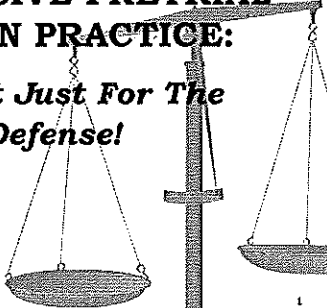


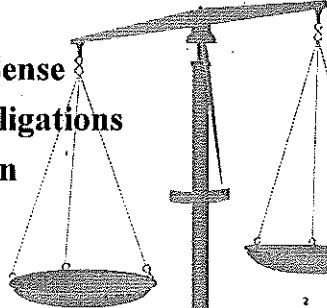
**AGGRESSIVE PRETRIAL
MOTION PRACTICE:**
*It's Not Just For The
Defense!*



1

**Motion Practice
Driven & Shaped by:**

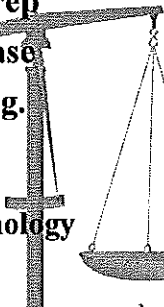
- Need
- Common Sense
- Ethical Obligations
- Imagination
- Courage



2

Why

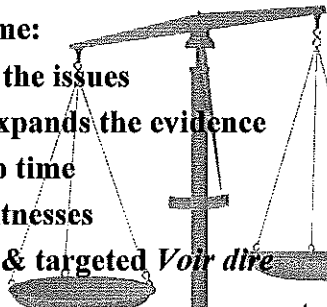
1. Early start on trial prep
2. Take control of the case
3. Educate the court; e. g.
 - Child Development
 - Linguistics
 - Victim/offender Pathology
 - AHT/ITBI
 - Failure to Thrive



3

Why

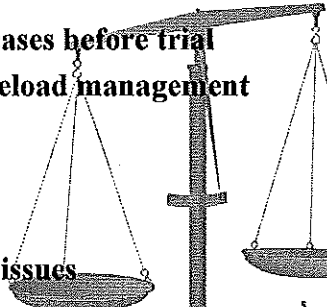
4. Saves Time:
 - Narrows the issues
 - Limits/Expands the evidence
 - Less prep time
 - Fewer witnesses
 - Efficient & targeted *Voir dire*



4

Why

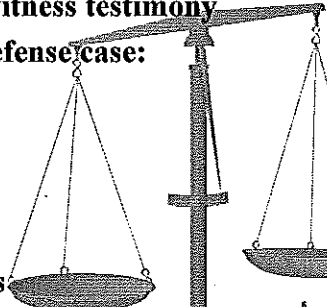
5. Resolves cases before trial
6. Better caseload management
7. Minimize:
 - Surprise
 - Delay &
 - Appellate issues



5

Why

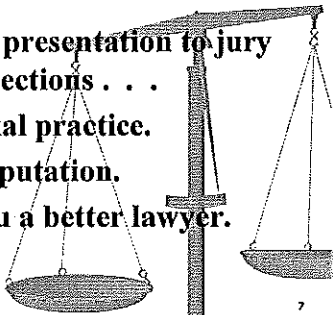
8. Facilitate witness testimony
9. Flush out defense/case:
 - Theory
 - Theme
 - Strategy
 - Facts
 - Witnesses



6

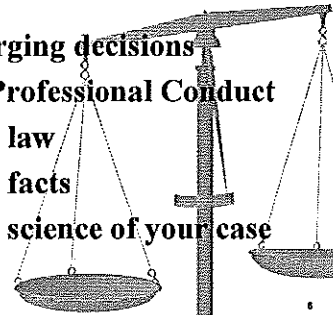
Why

10. Smoother presentation to jury
Fewer objections . . .
11. Build a trial practice.
Build a reputation.
Makes you a better lawyer.
12. To win!



