The Inns of Court College of Advocacy

The Council of the Inns of Court

ADVOCACY AND THE VULNERABLE

National Training Programme

The Principles of Questioning – HJJ Sally Cahill QC (transcript of video plenary session)

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JUDGE CAHILL: Good evening. I am saying that because as I record this it is evening at Gray's Inn. I am conscious that quite a few of you, however, might be watching it at different times of the day, so good morning, good afternoon, good evening, I hope it is not good night!

What I am intending doing over the course of the next hour or so is giving you some insight into how it is that you should be treating vulnerable witnesses in the criminal justice system. In doing that, I am going to assume a certain knowledge. I am going to assume that you know the law and, in particular, you know about the Youth Justice and Criminal Evidence Act, and I am going to assume that you know about Special Measures. I shall talk about those a little bit in this talk, but the main thrust of my talk is how you are to treat witnesses in terms of asking them questions.

The starting point, of course, is the Youth Justice and Criminal Evidence Act. That was introduced in 1999 and over the next few years what happened was it was not implemented in the way that it had been intended. That resulted in 2009 in research being done by the NSPCC. The NSPCC produced what is an extremely helpful piece of research and, if you have not read it, I would suggest you do. It was done by Joyce Plotnikoff and Richard Woolfson. They comment in there on what was going wrong at that stage. And in commenting, what they do reveal is a number of things which witnesses found when they were giving evidence: things, for example, like they did not like bumping into the defendant. That is something I am going to deal with during the course of this talk because it is something that needs to be avoided. But I do ask you to have a look at that research if you are not familiar with it. It is

very lengthy and you might only read the Executive Summary, but even that may assist you when you are dealing with vulnerable witnesses.

Following the research what then happened was the Senior Judiciary took it very much to heart and they decided that across the board for the judiciary there should start to be training in how we were going to deal with vulnerable people in the criminal justice system.

There was a case in 2010 which I am going to talk about called Barker which is absolutely key to what was then going to happen. But the real thing that you have to appreciate from this training is that there has been the most enormous change. Some of you will remember the 2003 Act and you will remember the changes in the law in respect of hearsay, in respect of bad character and such things as that. Those were huge changes. This is a huge change in practice. It is a change in practice because what advocates must now do is change the way they ask questions of witnesses so the witnesses can understand them and put them into a language which is witness friendly. That is quite different to how things used to be.

The test for competence for a witness is found in section 53 of the Youth Justice and Criminal Evidence Act 1999.

> A witness is competent to give evidence in criminal proceedings unless it appears to the Judge that he is not a person who is able to –
>
> 1. understand questions put to him, and
>
> 2. give answers to them which can be understood.

A It used to be the case that if the witness was asked a question and they gave an answer which seemed to be a nonsense or not to understand the question, it seemed to be the witness's fault. That is no longer the case.

B Although the test is the same, it has effectively been turned round and effectively now it is the advocate who has the responsibility of ensuring that they speak in a way that is user friendly for the witness. That came in the case

C of R v. Barker [2010] EWCA Crim 4. The then Lord Chief Justice, Lord Judge, gave the judgment. He said:

> D "The question in each case is whether the individual witness, or … the individual child is competent to give evidence in the particular trial. The question is entirely witness or child specific. There are no presumptions or preconceptions. The witness need not understand the special importance that the truth should be told in court, E and the witness need not understand every single question or give a readily understood answer to every question. Many competent adult witnesses would fail such a competency test …"
>
> He went on:
>
> F "… it is not open to a Judge to create or impose some additional but non-statutory criteria based on the approach of earlier generations to the evidence of small children."
>
> G "Many … suspicions and misunderstandings about children, and their capacity to understand the nature and purpose of an oath and to give truthful evidence at a trial have been swept away.""

H It is not just about children: as he made clear, this is about all witnesses. As he said, many competent adult witnesses would fail such a competency test and I am sure we have all been in court where we have heard an advocate ask a question of a witness and we have heard the witness's answer – even though

A they are an adult – and the two do not appear to bear any relation to each other. The responsibility, of course, now is the responsibility of the advocate.

In the case of R. v Lubemba [2014] EWCA Crim 2014 which is a key case B and one which every advocate should be fully aware of, Hallett LJ expanded on this. She said:

> "It is now generally accepted that if justice is to be done to vulnerable witnesses and the accused a C radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness not the other way round. They cannot insist on any supposed right 'to put **one's case**' or previous inconsistent statements to a vulnerable witness. If there is a right to 'put D one's case' (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness."

