLG urges the Court not to implement the Protocol in CIC cases. A more practical approach in CIC cases, where judges serve as the arbiter of evidentiary decisions and the ultimate factfinder, is to continue to treat child and adult witnesses alike. Upon a commitment to tell the truth, through an oath, affirmation or alternative method, the court should permit children to testify, subject to the court's discretion as to the weight and credibility of the testimony.[41]

The New Jersey State Bar Association (NJSBA) provided similar commentary:

> In summary, the NJSBA urges the Judiciary to consider whether it is better to eliminate the competency test rather than to have a test that is likely to result in unjustified confidence in

> the competence of child witnesses. According to the Joint Report, science supports this inquiry. Eliminating the test also removes the potential for bias to be introduced by the test itself, as noted above. The NJSBA urges that the Judiciary instead allow the fact finder to assess the weight of a child's testimony in total without a bifurcated finding of qualifying and credibility determinations.[42]

The County Prosecutors Association of New Jersey also objected to the use of what it called the "Lyon Protocol" to assess competency under *N.J.R.E.* 601 and asked for the opportunity to "vet" the Protocol before it is adopted as a model procedure or law.[43]

On the other hand, the Supreme Court Committee on Diversity, Inclusion and Community Engagement (DICE) Executive Board supported the new Protocol subject to its comments, most of which are borne out of its mission of diversity, inclusion, and community engagement; for example:

> Children from different cultural and economic backgrounds will be equitably assessed given the use of an interviewer script that accepts as valid a child's "misnaming" of a visual (e.g., naming the mouse depicted as a rat or a peach as an orange). So long as these vocabulary and context variations cannot become the basis to challenge accuracy during testimony, we believe that common concerns about embedded cultural biases, e.g., in the case of vocabulary and terminology in standardized tests, are ameliorated by this assessment standard.[44]

Thus, the DICE expressed its view that, , although children of different backgrounds may meld terms or concepts due to cultural, religious, or other differences (e.g., rat versus mouse), an instance of misidentifying specifics–though understanding the general nature–should *not* lead to a conclusion of incompetency as a witness.

Rules of Evidence - Competency

Issues of witness competency are left for the discretion of trial court judges.[45] *N.J.R.E.* 601 provides that:

> Every person is competent to be a witness unless (a) the court finds that the proposed witness is incapable of expression so as to be understood by the court and any jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness *to tell the truth*, or (c) as otherwise provided by these rules or by law.[46]

Clearly, *N.J.R.E.* 601 does not guide whether the factfinder is bound to accept the accuracy/reliability of a witness's testimonyonly whether the witness, at a threshold level, is capable of understanding the importance of telling the truth (and/or to be understood). The Report and Protocol are also limited to assessing *competency*.

Much of the negative commentary regarding the Report stemmed from this issue (i.e., competency to understand truth versus lie) and whether a judge would improperly conflate competency with *reliability*. To be sure, the commentary on that score is accurate (as recognized byLyon in the Report) and must be considered; but we are confident that in a bench trial, judges will be capable of recognizing this distinction. And, moreover, in a jury trial, the jury determines reliability and accuracy of testimony while the judge would have already determined competency. In other words, the competency/reliability guardrail is built into a jury trial because if the court determines that the child lacks competency, the child will not take the witness stand.[47]

Court Rule 5:8-6 and Title 9:2-4

Rule 5:8-6 gives judges the authority to conduct child interviews as part of a custody trial. It provides as follows:

> …As part of the custody hearing, the court may on its own motion or at the request of a litigant conduct an in camera interview with the child(ren). In the absence of good cause, the decision to conduct an interview shall be made before trial. If the court elects not to conduct an interview, it shall place its reasons on the record. If the court elects to conduct an interview, it shall afford counsel the opportunity to submit questions for the court's use during the interview and shall place on the record its reasons for not asking any question thus submitted. A stenographic or recorded record shall be made of each interview in its entirety. Transcripts thereof shall be provided to counsel

> and the parties upon request and payment for the cost. However, neither parent shall discuss nor reveal the contents of the interview with the children or third parties without permission of the court. Counsel shall have the right to provide the transcript or its contents to any expert retained on the issue of custody…[48]

N.J.S.A. 9:2-4 contains fourteen non-exclusive factors that a court may consider in fashioning a custody or parenting time award. This includes "the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision."[49]

Both the court rule and the statute empower a trial court to interview a child or consider the opinion of a child not only as expressed through a direct interview, but also as recited by an expert or guardian *ad litem*, or if the preference is expressed as an exception to the hearsay rule. These legal standards invite the use of the revised Protocol.

Conclusion

Even the most seasoned custody experts (and attorneys) express trepidation about the challenges of interviewing young children.[50] Prior to *State v. Bueso,* there have been published decisions highlighting the pitfalls and potential abuses associated with child interviews.[51] It is then of no surprise that trial judges routinely express concern about conducting interviews in any type of case. Most are very honest about their lack of sufficient training and background to properly conduct interviews with children. Although the major thrust of the Report is focused on competency *at trial*, we suggest that judges utilize the Protocol before conducting an interview of a child, regardless of the proceeding. We further recommend that a judge build a genuine rapport with a child-interviewee over the course of more than one interview before charting a course into the intended subject matter of the interview (e.g., information for child custody determinations). ■

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Endnotes

1. Judge Glenn A. Grant, Notice to the Bar: Report and Recommendations of the Joint Committee on Assessing the Competency of Child Witnesses–Publication for Comment (Feb. 9, 2021), njcourts.gov/notices/2021/n210210c.pdf. The Notice to the Bar also contains the full report and recommendations of the Joint Committee on Assessing the Competency of Child Witnesses (hereinafter Report).
2. *Id.*
3. Report at 58-77.
4. 225 N.J. 193 (2016).
5. *Id.* at 196-97.
6. *Id.* at 197.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 198.
11. *Id.* at 199.
12. *Id.*
13. *Id.*
14. *Id.* at 199-200.
15. *Id.* at 200-01.
16. *Id.* at 201.
17. *Id.* at 213.
18. *Id.* at 213-14.
19. *Id.* at 214.
20. *Id.* at 214 n.6.
21. Report at 3.
22. *Id.* at 13.
23. *Id.*
24. *See id.* at 20. The Report notes that children as young as the age of four can be presumed competent. *Id.*
25. *Id.* at 9-12, 16-34.
26. *Id.* at 18.
27. *Id.*
28. *Id.* at 11, 17-19.
29. *Id.* at 17-18.
30. *Id.* at 18.
31. *Id.* at 21-25.
32. *Id.* at 18.