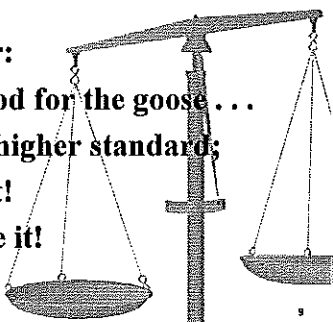
Basics Of Motion Practice

1. Solid charging decisions
2. Rules of Professional Conduct
3. Know the law
4. Know the facts
5. Know the science of your case



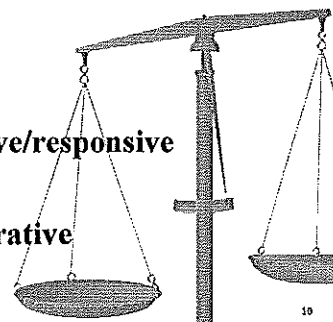
Basics Of Motion Practice

6. Remember:
What's good for the goose . . .
Held to a higher standard;
Accept it!
Embrace it!
Enjoy it!



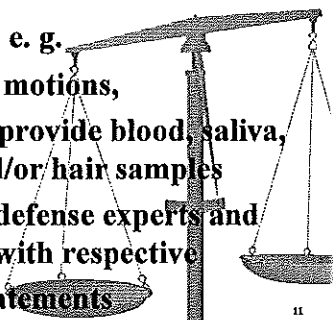
The Motions:

- A. Offensive
- B. Preemptive/responsive
- C. Administrative



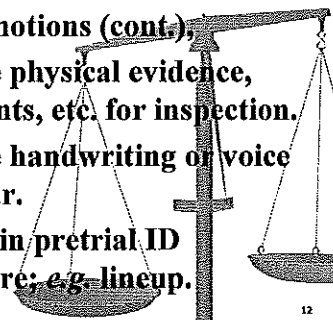
Motions:

- A. Offensive: e. g.
 1. Discovery motions,
 - Produce/provide blood, saliva, semen and/or hair samples
 - Disclose defense experts and witnesses with respective reports/statements



Motions:

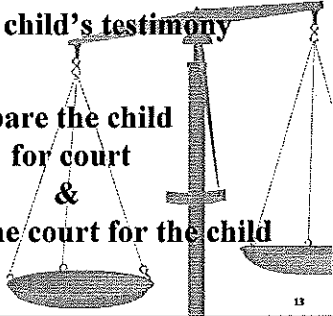
1. Discovery motions (cont.),
 - Produce physical evidence, documents, etc. for inspection.
 - Produce handwriting or voice exemplar.
 - Appear in pretrial ID procedure; e.g. lineup.



Motions:

2. Facilitate child's testimony

Prepare the child
for court
&
Prepare the court for the child



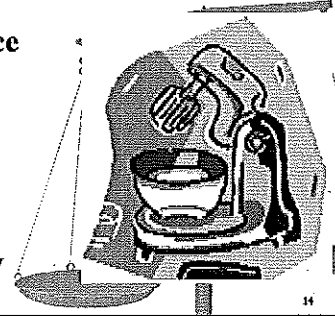
13

The Recipe

a. Social Science
Research

b. Law

c. Public Policy

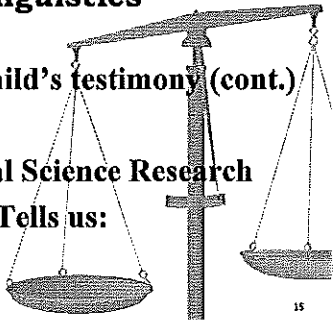


14

Motions: Example Linguistics

2. Facilitate child's testimony (cont.)

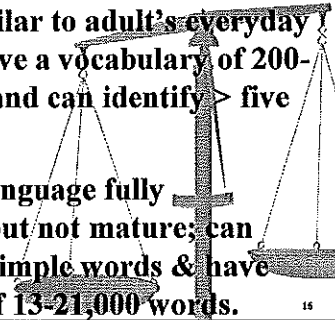
What Social Science Research
Tells us:



15

KIDS IN COURT - Linguistics

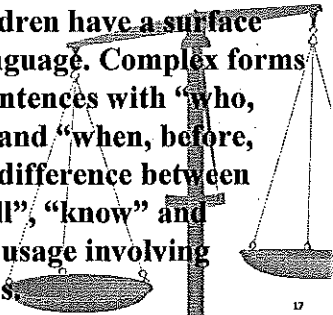
- By age three, children can use language similar to adult's everyday language, have a vocabulary of 200-1000 words, and can identify > five body parts
- By age 5-6, language fully established, but not mature; can define some simple words & have vocabulary of 13-21,000 words.



16

Linguistics: *Caveat*

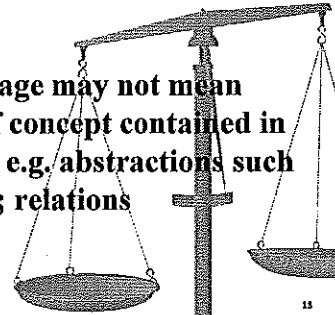
- By 5 or 6, children have a surface mastery of language. Complex forms come later. Sentences with "who, what, which" and "when, before, after, while"; difference between "ask" and "tell", "know" and "think"; verb usage involving passives begins.



