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Fire and Casualty Seminar

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The Juvenile Witness In A Fire Case

Introduction

On November 14, 1998, Ladean Knotts, age 60, was morbidly obese, oxygen-dependent and confined to a first floor bed at her home on Buckeye Street. Grandchildren Milisa, age 14; Samuel, age 5; Michael, age 3; Nathaniel, age 3; Harley, age 1; and Chelsea, age 14 months, were with her at the home. Milisa was responsible for all the younger kids. While Milisa was taking out the garbage and visiting with her teenage girlfriend outside, a fire started in the house. Ladean and Harley perished. The others escaped.

Plaintiffs claimed that the fire was caused by a defective Black & Decker battery charger consisting of a transformer which was plugged into an electrical outlet and a charger base hanging on the wall. The battery charger was not found at the fire scene.

The fire department initially reported the cause of the fire as "underdetermined." Days later, after interviewing young Samuel and Nathaniel, the fire department amended its report and ruled that the fire was accidental and all indications pointed to the battery charger as the cause. By this point, the fire scene was destroyed by the City.

The defense contended that the battery charger was not defective, could not have caused the fire, and moved to preclude the statements of Samuel and Nathaniel on the basis of competency and hearsay.

In a case like this, defense counsel must consider issues, including witness competence, witness credibility, juvenile psychology and the admissibility of statements given to fire investigators, long before the opportunity for depositions arises. Accordingly, this article addresses the issues surrounding

- the psychology of juvenile firesetters;
- the admissibility of juvenile statements in a fire investigator's report;
- the competency and credibility of juveniles to testify; and
- techniques for interviewing and cross-examining juveniles.

I. Psychology of Juvenile Firesetters

A. Child's Involvement with Fire

Recent research identified three main child development phases related to fire: fire interest, fireplay, and firesetting. (Ian Lambie, *Where There's Smoke There's Fire: Firesetting Behavior in Children and Adolescents*, NEW ZEALAND J. PSYCHOL., Dec. 2002, at 2.) The fire interest phase occurs when children exhibit curiosity about fire. (Id.) This phase typically appears in children who are between three and five years of age. (Id.) Children at this stage are captivated with fire because of its colors, flickering, and transparency. (HANDBOOK ON FIRESETTING IN CHILDREN AND YOUTH, 19 (David Kolko ed., Academic Press 2002).) At this stage, children ask questions related to fire, dressing up as firefighters, or play with toy fire engines. (Lambie, *supra* at 2.)

The next stage in normal development is fireplay. Fireplay occurs between the ages of five to nine years and conveys a low level of intent to inflict harm and an absence of malice. (Id.) These children are not intrigued by the appearance of a flame, but the process of fire. (HANDBOOK ON FIRESETTING, *supra* at 21.) Usually, children in this phase experiment with fire by lighting candles or roasting marshmallows under parental supervision. (Lambie, *supra* at 2.) However, occasional unsupervised fireplay does occur. (Id.) Children who engage in fireplay are likely to attempt to extinguish a fire should it get out of control. (Id.)

The final developmental phase is firesetting. Firesetters are the group of children who have a deliberate intent and varying degrees of malice and use fire as an instrument of purposeful action. (Id.) Unlike fireplay, firesetting is not an isolated event and is conducive to repetition and chronic behavior. (Charles T. Putnam & John T. Kirkpatrick, *Juvenile Firesetting: A Research Overview*, JUV. JUST. BULL., May 2005, at 2.) Firesetting is not to be confused with arson. Arsonists, unlike firesetters, are aware of the potential consequences of their behavior. (Lambie, *supra* at 2.)

B. Prevalence of Childhood Firesetting

According to FBI crime data, arson has the highest percentage of child and adolescent involvement of any serious offense. (Id. at 1.) Children and adolescents make up roughly half of all arrests for arson. (Id.) In 2001, 49% of all arson arrests were juveniles. (Paul Zipper & David K. Wilcox, *Juvenile Arson: The Importance of Early Intervention*, FBI L. ENFORCEMENT BULL., Apr. 1, 2005, at 1.)

