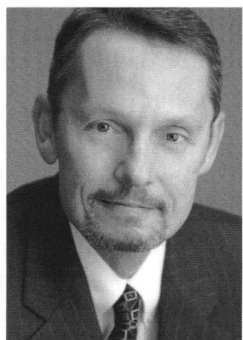
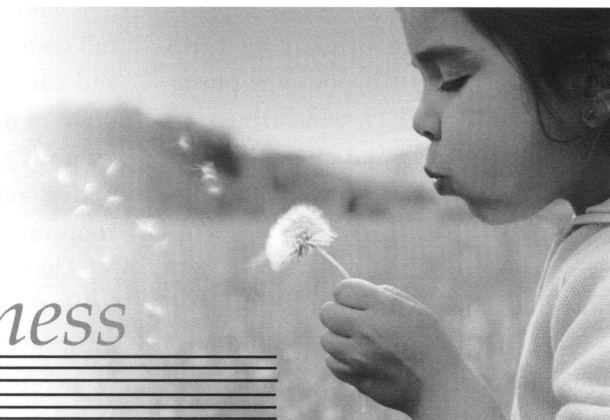


# Protecting the child witness



Jeff Merrick

By Jeff Merrick  
*OTLA Guardian*

**M**y client: a brain-injured child who fell from an apartment window. The deposition taker: a highly skilled and experienced defense lawyer who could lead the child anywhere the attorney wants to take him. “How do I protect this kid?” I asked myself.

## In deposition

When representing children, job one is to protect the child. It starts with making sure we involve a responsible conservator or guardian ad litem. But we also have to protect children who appear as witnesses.

In the above example, I hired my own videographer and asked him to shoot a wider angle. I wanted to record the attorney, court reporter and the boy for

three reasons:

1. To discourage the attorney from doing anything too crafty.
2. To show any expressions of the attorney that would either tend to intimidate or lead the child.
3. To capture any expressions or gestures of the child that would convey meaning beyond the cold words in the transcript.

The result: We obtained deposition footage of the boy answering questions with such total gibberish that the court reporter surrendered. She raised her hands off the steno machine, palms up and shoulders shrugged in a gesture indicating, “There’s nothing I can do.” I featured the footage prominently in the mediation video submitted to the insurance adjuster.

For depositions, counsel should also consider the statutory protections provided to child witnesses in court.

## In court

Try to imagine yourself as a six-year-old client going to court. The child knows something very important is happening. He or she goes through the security line with dozens of others. All of these tall people rush to and fro. He or she walks into either a grand old courtroom or one that is cramped and claustrophobic, with the lawyers, exhibits, documents and jurors seemingly piled on top of one another. Then, there’s the

judge up high and “Speak into the microphone.”

That atmosphere might not be the most conducive for calmly remembering and stating facts and feelings. Fortunately, the law allows attorneys to ask the court to modify the atmosphere.

ORS 44.547 directs the court to accommodate the needs of witnesses under age 12 (and certain persons with developmental disabilities). The court may grant accommodations including the following:

- Provide break periods.
- Wear clothing other than the judicial robe.
- Designate an appropriate waiting area.
- Relax the formalities of the proceedings.
- Adjust the layout of the courtroom for the comfort of the child witness.
- Conduct the proceedings outside of the normal courtroom.

Maybe the six-year-old would be more comfortable in a child-sized chair with the questioner seated across from him or her, about five feet away, to create easier rapport and to minimize the distractions. Perhaps the court can order the defense lawyers to move farther away. Request frequent recesses when helpful.

To obtain the court accommodations, the attorney must notify the court at least seven days in advance of trial.

*See Child Witness p 38*

The protection offered by ORS 44.547 also applies to depositions, pursuant to ORCP 39D(1), which states, in part, "Examination and cross-examination of deponents may proceed as permitted at trial."

#### Your child client's testimony

First, determine what accommodations might be useful. Request any accommodations well in advance of deposition or trial and cite the above provisions.