17

Linguistics: *Caveat*

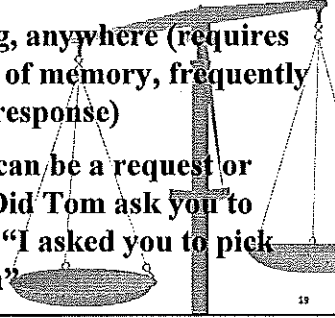
- But, language may not mean mastery of concept contained in the words, e.g. abstractions such as "truth"; relations



18

Problem Words & Concepts in Questioning Children

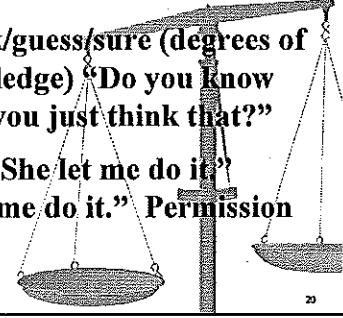
- Any, anything, anywhere (requires global search of memory, frequently results in no response)
- Ask/tell (ask can be a request or command) "Did Tom ask you to touch him?" "I asked you to pick up your room"



19

Problem Words & Concepts in Questioning Children

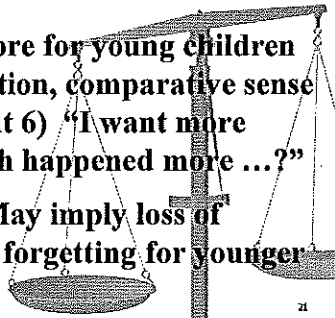
- Know/think/guess/sure (degrees of adult knowledge) "Do you know that, or do you just think that?"
- Let/make "She let me do it." "She made me do it." Permission v. coercion



20

Problem Words & Concepts in Questioning Children

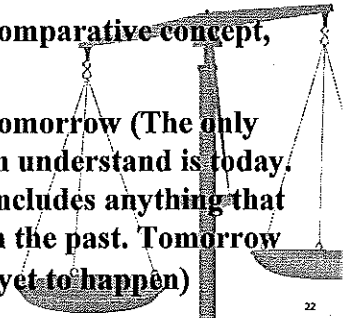
- More/less (More for young children implies repetition, comparative sense not until about 6) "I want more milk"; "Which happened more ...?"
- Remember (May imply loss of knowledge or forgetting for younger children)



21

Problem Words & Concepts in Questioning Children

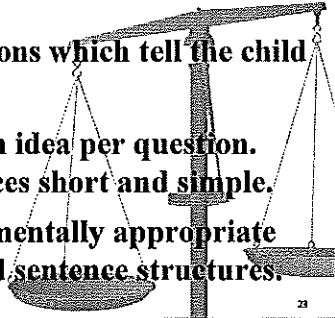
- Some/all (comparative concept, grouping)
- Yesterday/tomorrow (The only day children understand is today. Yesterday includes anything that happened in the past. Tomorrow is anything yet to happen)



22

What Research Says

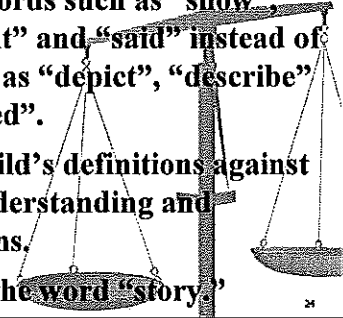
- Avoid questions which tell the child the answer.
- Use one main idea per question. Keep sentences short and simple.
- Use developmentally appropriate language and sentence structures.



23

What Research Says

- Use simple words such as "show", "tell me about" and "said" instead of legalese such as "depict", "describe" and "indicated".
- Check the child's definitions against your own understanding and interpretations.
- Avoid using the word "story."



24

What Research Says

- Give all verbs appropriate nouns: "Promise me you will tell the truth"
- Avoid pronouns - use names and places: "What did Tom (not he) say?"
- Stay away from negatives and tag questions: "You said this, didn't you?" "Isn't it true that ...?"