E It is important to understand that that quote is not to be read as giving defence advocates carte blanche not to put their case. In the section 28 cases that have been done in Leeds and Liverpool and Kingston, we have in every F single case found a way in which the case can be put to the witness. It may not be in the traditional way and it may not be in a way that counsel particularly wants to do it, but a case can usually be put to a witness and G counsel not putting it is not doing his or her duty. It is the duty of counsel to ensure that one way or another, with the agreement of the Judge and the intermediary, if there is one, it is put in a user friendly way. I will give examples H of that in due course.

I am going to talk a little bit about section 28. A lot of you will have very little, if any, experience of it to date but it is likely that section 28 is going

to be rolled out across the country and, when it is, everybody will have to take it on board. In the section 28 pilots that we have been doing the criteria for using section 28 is slightly different to statute because, of course, it is only a pilot. That has provided that:

> "Where a special measures direction provides for a video recording to be admitted under section 27 as evidence in chief of the witness, the direction may also provide
>
> (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording …"

So it is, putting it in a nutshell, the pre-recorded cross-examination of vulnerable witnesses.

> "(b) for such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be."

Those who have been eligible during the course of the pilot have been those under 16. That is different from the Act because the Act in fact applies to those under the age of 17. In addition, we have also been dealing with witnesses who suffer from a mental disorder or otherwise have a significant impairment of intelligence and social functioning. It could, of course, be that the witness has a physical disability or is suffering from a physical disorder that would mean that their evidence would be enhanced if section 28 was applied. Under the Act there is another criterion for such section 28 could be used ultimately although it does not, at the moment, and that is under section 17.

Coming back to vulnerable witnesses who are vulnerable either through age or some other kind of incapacity, it is very important for all advocates to bear in mind that some disabilities are obvious, some, of course, are hidden. Witnesses may have a combination of disabilities which means they need a combination of assistance in order that they can give their evidence. A witness may not wish to disclose the fact that they or he has a disability during the initial and subsequent needs assessments. Different witnesses on the autistic spectrum may have very different needs.

All that, of course, means that it can be very difficult for advocates to establish exactly what it is they need to do for this particular witness. It may be that the way of doing that is to take advice from an intermediary or from a social worker who works with the witness or somebody else. But it is vital that these kinds of things are covered. To give you one simple example, I had a witness not very long ago who was a little girl of 10. She had the normal problems of a child of 10 in that her language comprehension is not that of an adult. But what I later found out – fortunately, before she gave her evidence – was that in addition to that, she was incontinent and that, of course, would have meant had we not known about it, she would have given her evidence, she would have no doubt wet herself at some point and then been in extreme distress, sitting in a chair where she did not want to be. It is vital that we find these kinds of things out.

Because different witnesses have different disabilities and different needs, of course it does mean that there has to be different considerations to what special measures are necessary for them. More than one special

measure might be necessary for witnesses. For example, they might want to give their evidence by live link but also be screened so that the defendant cannot see them. It is very important to consider the effect of Special Measures or lack of them on the witness. If you are going to have screens, how is the witness going to come into court? If they come in through the front door of the court building and across the main public concourse into court, they will still be exposed to the public, potentially the defendant and potentially the defendant's friends and advisers. That, of course, will then mean that the Special Measure of them being behind a screen in court probably will not have much effect because they will have already come through the public area and be feeling stressed and upset as a result.

So if a witness is going to have something like screens, give consideration to how are they going to get into the court building; how are they going to get into the courtroom; and make sure they have been asked in advance about how that impacts on them. You can then, if necessary, arrange with the Judge for rather than the witness coming in through the front door, to come in through a back door and to come down the secure corridors and come into the court through the Judge's entrance. That is what we routinely do in Leeds and it works extremely well. The difficulty with doing it any other way means that by the time they have come into the building and potentially been confronted or seen someone they do not want to see, it will be too late then to put things right so they can give their evidence in the best possible way. So consider Special Measures, not in isolation but cumulatively; how many are needed for this particular witness and make sure they are all put in place.

