

THE **RECORDER**

COMMENTARY

A very young child's voice in sexual abuse legal proceedings

Elisa Reiter, Daniel Pollack and Jeffrey Siegel | December 27, 2023



Cases involving sexual abuse of young children are onerous for the attorneys trying such cases as well the children who may be obliged to testify. Not surprisingly, young children may often be the only witness to their own alleged abuse. How can we assure that those children are not revictimized in the process of testifying and presenting their story to the court? The way in which children

participate in the process is, ironically, much like what is required of an expert witness – the child must have sufficient developmental capacity to present testimony that a fact finder will perceive as valid, authentic, and truthful, and be able to withstand the pressure of cross-examination.

The [Sixth Amendment](#) provides in pertinent part that: “In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him ...” The U.S. Supreme Court held in [Maryland v. Craig \(497 U.S. 836 \(1990\)\)](#) that, while defendants have the right to confront their accusers, the right to confront accusers in open court may be curtailed to further a vital public interest such as protecting children from further trauma. Therefore, courts must determine, on a case-by-case basis, whether there is a demonstrated need for using a one-way closed television setup for a child’s testimony, or some other alternative means of allowing a very young child to testify. Accordingly, in cases involving minor children, we sometimes vary from standard operating procedure regarding how testimony can be presented, as well as stretching boundaries as to whether the witness is developmentally capable of presenting testimony. Should such distinctions continue?

A child’s [nonverbal signals](#) may be as important as the words a child speaks. [According to ACT, a parenting program of the American Psychological Association](#), the following are reasonable developmental expectations for a child aged three to five:

- Can think about objects, people and events without seeing them.
- Although less than before, still think they are the center of the world and have trouble seeing things from someone else’s perspective.

- More able to use words to express thoughts and feelings and to share experiences.
- Talk to themselves out loud as a way to control their behaviors.
- Can think of events in the past or those yet to happen.
- Begin to think ahead and plan their actions; often can anticipate physical consequences of actions that are not too complicated.
- Starting to see the difference between things they see and what they really are.
- Starting to see the relationship of cause and effect.
- Ask a lot of why, how, when questions.
- Learn by imitation, observation and by exploring, creating and doing things.
- Beginning to understand before/after; up/down; over/under; today, yesterday and tomorrow.
- Can't play or do something for too long or become bored and tired unless there is adult guidance.

In addition, the following are listed as [social skills](#) for children who are three to five years old:

- Can read and interpret emotions of others; can tell when someone is angry or upset.
- Can't understand abstract emotions like pity, greed, gratitude.
- Use different ways to control their own emotions: close their eyes and ears; remove themselves from the situation; sometimes can resist temptation to respond to whatever is disturbing them.
- May develop first true relationship because friends become very important.
- How they play: At age 3, they typically play near a friend, find it difficult to take turns and to share things; at age 4, they may begin cooperative play, still difficult to share but begin to understand turn-taking, begin to offer

things to others; at age 5, enjoy playing with other children, often cooperate well, have special friends.

- Use less physical aggression than when younger.
- Use more frequent verbal aggression like insults, threats, teasing to hurt other children; bullying appears: they understand the power of rejection.
- Understand social rules and can act in accordance to them.
- Are eager to carry out some responsibilities; offer to help.
- Understand that praise or blame happens because of what they do.
- Begin to understand the difference of doing things “on purpose” and “by accident;” focus more on the damage than on the intentions of the perpetrator.
- By age 4, begin to have a sense of their ethnic identity and of the ways their social group is perceived in society.
- Increased capacity to use imagination; can imagine terrible things can happen to them and can lead to fear; nightmares can happen.

If a child is under the age of five, that child may engage in some exploratory behavior, including: [not being self-conscious](#) about nudity, [touching](#) their own private parts, being curious about [others'](#) body parts or nudity, using [alternative labels](#) for natural bodily functions such as peeing for urination or pooping for defecation, [role playing](#) with peers -- “doctor”, “house”, “mommy/daddy”.

However, very young children typically [do not discuss](#) clearly defined sexual activity, nor do such young children use detailed sexual language. Another excellent resource for an expanded view of children’s development with a focus on family law can be found in the [work](#) of Dr. Benjamin D. Garber.

What factors [contribute to acquittal](#) in cases involving sexual abuse of young children?

- No charge for the abuse involving the use of force
- The child maintaining contact with the defendant after the abuse occurred
- Collateral witnesses controverting the victim's testimony
- Collateral witnesses providing testimony as to the victim's character
- Challenges to the child witness' credibility

In the 1990s, developmental researchers began to investigate how interview techniques impact the quality of a child sexual abuse interview. [Michael Lamb](#) and [Debra Ann Poole](#) found that law enforcement personnel and forensic interviewers often conducted well-meaning but biased interviews. In an attempt to glean information from young, alleged victims, interviewers often used leading questions. This technique may have resulted in very young children making unwarranted incriminating statements. [The development of interview protocols and training in these new techniques has enhanced the quality of forensic interviews.](#)

In [Assessing Allegations of Child Sexual Abuse](#), Kathryn Kuehnle notes that props such as the use of anatomically correct dolls during interviews with young children may actually reduce the accuracy of the children's reports. Much depends on the "type of cues and props utilized, the way they are presented, and how the children are instructed to use them." (p. 215). Issues arise not with behavior elicited in the child by using such props, but with "the interviewer's interpretation of the child/doll behaviors . . . [t]he dolls should never be utilized as a projective measure

to ‘diagnose’ sexual abuse from the child’s doll play.’ Kuehnle recommends the use of the Thematic Apperception Test (TAT), the Children’s Apperception Test (CAT) as well as the Projective Story Telling Test as tools for assessing whether a child has been sexually abused. (pp. 236-237).