What Research Says

- Avoid "yes/no" questions with multiple propositions: "Do you remember when Mary asked you if you knew what color Bill's shirt was and you said 'blue'?"
- Signal shifts in time, place or date: "OK now I want to talk about the time when..."

What Research Says!

- Don't ask unnecessarily leading or suggestive questions.
- Ask follow up, open-ended explanatory questions following questions that call for a yes/no response.
- Empower the child to correct the interviewer, to say "I don't know" or "I don't understand."

Not until children are 6 to 7 years of age do they have a fully developed ability to consistently view the world from other perspectives. Consequently, young children may have difficulty answering questions about what another person may have been intending.

Saywitz, K.J.(1995). *Improving Children's Testimony: The Question, the Answer, and the Environment*

Children may contradict themselves because they are stretching themselves to try to explain something they do not understand.

Saywitz, K.J.(1995). *Improving Children's Testimony: The Question, the Answer, and the Environment.*

Motions:

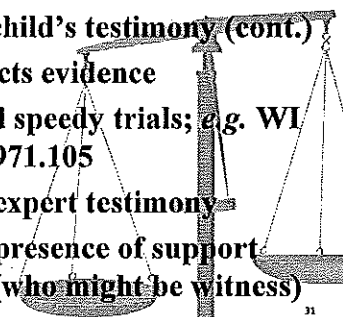
2. Facilitate child's testimony

- Schedule time for child's testimony
- Schedule regular recess
- Alter or change courtroom
- Use videotape, CCTV, screens or blackboards

Motions:

2. Facilitate child's testimony (cont.)

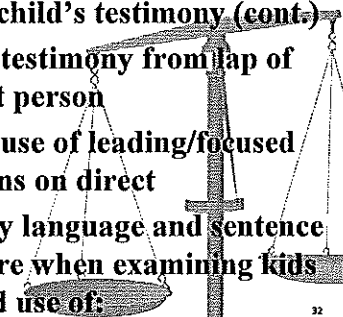
- Other acts evidence
- Demand speedy trials; e.g. WI statute 971.105
- Permit expert testimony
- Permit presence of support person (who might be witness)



Motions:

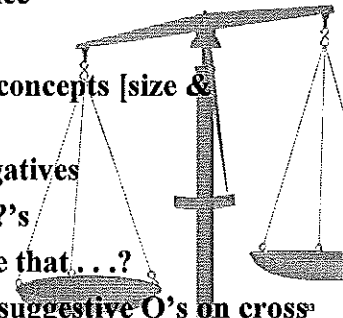
2. Facilitate child's testimony (cont.)

- Permit testimony from lap of support person
- Permit use of leading/focused questions on direct
- Simplify language and sentence structure when examining kids to avoid use of:



Motions:

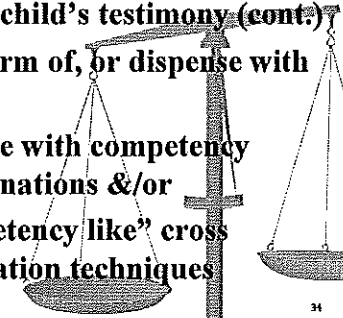
- passive voice
- pronouns
- relational concepts [size & kinship]
- double negatives
- d. u. r. X ?'s
- isn't it true that...?
- leading & suggestive Q's on cross



Motions:

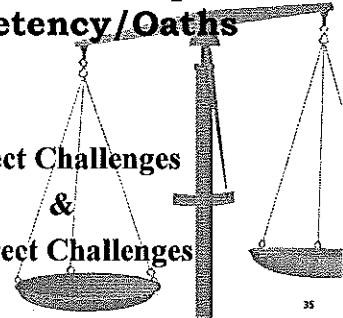
2. Facilitate child's testimony (cont.)

- Alter form of, or dispense with oath
- Dispense with competency determinations &/or
- "Competency like" cross examination techniques



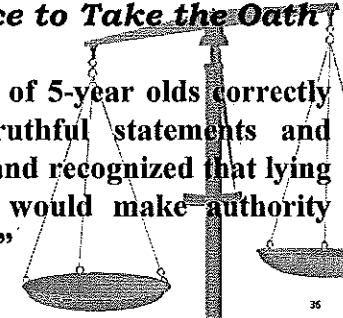
Motions: Example Competency/Oaths

Direct Challenges
&
Indirect Challenges



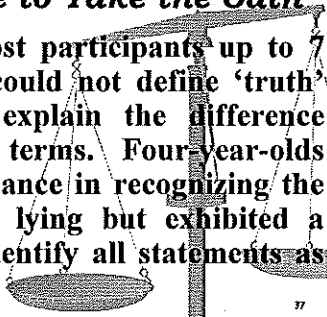
Lyon and Saywitz; *Young Maltreated Children's Competence to Take the Oath*

"A majority of 5-year olds correctly identified truthful statements and lies as such and recognized that lying is bad and would make authority figures mad."