Researchers have compiled data to determine what types of children have a fascination with fire. The data suggests that boys clearly outnumber girls, nine to one, in setting fires. (Id. at 2.) However, the data also suggests that in recent years firesetting among girls is on the rise. Although children as young as 2 and 3 can be responsible for setting fires, the average age of a juvenile firesetter ranges from 9 to 12 years old. (Id.) These adolescents are believed to set more fires away from home, start fires more often in groups, and to continue firesetting even after intervention. (Lambie, *supra* at 5.) These beliefs are "supported by the [adolescent's] unwillingness to think actions through to consequences in order to avoid responsibility for outcomes, the tremendous need to be accepted by peers, the strong need to test and overcome structures and limits, and the inability to resist a dare or challenge from a peer, no matter how

dangerous or how lame." (HANDBOOK ON FIRESETTING, *supra* at 25.) Interestingly, juveniles admit to engaging in firesetting because it's easy to commit and easy to get away with. (Id.)

Furthermore, studies also indicate that firesetting and fireplay are more prevalent among clinical populations of children than samples taken from the community. Clinical firesetters are more likely to have a history of sexual and inhalant abuse and schizophrenia than non-firesetters. (Id. at 41.) However, no differences in antisocial behavior were found between the two groups. (Id.)

Evidence has also shown that firesetting is a behavior that children will engage in repetitively. Researchers have found that recidivism is associated with hostility, carelessness, lax discipline, family conflict, exposure to stressful events, and knowledge of combustibles and engagement in fire-related activities. (Lambie, *supra* note 53, at 4.) Firesetters exhibit higher levels of arguing and fighting and more covert behaviors, such as lying, stealing, or running away. (HANDBOOK ON FIRESETTING, *supra* at 40.) Key predictors of recidivist juvenile firesetting are a history of match play, involvement in fire-related acts, and a high level of antisocial behavior. (Lambie, *supra* note 53, at 4.)

C. Classification of Firesetters

Researchers have divided firesetters into four non-mutually exclusive classifications: curious, pathological, expressive, and delinquent. The basis for division were differences in motivation and individual and environmental characteristics related to firesetting. (Putnam, *supra* note 64, at 3.) Curiosity firesetters are motivated by a fascination with fire to light a single accidental fire. (Lambie, *supra* at 3.)

On the other hand, pathological firesetters light fires out of deep-seated individual dysfunction. (Putnam, *supra* at 3.) These fires are more frequent, destructive, concealed, and planned by the children who light them. (Lambie, *supra* at 3.) According to studies, pathological firesetters set fires for a period of at least six months, using fire igniters such as lighters and matches and gather other flammable materials to feed the blaze. (Id.) This type of firesetter is motivated by revenge, anger, boredom, fascination, or is a child just seeking attention. (Id.) Unfortunately, pathological firesetters do not seek help to extinguish the fire if it gets out of control, but instead run away or hide to watch the fire engines arrive. (Id.)

The third classification of firesetters is expressive firesetters. These children set fires with the intention of getting attention because they are experiencing a stressful period in their lives. (Id.)

The last classification is delinquent firesetters. To delinquent firesetters, firesetting is a means to antisocial or destructive ends which may occur in the company of peers. (Id.) This behavior is more commonly apparent in adolescent males than females. (Id.)

D. Family Factors in Firesetting

Recently researchers studied the family factors of children who possess firesetting behaviors. The study found that the families of child firesetters exhibit significantly more marital dysfunction and less satisfaction, less cohesion, and less affectionate expression. (HANDBOOK ON FIRESETTING, *supra* at 42.) Overall, parents of firesetters have less involvement in and control over their child's life. (Id.) Furthermore, clinical studies of adolescent firesetters show that firesetters display emotional impulse control problems such as misdirected anger and boredom, and experimentation. (Id.)