There are special considerations that have to be given to children. First and foremost we have to understand that children are not mini adults. They are not a "little me", they are an individual and they have very different needs to the adults who come to court. Children need to be able to give their evidence at a time that is appropriate to their abilities. Timing in their evidence is crucial. Just think for one moment why it is that in primary schools children have their academic lessons in the morning and non-academic lessons in the afternoon. It is because they are better able to concentrate in the morning. The same applies to them when they come to court which means that special arrangements have to be made so that rather than coming to court in the afternoon or late in the morning, they should be there by half past nine or ten or, at the latest, 10.30 so they can give their evidence. It also means if they are going to be giving evidence for a substantial period of time there have to be breaks and it may also be, if they are going to go over the luncheon adjournment, their evidence has to stop and they come back again on a second day rather than push them into the afternoon at a time when they are tired and unable to give off their best.

It is vitally important that advocates understand that children do not lie or fantasise any more than adults. All of us know, and have had people in court who have lied and fantasised and they have been adults. Adults can do it; so can children. But just because they are children does not mean to say they do it any more than the adult witness. On the other hand, children are very suggestible. Exploiting that is not an acceptable way to cross-examine. Children are used to agreeing with the adults around them and therefore if a

proposition is put to them, it is quite likely they will accept it and say, "Yes". That is not a proper cross-examination.

But timing for the evidence of vulnerable witnesses is vital. I have just commented in relation to children. They need to come at a time that is suitable for them. There are other times that have to be thought about as well. In relation to some adults, they may be on medication which means that in fact they do not really start to function until later in the day, either late morning or in the afternoon. If that is the case, then allowance needs to be made for that.

Also in so far as timing is concerned, it is important to consider, when will the witness see their ABE DVD? In the section 28 cases they never see it at the same time as Judge and jury because, of course, the trial comes much later. But if the case is not a section 28 case, they equally should not watch the ABE DVD at the same time as the Judge and jury save and except in very exceptional cases where, for some evidential reason, it is necessary. Pure convenience of the court would not be a good reason. For the witness who is going to watch the ABE DVD, they are going to watch something which, if it is true, is something that has happened to them that has caused them distress. That means that if they are watching it at the same time as Judge and jury, and they know that, they are likely to be caused more distress. By the time they have finished watching it, if they are then expected to go into the witness box, they are not going to be able to give off their best.

A much better way of dealing with it is to make sure arrangements are made so that in the days before the trial the witness can watch their ABE DVD in private. Of course, if they are going to do that, there has to be somebody present with them, usually the officer in the case who can make a note of anything said by the witness. They can then file a Criminal Justice Act statement and the court can be made aware of what the witness has said. In that context, therefore, it is important that you should not rely on the Witness Care Service because it would not be appropriate for them to have to come and be witnesses before the court.

But in so far as a witness's evidence is concerned, for how long are they able to concentrate? It is unlikely that either advocates or Judge can answer that without taking advice from people who know the witness. It is important to know it at a very early stage because if a case is going to be given a time estimate, that time estimate has to take into account the incapacities of the witness. If the witness is going to need a 10-minute break every 20 minutes and their evidence is going to last two hours, it is common sense that that means that the evidence is going to last rather longer than had been previously thought. So all this has to be thought about at the time the time estimate for the trial is being dealt with.

Most witnesses should have a familiarisation visit; that is when they come to court, they are shown the courtroom or they are shown where it is that they will be when they are giving their evidence. Again, it is important that advocates consider when is that going to take place? That is a visit that can

be used very usefully for them to watch the ABE DVD at the same time, so a good time for it is in the day or couple of days just before the trial.

What time are they going to come to court? Should they come on the first day of the trial when case is going to be opened or should they come on the second? I would suggest that, normally speaking, if you have a vulnerable witness they should never be scheduled to come on the first day of the trial. The first day of the trial can be used for the Crown to open their case, for any legal arguments to take place and for the Judge and jury to watch the ABE DVD, but the witness need not come until the next day. They should be scheduled to start first thing the next day and then in and out of court as soon as is reasonably practicable.

One thing to consider, quite apart from those matters, is, is a remote link available or is it necessary? There are at the moment something like 15 centres where there are remote links. A remote link is where there is a room in a building completely separate from the court where the witness can be and their evidence can be streamed into the courtroom. There are advantages to it because it means the witness will not have to meet any of the defendants or any of the defendants' supporters. It also means they do not have to come into the court building. There are disadvantages to it because it might mean, if you have a very young witness who would normally meet the Judge and the advocates together, that could be difficult to arrange. It also means that if there are exhibits in the case which are to be shown to the witness, arrangements have to be made so the exhibits can be at the remote link centre so the witness can see them.