Lyon and Saywitz; *Young Maltreated Children's Competence to Take the Oath*

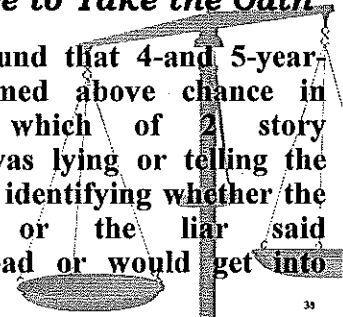
"However, most participants up to 7 years of age could not define 'truth' and 'lie' or explain the difference between the terms. Four-year-olds were above chance in recognizing the immorality of lying but exhibited a tendency to identify all statements as the truth."



37

Lyon and Saywitz; *Young Maltreated Children's Competence to Take the Oath*

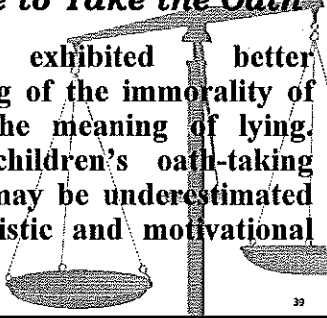
"Study 2 found that 4-and 5-year-olds performed above chance in identifying which of 2 story characters was lying or telling the truth and in identifying whether the truth-teller or the liar said something bad or would get into trouble."



38

Lyon and Saywitz; *Young Maltreated Children's Competence to Take the Oath*

"Children exhibited better understanding of the immorality of lying than the meaning of lying. Maltreated children's oath-taking competence may be underestimated due to linguistic and motivational difficulties."



39

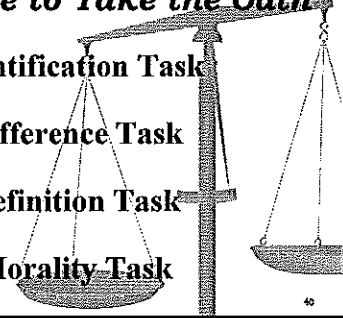
Lyon and Saywitz; *Young Maltreated Children's Competence to Take the Oath*

Identification Task

Difference Task

Definition Task

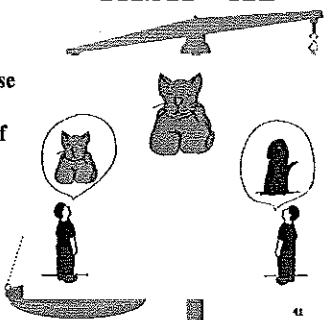
Morality Task



40

- Here's a picture. Look at this animal-what kind of animal is this?
- OK, that's a [child's label].
- LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH

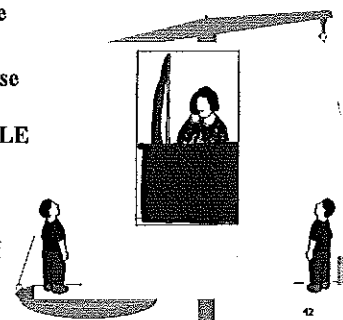
TRUTH v. LIE TASK A1



41

- Here's a Judge. She wants to know what happened to these boys.
- Well, ONE of these boys is GONNA GET IN TROUBLE for what he says, and YOU'LL tell ME which boy is GONNA GET IN TROUBLE.