II. The Admissibility of Juvenile Statements in a Fire Investigator's Report

In the context of a residential fire case, juvenile witnesses often need to be one focus of an investigation. "Culpable" or not, juveniles may have taken action to initiate a fire. Juveniles may be witnesses to a fire's origin. As lawyers and investigators, we prefer to rely on scientific evidence to determine the origin and cause of a fire. However, there can be instances when, despite the lack of science, a plaintiff's entire claim against your client may be supported by an apparently "innocent" and loveable child.

Defense counsel need to address the admissibility of statements made to fire officials during their investigation. These statements will be double hearsay: out-of-court statements offered for their truth and contained in an out-of-court statement in the form of a report (hearsay). (FED. R. EVID. 805.) For plaintiff to admit the child's statement on origin and cause, both the statement in the report and the report itself must satisfy exceptions to the hearsay rule. (Id.)

Fed. R. Evid. 803(2) states that out-of-court "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not barred by the hearsay rule. (FED. R. EVID. 803(2).) Ohio's rule is identical. The Supreme Court of Ohio adopted the following test to determine whether a statement constitutes an excited utterance:

> (1) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective;
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> (2) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such

domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs;

(3) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence; and

(4) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration. (*State v. Wallace*, 524 N.E.2d 466, 469 (Ohio 1988).)

If statements in the fire investigator's report are excited utterances, a hearsay exception still must apply to the report itself for it to be admissible. The common hearsay exception utilized in this instance is the public records exception under Fed. R. Evid. 803(8). Rule 803(8) provides that records created under a duty of law by any public office or agency are admissible "unless the sources of information or other circumstances indicate a lack of trustworthiness." (FED. R. EVID. 803(8).) Generally, the term "public" connotes that a record was made or done by an officer of the government. (Glen Weissenberger, *Hearsay: Business Records and Public Records*, 51 U. CIN. L. REV. 42, 58 (1982).)

The rationale for Rule 803(8) is two-fold -- necessity and reliability. (Id.) First, Rule 803(8) is based upon necessity. The report may have to be produced (1) because there is a high likelihood that a public official may not remember his action in regard to the entries; and (2) to avoid the inconvenience of calling the public officials as witnesses. (Id.) Second, there is a circumstantial guarantee of trustworthiness accorded to official reports. (Id. at 59.) The rule presumes that public officials conduct their duties carefully, promptly, and without bias. (Id.) Furthermore, public reports are subject to public scrutiny, exposing errors and prompting correction. (Id.) Where sources outside the public agency have made statements contained in the report, only the portions that qualify under Rule 803(8)(a) or (b) could be admitted (i.e. the

date and time of investigation, the location of the origin of the fire [but not the cause], and the time and duration of the fire). (Id. at 62.)

In the case study, Samuel and Nathaniel gave statements to the fire department investigator four days after the fire to the effect that "they saw fire on the battery thing." The court determined that at the time of the fire investigator's interview, the children were not under the influence of the startling event, and the children did not display any signs or indicia that the fire continued to dominate their thought processes, so the excited utterance exception did not apply and the children's statements in the fire investigator's report were inadmissible because

> Although Plaintiffs advocate that Samuel and Nathaniel were still under the influence of the startling event, there is nothing in the record to support that contention. The deposition testimony of Investigator Sbrocchi does not indicate, for example, that the boys were visibly distraught when asked about the incident, which could have indicated that they were still under the stress of the event. It is not even clear exactly what questions were posed to Samuel and Nathaniel. Thus, on the record before the Court are the childrens' statements in response to some sort of questioning by the investigator. Taking into account that situation, coupled with the passage of four days and the unknown influences of intervening circumstances which effects on the reflective thought process are unknown, it is unclear that the young boys were still under the stress of nervous excitement. It is a combination of all these factors which leads this Court to conclude that the statements made by Samuel and Nathaniel Amerson to Investigator Sbrocchi do not qualify as excited utterances under Fed. R. Evid. 803(2).
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> Alternatively, the Plaintiffs argue that the statements are admissible under the public records exception under Fed. R. Evid. 803(8). However, both the Sixth Circuit and Ohio courts have held that witness statements contained in an investigative report are not admissible under 803(8). *Miller v. Field*, 35 F.3d 1088, 1091 (6th Cir. 1994); *Nelson v. Ford Motor Co.*, 145 Ohio App.3d 58, 68, 761 N.E.2d 1099, 1107 (2001). Under this rule, such factual findings of an