Intermediaries: some of you may have experience of intermediaries, some of you may not. They are something which have become far more popular and far more frequent in the course of the last three or four years. The rules have recently changed in relation to intermediaries. They are covered by the Criminal Practice Directions. In the previous Practice Directions it was said that there should be an intermediary for any child who is at primary school. That has changed. There is now no presumption of an intermediary at that stage, but consideration should be given to intermediaries for under 18s. The reason for the change is not because intermediaries are not necessary, but because there are not enough of them and they can be very expensive in some cases. Because there is not enough of them, of course they have to be spread fairly thinly.

But it is the case that in any case where a child is at primary school, you should consider an intermediary. It is no good just saying, "Oh, this child is nine years old and she is a bright, intelligent little girl". No matter how bright and intelligent she is, she may have problems such as the one I described earlier about the incontinent little girl who was bright and intelligent but, sadly, had that disability. It may also be, of course, that even though she is bright and intelligent, she does not fully understand the language that is going to be used in a courtroom. The only way you are going to know the answer to that is if you have an expert, usually an intermediary, to advise you about it.

Intermediaries should also be in cases where the witness has special needs in relation to communication or where the witness has learning difficulties which may impact upon their ability to give evidence. In

considering whether or not to use an intermediary, one thing to consider is that it may be that you need the assistance of the intermediary by way of a report to tell you what the particular difficulties of the witness are. That report will give you a lot of information. After that report you may still need the intermediary to help you formulate the questions which the witness can understand. That, again, can be enormously useful. Whether you still need them at the final cross-examination will be a matter for you and the Judge to consider when you get to that point in time. But where the intermediary's real help comes is at the initial stages in their report and at the Ground Rules Hearing which I am going to deal with in a moment.

Intermediaries, of course, are also enormously useful not just for children but for older witnesses as well who have special needs or have particular difficulties. I have already given you the test for competence and suggested that it is up to counsel to make sure they put questions that the witness can understand. But, of course, included in the test for competence is the fact that the witness needs to be able to give understandable answers. Not very long ago I had a man of 49 giving evidence before me. He was a stroke victim and as a result of his stroke whilst he could understand everything that was being said to him, his capacity to communicate was extremely limited. In order to assist him giving his evidence, we went down to the Live Link Room and I was actually in the room with him, as was counsel asking him questions, together with the intermediary. We did that because the intermediary told us that for this particular man, to see us across the TV link would mean that he would not be able to communicate with us at all. We therefore sat in the TV

Link Room with him as he was being asked questions. He was asked, "What was the colour of the jumper that was being worn by the alleged burglar?" We knew the answer because we had the CCTV. He sat there and he thought for quite a while and he was clearly desperately trying to tell us something and, eventually, he shouted out the word "banana". Now, of course, he is exactly the kind of person who not very long ago a court would have said, "Well, he cannot give an answer that makes any sense" and therefore would not have been competent. But, with the assistance of the intermediary, we were very easily able to understand that he did not really mean "banana" at all, what he meant was "yellow". We knew that was correct because of the CCTV.

In so far as the Ground Rules Hearings are concerned, those should take place in every case where there is a vulnerable witness, not just in cases where there are intermediaries. However, if there is an intermediary it is very important to understand that it is not the intermediary who has the final decision about what should be asked, it is the Judge. The Judge is the person who has an overall perspective of the case. They will not just know the prosecution case, they will have a defence statement and they will understand the issues involved. That is not the role of the intermediary. All the intermediary knows is the needs of this particular witness. Therefore advocates need to understand that although it is very important that they should let the intermediary see their questions and discuss them with the intermediary, at the end of the day it is the Judge who decides whether a question should or should not be put.

Hallett LJ in the case of *R. v Jones* [2015] EWCA Crim 562 said:

> "As was explained in *R v. Lubemba and Pooley* [2014] EWCA Crim 2064, the judge has a duty to control questioning.
>
> Over-rigorous or repetitive cross-examination of a child or a vulnerable witness must be stopped. In a multi-handed trial the judge must ensure that the witness is treated fairly over all, and not asked questions on the same topics, to the same end, by each and every advocate. … For these purposes defence advocates will now be treated as a group and, if necessary, issues divided amongst them, provided, of course, there is no unfairness in so doing."