MORALITY TASK 1



42

MORALITY TASK 1

- LOOK [child's name],
- (point to left boy) This boy tells the TRUTH.
- (point to right boy) This boy tells a LIE.
- Which boy is GONNA GET IN TROUBLE? (correct answer is boy on the right)

TRUTH v. LIE TASK B 3

- Here's another picture. Look at this food--what kind of food is this?
- OK, that's a [child's label].
- LISTEN to what these girls say about the [child's label]. One of them will tell a LIE, and one will tell the TRUTH

TRUTH v. LIE TASK B 3

- (point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a [child's label]."
- (point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a BANANA."
- Which girl told the TRUTH? (correct answer is girl on the left)

TRUTH v. LIE TASK C 1

- Here's a picture. Look at this animal--what kind of animal is this?
- OK, that's a [child's label].
- LISTEN to what these girls say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

TRUTH v. LIE TASK C 1

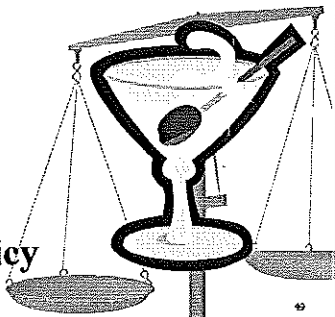
- (point to girl on the left) THIS girl looks at the [child's label] and says "IT'S a [child's label]."
- (point to girl on the right) THIS girl looks at the [child's label] and says "IT'S a FISH."
- Which girl told the TRUTH? (correct answer is girl on the left)

Establishing Child's Competency

- Avoid using abstract concepts like "What is truth?" or "What is the difference between the truth and a lie?"
- Use concrete examples with child demonstrating, rather than articulate their knowledge of these concepts.

THE RECIPE

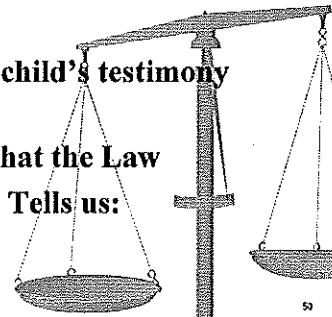
1. Social Science Research
2. Law
3. Public Policy



Motions:

2. Facilitate child's testimony (cont.)

What the Law Tells us:



Lipovsky, J. & Stern, P. (1997).
Preparing Children for Court:
An Interdisciplinary View.
2(2) Child Maltreatment 150-163.

"In many states the evidence rules, in fact, do not just authorize judges to make these accommodations for children but arguably obligate judges to do so."

Federal Rules of Evidence



Rule 601

"Every person is competent to be a witness except as otherwise provided in these rules..."

Federal Rules of Evidence

Rule 603

"Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."



Federal Rules of Evidence

Rule 611 Mode and Order of

Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses so as to:



Federal Rules of Evidence



- (1) make the interrogation and presentation effective for the ascertainment of the truth,
- (2) avoid needless consumption of time, and
- (3) protect witnesses from harassment or undue embarrassment

Federal Rules of Evidence



(b) **Scope of cross-examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

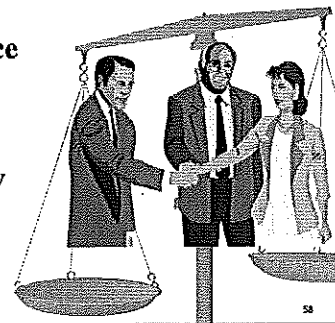
Federal Rules of Evidence



(c) **Leading questions.** Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions are permitted on cross examination"

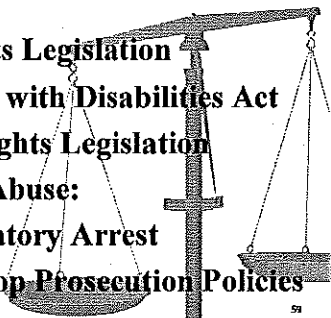
The Recipe

1. Social Science Research
2. Law
3. Public Policy



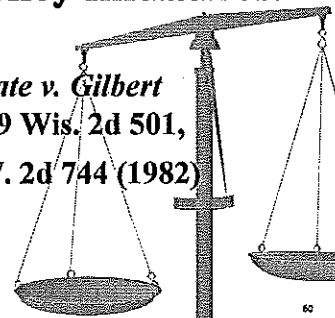
Public Policy Initiatives:

1. Civil Rights Legislation
2. Americans with Disabilities Act
3. Victims Rights Legislation
4. Domestic Abuse:
Mandatory Arrest
No Drop Prosecution Policies



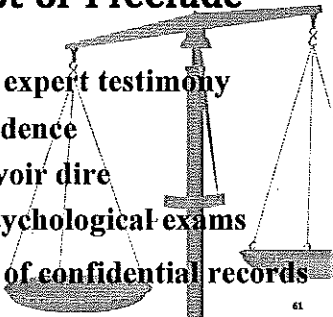
Public Policy Initiatives:

State v. Gilbert
109 Wis. 2d 501,
326 N.W. 2d 744 (1982)



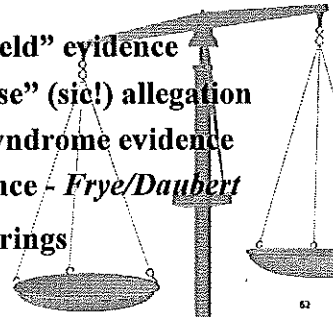
**Motions:
Preempt or Preclude**

1. Unreliable expert testimony
2. SODDI evidence
3. Improper voir dire
4. Adverse psychological exams
5. Access/use of confidential records



Preempt or Preclude

6. "Rape shield" evidence
7. Prior "false" (sic!) allegation
8. Certain syndrome evidence
9. Junk science - *Frye/Daubert*
10. Taint hearings

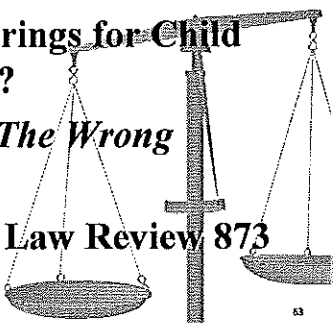


John E. B. Myers

**Taint Hearings for Child
Witnesses?**

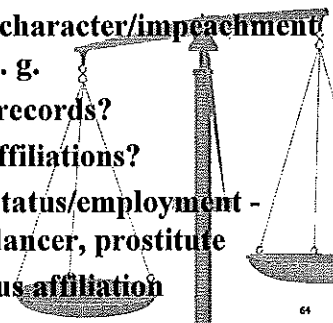
*A Step In The Wrong
Direction*

46 *Baylor Law Review* 873
(1994)



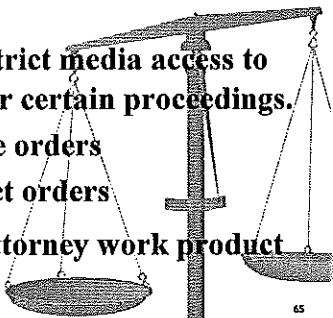
Preempt or Preclude

11. Irrelevant character/impeachment
evidence; e. g.
 - Arrest records?
 - Gang affiliations?
 - Social status/employment -
exotic dancer, prostitute
 - Religious affiliation



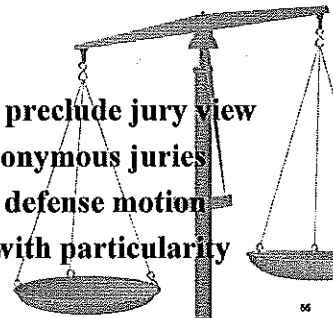
Preempt or Preclude

12. Limit/restrict media access to
records or certain proceedings.
13. Protective orders
14. No contact orders
15. Protect attorney work product



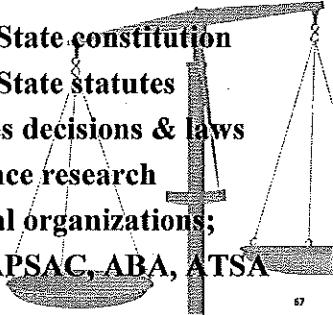
Motions: Administrative

1. S. J. Q.'s
2. Permit or preclude jury view
3. Permit anonymous juries
4. Quashing defense motion
5. Pleading with particularity



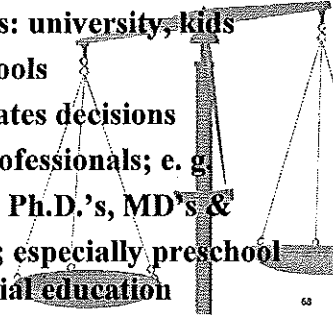
**Recipes:
Sources & Resources**

1. Federal & State constitution
2. Federal & State statutes
3. Other states decisions & laws
4. Social science research
5. Professional organizations;
NDA, APSAC, ABA, ATSA



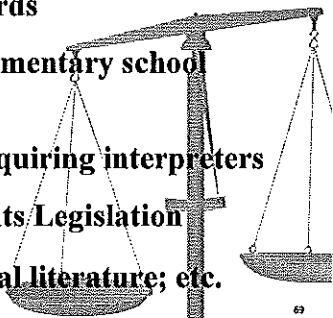
**Recipes:
Sources & Resources**

6. Libraries: university, kids
7. Law schools
8. Other states decisions
9. Local professionals; e. g.
MSW's , Ph.D.'s, MD's &
teachers; especially preschool
and special education



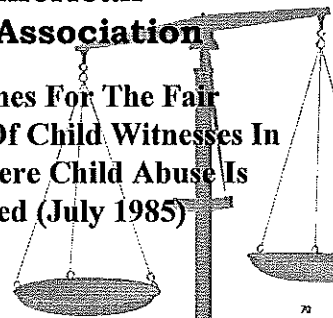
Sources & Resources (cont.)