> investigation are excluded where "the sources of information or other circumstances indicate lack of trustworthiness." In light of the childrens' statements not being qualified as excited utterances, the Defendant has met its burden of establishing a lack of trustworthiness. *See United States v. Garland*, 991 F.2d 328, 335-336 (6th Cir. 1993).
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> Accordingly, the statements of Samuel and Nathaniel Amerson made to the investigators four days after the incident are inadmissible. [*Knotts* Memorandum Opinion, May 13, 2002 at pp. 9-10.]

III. The Competency and Credibility of Juveniles to Testify

Pursuant to FED. R. EVID. 601, a court is to follow applicable state law to determine the competency of a witness. (FED. R. EVID. 601.) Under Ohio law, "all persons are competent witnesses except... children under 10 years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly." (OHIO R. EVID. 601; OHIO REV. CODE ANN. § 2317.01 (Anderson 2005).) In the federal system, children are presumptively competent.

Determining a child's competency is within the sound discretion of the trial judge, and that determination cannot be disturbed by a reviewing court absent an abuse of discretion. (*State v Frazier*, 574 N.E.2d 483, 487 (Ohio 1991); see also, Annotation (1988), Witness: Child Competency Statutes, 60 ALR4th 369.) The judge is given such deference because he is in the best position to observe a child's appearance, fear or composure, general demeanor, manner of responding to questions, and indications of coaching or instruction.

To determine competency, the judge can be asked to conduct a *voir dire* examination of the child or can do so *sua sponte*. The trial judge must at least consider:

(1) the child's present understanding or intelligence to understand, on instruction, an obligation to speak the truth;

(2) the child's mental capacity at the time of the occurrence in question to observe and register such occurrence;

(3) the sufficiency of the child's memory to retain an independent recollection of the observations made; and

(4) the child's capacity truly to translate into words the memory of such observations. (Honorable Charles F. Stafford, *The Child as a Witness*, 37 WASH. L. REV. 303, 313-14 (1962).)

In general, American courts do not focus on a child's understanding of an oath or promise, but on the importance of the child's ability to recollect the events at issue and to answer questions sincerely. (Nicholas Bala et al., *A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses*, 38 OSGOODE HALL L.J. 409, 439 (2000).) Recent research shows 60-70 percent of children aged four to seven understand the difference between truth and lies, but cannot provide their meanings or an explanation of the difference between them. (Id. at 442-43.) Similarly, younger children are able to understand why lying is wrong and that it leads to punishment, but they cannot explain **why** lying is wrong. (Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. CAL. L. REV. 1017, 1049-50 (1999-2000).) Studies suggest that to convey the importance of truth telling, "children [should] be asked if they can 'promise' that they 'will' tell the truth." (Id. at 1063.)

The procedure of *voir dire* can be intimidating and overwhelming to child witnesses. Therefore, it is left to the court and counsel to make the child feel at ease so that he feels confident and can be an effective witness. As a child's fear increases, so does his or her apparent

incompetence. (Id. at 1056.) Before questioning, counsel should have general knowledge of the child's background and his relative competency so that he can formulate his own questions. During the *voir dire*, all questions should be tailored to the individual child and cover the following topics:

(1) General questions about the home and members of the family;

(2) Questions about his schooling, including his grade, present teachers, former teachers, subjects studied, class standing, grades received in former years, regularity of promotion, failures if any, favorite subjects, attendance record and extra-curricular activities. If the child is very young, he should be questioned about his ability to count, read and spell simple words;

(3) Questions about his attendance at church or sunday school, including his frequency of attendance, name of his teachers, pastor and location of the church;

(4) Questions to demonstrate his knowledge of the difference between the truth and a falsehood, that it is wrong to lie and the consequences of telling a lie; and

(5) Questions to dispel the possibility of coaching. (Stafford, *supra* at 316-17.)