So what that means, of course, is that there will be one cross-examination in a multi-handed trial and the only time there will be more than one is if the second advocate has different issues to put to the particular witness. It means there must be co-operation between the advocates. They must work together to decide on the questions that are going to be put and the areas of cross-examination.

This slide is headed '"Noddy' goes to the Old Bailey" simply because what I am about to say should be very "Noddy" material, but it is absolutely crucial. When you are going to cross-examine a witness, whether it is a vulnerable witness or anybody else, but most particularly for a vulnerable witness, there are three really key things to remember. First of all, you must ask questions. Secondly, those questions must be relevant. Thirdly, they must not be repetitive. You will be amazed, if you sit back and listen to advocates, how often they fail on those three issues.

So, what are your principles for preparation of your questions? Let us have a look at them. First of all, you must comply with the Ground Rules

Hearing. At the Ground Rules Hearing the people who will be present will be the Judge, yourselves as advocates, both for the Crown and for the defence and also, if there is one, the intermediary. At the Ground Rules Hearing the Judge will make orders. The rules arising from the Ground Rules Hearing are absolutely sacrosanct and they must be adhered to by all counsel. It is likely that you will have been asked to submit questions for each witness so the Judge can see them in advance and decide if they are appropriate in length and style. That does not just mean areas of cross-examination, it means precise questions.

Having said that, that does not mean that one size fits all. Judges are going to be much more concerned about the precise questions for very young witnesses than they may be, for example, if your witness is a 15 year old girl who is of normal intelligence about to take her GCSEs. They may be much more precise about the evidence of somebody who has a mental incapacity. So one size does not fit all, but there will be many cases where, if you go into court simply with a list of the areas of cross-examination, you will find that is not sufficient. Furthermore, when I say "a list of the questions" I mean the precise questions, absolutely word-for-word. I shall go into why that is the case in a few minutes. But if the Judge has made an order at the Ground Rules Hearing, that is something which must be followed. If, for any reason, you want to depart from it, then before you do that, you must canvas it with the Judge.

When you are going to compile your questions the first thing to do is to identify the key issues. That is absolutely imperative if you are going to be

able to formulate focussed and brief questions. Bear in mind, particularly with the very young or with the very vulnerable, evidence can often sensibly come from another source rather than from the particular witness. The cross-examination must be separated into topics based upon the defence that you have set out in your client's defence statement.

Draft your questions in advance, not just in cases where there is a Ground Rules Hearing. Again, it should be done all the time with vulnerable witnesses. That helps you, as an advocate, keep the "flow" of your questions and it means you will not fall back into ways that the Judge is going to say are inappropriate.

One of the things that has often been asked of me when we are dealing with the section 28 cases in Leeds is, "What happens if there is a list of questions, the advocate is going through the list of questions and the witness suddenly comes out with an answer that is unexpected?" Well, the answer to that is I give counsel the choice in most cases. I say to them, either "You can carry on and if I do not like the question you put, I will then edit it" – because, of course, in section 28s that is what we can do – or I say to them, "The other alternative is that you can say, 'Judge, can we have a short break?'" The advocate then uses that short break to re-formulate new questions.

What happened when we started the section 28s was that virtually every advocate decided that what they would do, if they were given an answer that they were not expecting, was just carry on and they would do it "on the hoof" as they always have done. What they very quickly found was that they

were making enormous mistakes such that they were being stopped and the section 28 had to be edited. These were people some of whom were very experienced advocates. They simply went back into their old ways. Certainly what we found in Leeds is that those who do these cases routinely now, and who are the good advocates and the experienced advocates, now choose not to carry on. Inevitably what they all do is they say, "Judge, can we have a short break?" We have the break, re-formulate questions and everything then works perfectly.

So when you are drafting your questions, please make sure that you do them precisely with the words exactly as you are going to deliver them because if you do them in any other way you will find you stumble. And, as I have said, it is crucial that advocates understand that it is the Judge, and not an intermediary, who is the final arbiter about whether a question is permitted. Intermediaries are there to advise and assist; they are not there to make decisions.

I am now going to turn to some principles for conduct when you are conducting a cross-examination. First of all, there is no need to build a rapport with the vulnerable witness. If you are going to deal with a young child, what should be happening is the Judge, together with both prosecution and defence counsel, should go and meet the child. The Judge should take control of that, introduce him or herself and then introduce you, the advocates. Once you are all in court it is the Judge, of course, who will first of all speak to the child and then the Judge will have the camera put on to whichever advocate is going to ask questions. You do not need to start by building a rapport.