- School records
- Pre- and elementary school
teachers
- Case law requiring interpreters
- Victim Rights Legislation
- Psychological literature; etc.



**American
Bar Association**

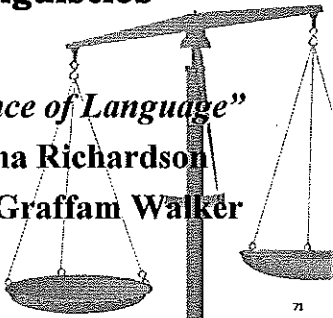
**Guidelines For The Fair
Treatment Of Child Witnesses In
Cases Where Child Abuse Is
Alleged (July 1985)**



Linguistics

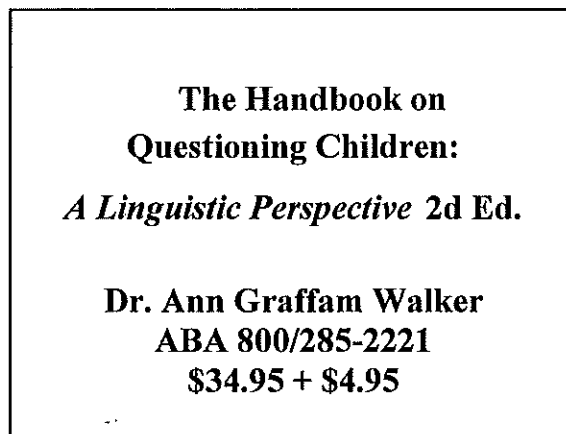
"The Science of Language"

Dr. Gina Richardson
Dr. Ann Graffam Walker



**The Handbook on
Questioning Children:
A Linguistic Perspective 2d Ed.**

Dr. Ann Graffam Walker
ABA 800/285-2221
\$34.95 + \$4.95



Resources

Psychological Research on
Children as Witnesses:

*Practical Implications for
Forensic Interviews and
Courtroom Testimony*
28 Pacific Law Journal 1 (1996)

Myers, Saywitz, Goodman

73

Resources

*Young Maltreated Children's
Competence to Take the Oath*

Applied Developmental Science
1999, Vol. 3, No. 1, 16-27

Lyon and Saywitz

74

Resources

*Drawing Facilitates Children's
Verbal Reports of Emotionally
Laden Events*

Journal of Experimental
Psychology: Applied 1998, Vol.
4, No. 2, 163 - 179

Gross and Hayne

75

Resources

*ASSESSING THE ACCURACY OF A
CHILD'S ACCOUNT OF SEXUAL
ABUSE: A CASE STUDY*

Child Abuse and Neglect,
Vol. 23, No. 1, 91 - 98

Orbach and Lamb

76

Strategy

- Burden of production v.
proof
- Educating the defense?
- We'll get 'm the next time!
- Honor third party rights

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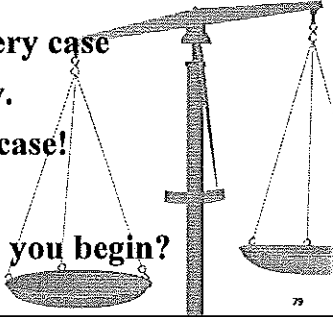
Strategy

- Pick your "fights" carefully!
- In front of the right judge
 - on the right case
 - on the right issue
 - against the right lawyer!

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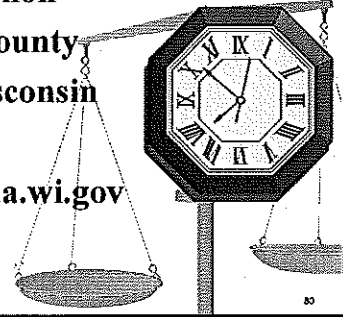
Strategy

- Not in every case
v.
In every case!
- Where do you begin?



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