If a child is found to be competent, his or her subsequent testimony must prove that he has the ability to understand and relate the truth; otherwise, his testimony will be stricken and disregarded. (Id. at 308.) However, a child's mere inconsistent statements will not destroy his competency, but will go to his credibility. (Id. at 309.)

In the case illustration, Samuel and Nathaniel were subjected to *voir dire* by the court, but rulings were not given until after counsel questioned the boys and written motions were filed and opposed. The court ultimately concluded that the boys were not competent, because they lacked the ability to recount impressions and details that they experienced at ages five and three, respectively.

> At the time of the voir dire by the Court, Samuel was seven years old and Nathaniel six years of age. Upon questioning each separately, both Samuel and Nathaniel were responsive to short-term memory questions such as where they attended school, who their teachers were and their respective ages. Additionally, both children were able to identify their family members who had accompanied them to the courthouse. Both children were also able to discern the difference between the truth and a falsity. Their demeanor also indicated that they appreciated the need to be truthful in response to questions.
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> Having attended the depositions of the children taken just a month after the voir dire, this Court concludes that Samuel and Nathaniel, at the time of their examination on voir dire and on deposition, were capable of receiving just impressions of facts observed and could accurately relate them to recent events. More problematic, in this Court's view, is the depth of the children's memory relative to this incident. The Court observed the children's demeanor during the depositions and it appeared that their response to counsel's questions were not contrived and appeared to be based upon their best recollection. However, the inability of the children to accurately recount the events they experienced at ages three and five, respectively, raises serious concerns as to their competency. At times during their depositions they were unable to remember details previously given to the fire investigators and gave inconsistent answers. It is this inability to recount those impressions and details which renders them incompetent to testify as to those events. Although this is admittedly a close issue, the Court finds that the relevant factors weigh against a finding of competency; therefore, Samuel and Nathaniel Amerson are not deemed competent to testify as to the events of November 14, 1998. [*Knotts* Memorandum Opinion, May 13, 2002 at pp. 6-7.]

IV. Techniques for Interviewing and Cross-Examining Juvenile Witnesses

The manner in which a child is interviewed is as important as the competency of the child being interviewed. Recent research shows that the interviewer directly affects the quality of the report and "influences whether a child relates a true memory, discusses a false belief, affirms

details suggested by others, embellishes fantasies, or provides no information at all." (Nancy E. Walker & Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don'ts, The How's and the Why's*, 29 CREIGHTON L. REV. 1587, 1588 (1996).) Statutory procedures for interviewing children are lacking and only a few states address the issue of questioning child witnesses at all. Therefore, it is imperative that attorneys and other professionals use techniques recommended by psychological experts when conducting child interviews.

Psychological experts have provided guidance as to practice do's and don'ts for child interviewing. First, interviewers must prepare for the interview by taking time to understand the basic principles of child development, especially in the areas of language comprehension and usage. (Id. at 1590.) Second, interviewers must create an appropriate climate for the interview. (Id.) An overly friendly atmosphere may unintentionally encourage the child to fabricate details, where as, a hostile environment may result in the child making a higher percentage of errors. (Id.) Thus, it is necessary for interviewers to create an atmosphere that remains neutral and conducive to the child providing the most accurate and detailed reports. (Id. at 1591.)

Third, interviewers should use developmentally age appropriate language. For instance, interviewers should,

(1) Use active voice;

(2) Avoid negatives;

(3) Include only one query per question;

(4) Use simple words and phrases;

(5) Use the child's terms; and

(6) Be alert to any signals of comprehension difficulty. (Id. at 1592-93.)