Second, determine what the child can do. For example, preschoolers, age 3 to 6, have yet to develop the capacity to tell stories in the correct order. By age 6, children do better with sequencing, but still confuse "before" and "after" until about age 9. The attorney must carefully evaluate the purposes for the testimony of any child and narrow the questions to those topics that only the child can pro-

vide.

Children ages 6 through 12 talk in full sentences. They observe more detail and can relate the details when called upon to do so. School-age children can set goals and solve problems. They can understand what is going on and can cooperate.

There is no substitute for getting to know the family and friends. None. You must meet the family members in their home. You need to see how they live. What is on the walls? Who runs the household? What is the neighborhood like? Many times, by meeting people in their homes, I've also met the neighbors or other family members who never would have come to my office. I've identified excellent witnesses on damages. For example, the friend next door who says, "Before, we played video games, now, he gets headaches when he tries." The uncle who says, "He never swore at his mom or sister before [the anesthesiologist screwed up and caused anoxic brain in-

jury.] He gets really frustrated and has a short fuse, now."

Third, the attorney needs to develop strategies that will help the child tell his or her story truthfully and accurately. Review your evidence rules: What leading questions are appropriate? How can you properly refresh the recollection? What demonstrative aids will help the child tell the story accurately?

Fourth, give some thought as to how you will talk with the child in a way that will not create unnecessary stress and anxiety. Talk with children in their own homes. Ask mom and dad where their child is most comfortable and what helps open communications and what causes their child to shut down. Try to get the child talking about something nonsubstantive first, perhaps a favorite toy or TV show. Days or weeks before the deposition, have a pleasant meeting or two in the deposition room. "Hot chocolate, anyone?" In terms of substance, be simple: What did you see? What did you

## You get the **SETTLEMENT.** We'll do the **PLANNING.**



**Donna Meyer**  
Attorney  
dmeyer@  
fitzwatmeyer.com



**Michael Edgel**  
Attorney  
medgel@  
fitzwatmeyer.com



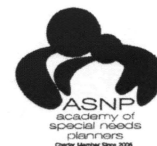
**Melanie Marmion**  
Attorney  
mmarmion@  
fitzwatmeyer.com

### Oregon's Largest Special Needs Law Firm

*Fitzwater Meyer, LLP, has 11 attorneys to advise and assist with:*

- Government Benefits such as Social Security, SSI, Medicare and Medicaid Special Needs Trusts
- Court Approval of Settlements for Disabled and Minor Plaintiffs
- Tax and Estate planning issues
- Guardianship and Conservatorships
- Medicare Set Asides (MSAs)
- Qualified Settlement Funds (QSFs)
- Lien resolution

**Proud to be an OTLA Guardian and Annual Gold Sponsor**



**Fitzwater Meyer, LLP**

*Likeable Lawyers, Excellent Lawyering*

**503-786-8191**

**www.FitzwaterMeyer.com**

hear? What did you feel?

Fifth, explain your role. Many young people do not know lawyers. They know teachers, doctors and dentists, but, often, you will be the first lawyer in their lives. It is useful to explain what your job is in relation to the child, the family and the court system. For adolescents, especially, it is important to explain how seriously we accept our obligation of confidentiality. Bring out their expectations and try to reach a common understanding.

Sixth, address any competency issues. OEC 601 is minimal, requiring only that the witness be able to perceive and to make known his or her perception to others. Nevertheless, the court may conduct a competency hearing pursuant to OEC 104(1). The rules of evidence do not apply to a competency hearing, and the court may deny the defendant the opportunity to ask questions.

Seventh, for child witnesses who are not your clients, consider how to blunt the defense insinuations that you put words into the child's mouth. "Did Ms. Attorney talk to you? Did she tell you what to say?" "Yes, she told me to tell the truth." Do not say or do anything that you would not say or do if the defense lawyer were present.