The [Rorschach](#) is also a potential assessment test. It should come as no surprise that sexually abused children have been found to have higher sexual content scores on their Rorschach test results than nonsexually abused children. Caution must be implemented in the use and interpretation of these “tests.” While testing may be useful to determine and clarify underlying emotional conflicts in children and adults, the use of such tests in the forensic context is very suspect.

Has the child made an outcry to others, including parents, grandparents, teachers, mental health professionals or other counselors? Does the young child have a healthy sense of the difference between the truth and a lie? Most young children have little understanding of time. In other words, the child may not be able to distinguish the exact day that they were abused, particularly where there has been a pattern of abuse. When [a young child has been traumatized](#), their story tends to come out in bits and pieces, [not in a full story expressed in a short period of time](#). Trust must be built between the child and any interviewer over time, and the interview protocols mentioned above establish criteria regarding how to set up, conduct and document such interviews to provide the best available results.

A Missouri conviction of a man accused of sexually abusing a child was overturned in 2022. Michael Wolff, a former chief justice of the Missouri Supreme Court and a professor at the St. Louis University School of Law, commented that

while the United States Supreme Court has allowed exemptions to the right of confrontation, condoning a child witness testifying remotely to protect the child from (further) traumatization, “you still don’t get away from the fact that the Constitution says [there’s a right to confrontation](#).” As previously noted, the 1990 case of [Maryland v. Craig](#) established the precedent for allowing a child witness to testify remotely. Analogies are easy to make to the many cases that went to trial during the Covid pandemic where the only option was a trial via Zoom or some other type of platform allowing testimony via a remote platform. If a very young child is allowed to testify by remote means, does that preserve the defendant’s right to confrontation? If a parent faces the onerous burden of having their parental rights terminated due to allegations of sexual abuse, or having severe restrictions imposed on their access to their children based on such allegations, should the child making such allegations be forced to testify in open court?

Did the framers of the U.S. Constitution and the amendments envision young children having to testify in open court, in front of both parents, and/or a third party accused with sexually abusing the child, numerous other court personnel and members of the general public about such intimate and often disgusting actions allegedly perpetrated on those young children? Unlikely. Sadly, there seems to be a huge imbalance between protecting the rights of the accused versus allowing the legal process to further victimize very young children, under penalty of law (perjury).

[FRE 413](#) and [FRE 415](#) define “sexual assault” as including:

- (1) any conduct prohibited by 18 U.S.C. chapter 109A;

(2) contact, without consent, between any part of the defendant's body — or an object — and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

Often, an outcry will be followed by an [interview of the child](#) by the police and/or a trained professional at a child advocacy center. In assessing a very young child witness, one must question whether the child has the mental acuity to recollect an experience of sexual abuse. In addition, the fact finder must consider the child's narrative in the context of the child's relationship and social interactions, as well as the quality of the child's narrative. Questions include:

- Was the initial [outcry spontaneous](#)?
- Does the child use childlike labels for the interaction?
- Did the child display unique knowledge that would not be typical for a very young child as to anatomy and/or sexual function?
- Did the child present distinctive or peculiar knowledge regarding the alleged perpetrator? (Tattoos, piercings, distinctive marks on genitalia)
- Was the child taunted or threatened by the alleged perpetrator that the child or the child's family would be harmed if the child disclosed the abuse?
- What was the child's state of mind/emotional display/body language (Agitated? Flat affect? Monotone? Turning away in shame? Volume?)

- What was the nature of the interaction between the interviewer and the child?
- What body language, gestures, words, or tone did the child use that support the allegations of abuse (or lack thereof)?
- Does the child, or someone close to the child, have an incentive to lie?

A very young child's allegations may be enhanced by the presence of the following factors:

- Evidence of a spontaneous, excited utterance as to the initial disclosure.
- Lack of undue influences or the child being placed under duress to tell lies about the alleged perpetrator.
- The child's words and body language reflect a reluctance to share their story.

There are two overarching concerns regarding child witness testimony – competence and reliability. Even after overcoming these hurdles, defense and prosecuting attorneys must be extraordinarily tactful when cross-examining a very young child. If a court does permit a child witness to testify remotely, the judge must be vigilant in preserving the defendant's constitutional rights to confront the defendant's accusers.

Elisa Reiter, a Senior Attorney with Underwood Perkins, P.C. in Dallas, Texas, is Board Certified in Family Law and in Child Welfare Law by the Texas Board of Legal Specialization. She has served as an Adjunct Professor at SMU. She is also admitted to practice in the District of Columbia, Massachusetts, and New York. Contact: ereiter@uplawtx.com.

Daniel Pollack, MSW, JD is a professor at Yeshiva University's School of Social Work in New York City. He was also a Commissioner of Game Over: Commission to Protect Youth Athletes, an independent blue-ribbon commission created to examine the institutional responses to sexual grooming and abuse by former USA Gymnastics physician Larry Nassar. Contact: dpollack@yu.edu.

Jeffrey C. Siegel, Ph.D., ABPP is a forensic and clinical psychologist in Dallas, Texas. In practice since 1981, he has been conducting child custody evaluations for over 40 years in multiple states and has provided court testimony over 300 times. He is board certified in Clinical Psychology and Family Psychology through the American Board of Professional Psychology and is a Fellow of the American College of Forensic Psychology. Contact: jeff@siegelphd.com.

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