So, for example, you do not need to say, "I understand this may be tiring or difficult". Instead, give the witness a signpost and ask a short, concise and focussed question. Address them by name. Say something like,

> "Hello Rebecca, I am going to ask you some questions about George."

Please do not suggest that you are going to "talk" to the witness. Some intermediaries may suggest that you should do that. But there is a very good reason why you should not; that is, you are not there to talk to the witness, you are there to ask questions. Saying to the witness that you are going to talk to them gives them the wrong impression about what is about to happen. Be honest with them. Rather than saying something like, "I want to talk to you now about last weekend", simply say, "I am going to ask you about last weekend" or "I am going to ask you questions about last weekend" or "I am going to ask you a question about" whatever the topic is. That is being honest with the witness.

When you are putting your questions to the witness, it is very important that you keep to a chronological order. The reason for that is because it usually helps them follow the flow of where you are going. Chronological order, of course, normally means starting at the beginning and going through to the end. It can, however, be reversed sometimes for some witnesses. Certainly recently I had a young boy where we were trying to get him into a particular house where he had lived with his mother and stepfather. He had lived in several houses with them and it was very difficult to get him to the precise address. So what we did was rather than go forwards chronologically, we

started with where he was living at the time of the case and worked slowly backwards. That took him back to the place where he needed to be so he could be asked questions about it.

But do try and keep things in a logical order for the witness. Good examples would be, "I want to ask you questions about when you were six"; "I am going to ask you some questions now about when you started senior school"; "I am now going to ask you questions about when you saw your Auntie Fay last week". Those are areas where, of course, you are taking them chronologically through their life to topics that you want to ask them questions about.

One of the things that you need to do when you question a vulnerable witness is put the questions at a pace that is suitable for the particular witness. There need to be pauses between questions and the considered wisdom is that normally six seconds is about appropriate. That allows the witness to assimilate what it is you have asked them and then to prepare their answer. Response time with vulnerable witnesses will be slower. You need to wait longer than the normal witness so that they can answer. You should not plough ahead with the next question because if you do, what then happens is they will probably answer the question that was previously asked not the one you have just asked. If you are not certain what is happening, give them a decent amount of time by way of pause and then say, "Would you like me to ask that again?" but do not rush them.

A It is vital that when you are going to ask questions of a witness you ask questions and you do not make statements. Start with words prefacing the question such as, "Did" or "Where" or "When" or "Was" or "What". Avoid B saying something like, "Uncle George liked you best". That is not a question, that is a statement. A lot of advocates fall into the trap of saying, "Uncle George liked you best" and then standing looking at the witness expecting an C answer. The witness does not reply. Frequently counsel put statements to witnesses. Again the witness does not reply. Counsel continues with the next statement on the assumption that there has been some kind of tacit D agreement. That does not happen; there is not tacit agreement because they have not been asked a question. The statement is entirely worthless. So rather than asking, "Uncle George liked you best", what you should do is put a E proper question which is, "Did Uncle George like you best?" It is really very simple. "Did Uncle George give you some sweets?" "Was Uncle George nice to you?" Those are the kinds of questions that are simple to formulate and F essential to put.

When you have a vulnerable witness it is very important that what you do is give them a signpost of what you are going to ask them about because G that will help them to stay focussed. When you are moving on to a new topic you need to give them a new signpost so they know that you have changed topic. You must avoid moving from topic to topic without telling them where H you are going. So once again, a good example of that would be, "I want to ask you about Bob now". Ask your questions then about Bob. When you finish those questions, "I am now going ask you some questions about your teddy".

A Ask your questions about the teddy. When you have finished those, "I am now going to ask you some questions about your school" and so on.

B You need to avoid repetition. All your questions should be asked once, at the relevant time, under the topic which you have signposted and in, of course, their chronological order. What you must not do is jump around from different places and ask questions which are repetitive. Once the witness has answered the question, do not go back to it simply because you have an answer that you do not like.

C

D It is important that when you are asking questions you should not ask them in such a way that indicates either your approval or your disapproval. Thus, you have to avoid saying things like, "That cannot possibly be right, can it, Rebecca" or "Surely that must be true, Rebecca"? What you need to be saying is, "Are you sure that is right, Rebecca?" That is a question, it is not suggestive and it does not indicate your approval or disapproval.