Fourth, interviewers should establish a rapport with the children they are interviewing. (Id. at 1593.) Even if the child and the interviewer have met on several occasions, it is still essential to make the child feel as comfortable as possible at each interview. (Id.) Building a rapport with the child helps the interviewer assess the child's social, emotional, and cognitive development. (Id.) Furthermore, studies have found that if the interviewer takes the time to establish a rapport, the child provided four times as much information when answering the first open-ended question. (Id.) To establish a rapport, interviews should ask open-ended questions that require a more lengthy response versus specific questions that require only a single word reply. (Id. at 1594.)

Fifth, interviewers should explain the purpose for the interview and how to give an appropriate response. (Id. at 1594-95.) During this phase of the interview, interviewers should do the following:

(1) Emphasize the importance of truth-telling;

(2) Explicitly indicate the need for detailed information;

(3) Teach the child how to use the "don't know" response; and

(4) Give the child permission to indicate when he or she does not understand the question. (Id. at 1595-96.)

Sixth, interviewers should request a spontaneous narrative from the child. (Id. at 1596.) This is done by the interviewer asking only general questions, using narrative prompts, stressing that importance of detail, and tolerating long pauses. (Id. at 1597.) Note, interviewers should always refrain from interrupting a child during his or her narration. (Id.)

Seventh, interviewers should explain a legal proceeding and then formally close the interview. (Id. at 1598-99.) To formally close the interview, interviewers should, if possible,

address any questions the child might have, provide a contact if the child recalls any further details, return to some of the topics discussed in the rapport phase to ease the child out of the intense interview, and most importantly thank the child for his or her time and cooperation. (Id. at 1599-1600.)

On the other hand, there are many interview practices that attorneys and other professionals should avoid:

(1) Demonstrative aids, if possible;

(2) Leading and suggestive questions;

(3) Modifying the child's statements;

(4) Asking multi-part questions;

(5) Asking forced-choice questions; (Id. at 1600-04.)

(6) Repeating questions so as to suggest child gave the wrong answer; and

(7) Communicating outside information to the child. (Mary A. Lentz, *Interviewing Child Victims/ Witnesses*, 9 BALDWIN'S OHIO SCH. L.J. 25, 26 (1997).)

Related to the issue of interview practice procedure is whether child witnesses should be videotaped during the interview phase. The primary argument for allowing videotaped interviews is that it preserves the child's exact statements, emotion, and demeanor at the moment of disclosure. (Jean Montoya, *Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses*, 35 ARIZ. L. REV. 927, 941 (1993).) This is essential because the accuracy of a child's memory fades as time passes. Furthermore, with the passage of time a child's recollection is more susceptible to potential contamination, especially as interactions with others about the event at issue increase. (Lucy S. McGough, *For the Record: Videotaping Investigative Interviews*, 1 PSYCHOL. PUB. POL'Y & L. 370, 374 (1995).)

Videotaping also eliminates the need for repetitive interviews to be conducted by multiple attorneys or other professionals. (Montoya, *supra* at 941.) Currently twelve states authorize pre-trial videotaping in child abuse cases. (McGough, *supra* at 380.) The party submitting the videotape into evidence must show that it is reliable and trustworthy, and the child must be available for cross-examination. (Id.)

On the other hand, videotaping the interview does have negative aspects as well. First, submission of the videotape at trial instead of having the child witness testify requires the court to admit hearsay statements that may have been obtained through improper interview techniques. Second, the videotape may be inappropriately used to discredit a child and exaggerate inconsistencies in the child's statements. (Id. at 383.)

After the interview phase is completed and once the child is on the witness stand, he is subject to cross-examination that any other witness would receive. (Stafford, *supra* at 321.) However, the cross examiner should never attack the child rudely and he should avoid any line of questioning that may appear as overbearing. (Id.)