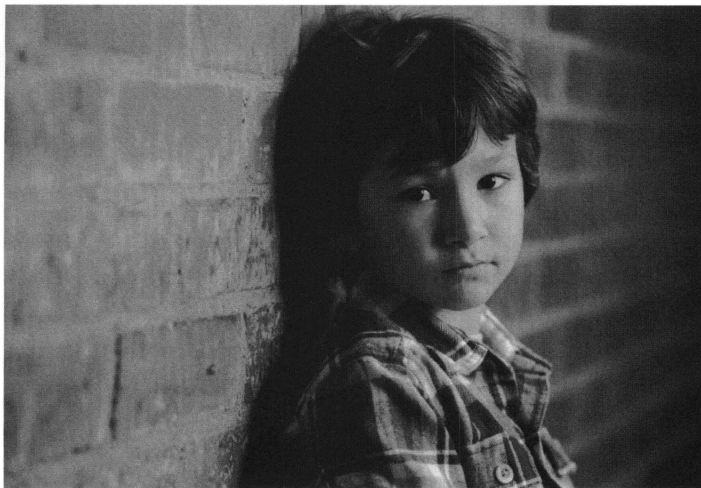
### Language and syntax

In his article, *Children, Language and the Law*, Roger Shuy discusses how children understand and use language differently from adults. 66 MONT. L. REV. 61 (2005). Some of his examples, which follow, emphasize why you must be careful.

- "Remember" — Many children up to age eight or nine believe that to "remember" something means that they must have forgotten it first.
- "Any" — A young child will generally answer "no" to questions using "anyone" or "anything" or any variant

of "any" regardless of the true answer. That's because "any" is too non-specific to generate consistent answers.

- Multiple nouns can confuse. Judge: "Will you promise to tell me the truth." Child: "I'm sure you will." In this example, drop a noun / concept with the question: "Do you promise



to tell the truth."

- Avoid negatives such as "You could see he was not in the crosswalk?" Negatives confuse children until age nine. Instead, the child will likely understand the question as, "You could not see he was in the crosswalk?"

Even with adults, lawyers need to simplify, simplify and simplify their questions. That mantra is even more important with children.

### Bolstering or correcting

In trial, the bolstering should come before you call the child to the witness stand.

*Lay witnesses.* The jury should already know the child through photos, videos, friends, family, day care providers and teachers. There should be virtually nothing new for the jury to learn from the child. Keep the direct exam short.

*Expert witnesses.* In addition to your medical witnesses, what other experts might be useful? Do any syndromes or psychological diagnoses apply? If harmful

prior statements exist, then maybe you need an expert on child development to explain why the child answered questions the way he or she did.

*Prior statements of your child witness.* Make sure you have the prior statements handy and know your rules on use of prior consistent statements to rehabilitate and prior inconsistent statements to impeach our own witness, if necessary. If your case involves sexual abuse, read OEC 803(18a).

### A happy ending

A happy ending for your child client and you begins with that first meeting in the family home. Discuss the benefits of a professional conservator on juror perception and get one appointed before settlement or trial. Here are just two true stories, which illustrate

why you want a professional conservator.

In one case, the mom thought the settlement money for her four-year-old should pay for a Camaro. She reasoned it would be much easier on the boy to ride in a car than on the bus. Happily, I don't know if mom's reasoning prevailed.

In another case, the dad, a medical professional, thought some of the money to compensate his son for a lost eye should be invested in a new family home on the Clackamas River. Real estate, he figured, was a better investment than annuities or certificates of deposits or other conservative options. Fortunately, I did not participate in that debate. I can sleep well knowing the child is protected, and he will have no reason to sue me later.

---

*Jeff Merrick, of Merrick Law, specializes in Pediatric law. He contributes to the OTLA Guardians of Civil Justice at the Friend Level. His office is located at 4800 SW Meadows Rd Ste 300, Lake Oswego OR 97035. He can be reached at 503-665-4234 or jeffmerrick@jeffmerrick.com.*