E

F When the witness is giving evidence all advocates, both Crown and defence, together with the Judge, need to watch out for signs of distress from the witness or a lack of concentration or if they are getting tired. That is part of your role. Understanding the vulnerabilities and the needs of the witness is something you should be looking at very carefully.

G

H The intermediary reports, if you have one, are likely to be very detailed and make recommendations specific to the witness. You need to make sure you follow those. But there might be other things that occur during the course of the cross-examination that again need to be looked out for. You need to be

A very familiar with what the intermediary has said in their recommendations in respect of each of the witnesses that you are going to cross-examine.

B Now some principles for questions that you are going to put to your vulnerable witnesses: please avoid saying, "Do you remember"? That requires complex processing for witnesses, especially for young children. Instead of

C asking, "Do you remember Uncle George giving you sweets in the shed", try instead, "Did Uncle George give you sweets in the shed"? Again, it is quite simple to re-formulate it.

D When you are asking questions about a person, you need to identify them. You may know who it is that you are talking about, but the witness may not, even if you have referred to them in your last question. So if you say

E something like, "Did you go to the park with him", you may be thinking of a particular person in the case. The witness may have somebody completely different in mind; so the two of you can be at cross-purposes. It is therefore

F vital that when you ask questions about a person, you identify them and you identify them in each question that you put. So instead of asking, "Did you go to the shed with him?"; "Did he let you go into the shed?"; "Did he give you

G sweets?"; what you need to do is say, "Did you go to the shed with Uncle George?"; "Did Uncle George let you go in the shed?"; "Did Uncle George give you some sweets?" That way there can be no room for confusion about whom

H it is that you are speaking.

You need to take great care if you are asking a witness about what they told someone else. Children can get very confused about that, when they are

not asked about the event but they are asked about what they have said about it to somebody else. By way of example, if you put to a child, "Do you remember telling Mummy your bottom was sore?", if the child answers "No", what does that mean? It could, of course, mean, "No, I don't remember". It could mean, "No, my bottom wasn't sore". Or it could mean, "Yes, I remember telling Mummy but no, my bottom was not sore". So instead ask the simple question, "Did you tell your Mummy your bottom was sore?"

You need to avoid using the word "why". Vulnerable witnesses find that a difficult concept to deal with and find it difficult to explain why something was happening. Vulnerable witnesses can find identifying intention very difficult and young children often reverse the word "why" and the word "because". They say, for example, "I fell over, that's why I was running". So it is a word that you need to avoid when you are asking them questions.

Something which I am sure you are all familiar with: there must be no "tag" questions. A tag question is putting together a positive and a negative. Tag questions should not even be asked of adult witnesses, but certainly not of children. A question which is a tag would be something like, "You did go the park with Bob, didn't you?" Instead what you need to do is ask questions such as "Did you go the park with Bob?" "Are you sure you went to the park with Bob?" "Did you tell anyone you went to the park with Bob?"

I know from the training I have done over many years that quite a few people struggle with this concept. I have had Judges say to me, "Well, what is the problem with tag questions? If I say to my grandchild, 'You want some

chocolate, don't you', they understand what I am saying." And they do. They understand it because, of course, they are in an atmosphere whereby they are with their grandparent, they are probably quite content and happy, they are not under stress and the word "chocolate" is used. It is quite simple really; of course they want some chocolate. But they are not children who are coming to court who are being cross-examined about something which was unpleasant for them and who are in the scenario whereby they do not know many of the adults around them who are asking what, to them, are hostile questions. Tags need to be avoided. Just because our grandchildren might understand one about chocolate, it does not mean to say a child does when being asked about difficult areas.

You need to avoid compound questions. At the best of times witnesses do not give reliable answers to compound questions, but the answers obtained from a vulnerable witness as a result of a compound question will be confused and lacking any value at all before the jury, so it is a waste of your breath and that of the witness. A compound question put in my court not so very long ago was, "You and Susan went to the park, you played on the swings, you drank vodka and nothing else happened?" Well, that was many concepts all in one. What should, and indeed then did happen, was it was broken down into four questions: "Did you and Susan go to the park? Did you play on the swings? Did you drink vodka? Did anything else happen?"

It is very easy to make mistakes about compound questions. I have to put my hand up and say very recently, as the Judge overseeing a Ground Rules Hearing so of course the person who made the decisions about the questions, I

made a very basic error. The allegation from the child was that they had been indecently assaulted by their babysitter. I was told that the babysitter's name was Tyler. I was also told that the child had a brother called Tyler. And so we had some debate about how the questions were to be put to the child so we could separate the two people out and only deal with the Tyler who was relevant. We did all of that. The intermediary was there. She proposed some things. I proposed some things and eventually we agreed the appropriate first question was, "Do you have a brother called Tyler?" So we started the cross-examination with the child. The first question was put, "Do you have a brother called Tyler?" The child responded, "No." That rather meant that we were not quite sure what was going to happen next so, of course, counsel asked for an adjournment.

We were downstairs with the child in the TV Link Room at the time of this questioning. We all had to go back upstairs to court, which we did, and when I got upstairs to court there was a very embarrassed police officer who said, "I am terribly sorry, the brother is not called Tyler, he is called Riley." Now, of course, I was the one who got that wrong because I approved the question, "Do you have a brother called Tyler?" What should have happened there was there should have been two questions: the first one, "Do you have a brother"; and the second one, "Is his name Tyler"? So although that seemed a very simple question, it was compound and it should never have been put in the questioning.

You need to ask short, directed questions. Those are the kinds of questions the witness is going to be able to deal with. But not every single

challenge needs to be put to every single witness, but the case needs to be put as far as you can. If you have any doubt about how you are going to put your case, the time you need to deal with that is with the Judge at the Ground Rules Hearing. Cross-examinations which include questions on multiple topics with vulnerable witnesses will be stopped by the Judge, but what the Judge will not do is stop you putting your case if what you are going to do is put it in a sensible fashion – they may even help you formulate the questions.

There should not be any leading questions. Vulnerable witnesses are, of course, going to be nervous and they will be suggestible. They may want to give you an answer which is going to please you, as opposed to the answer which is the truthful one. There is no point in asking a question and receiving an answer that has no value. So you need to avoid questions such as, "You did go to the park with Bob then" and instead ask questions like, "Did you go to the park with Bob? Are you sure you went to the park with Bob? Did you tell anyone you went to the park with Bob"?

At the Ground Rules Hearing all these are the kinds of topics you are going to be discussing with the Judge as to what questions you should put. On the slide you will find the link to the Ground Rules Hearing form that is used in the section 28s. It is an enormously useful document and even if you are not doing a section 28, you may want to have a look at it because it gives you the kinds of areas that you should be thinking about if you are going to go to a Ground Rules Hearing. As I have indicated, there must be a Ground Rules Hearing in all cases where there is a young or vulnerable witness, and not just in cases where there is an intermediary.

Once the Ground Rules Hearing has been completed, what should happen is counsel should draw up a note of what the Judge has ordered and if the advocates choose not to comply with directions given by the Judge, then the Judge should enforce them. In so far as that is concerned, you need to see the case of *R v. Wills* [2011] EWCA Crim 1938:

> "First, we consider that in cases where it is necessary and appropriate to have limitations on the way in which the advocate conducts cross-examination, there is a duty on the judge to ensure that those limitations are complied with. This is important to ensure that vulnerable witnesses are able to give the best evidence of which they are capable. Where appropriate the judge, in fairness to defendants, should explain the limitations to the jury and the reasons for them. …"

So if you are prosecuting, have that one in mind and if defence counsel go off the Ground Rules Hearing Rules, make sure the Judge is alerted straightaway.

> "Secondly" – in the case of *Wills* – "we observe that if there is some lapse by counsel in failing to comply with the limitations on cross-examination, it is important that the judge gives a relevant direction to the jury when that occurs, both for the benefit of the jury and any other defendant. To leave that direction until the summing up will in many cases mean that it is much less effective than a direction given at the time."

So that is your sanction if you choose to go against the directions of the Judge: they will tell the jury about it straightway, which is not necessarily going to be what you are wanting to happen.

Going back to the case of *Barker*, the Lord Chief Justice said:

> "The trial process must, of course, and increasingly has catered for the needs of child witnesses, as

> indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries … When the issue is whether the child is lying or mistake in claiming that the defendant has behaved indecently towards him or her it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the **defendant's case to the witness, and fully to** ventilate before the jury the areas of evidence **which bear on the child's credibility."**

So how is that to be put? As I have said, one size does not fit all. How things are to be put will very much depend upon the abilities of the witness and the age of the witness. Traditionally, perhaps, a way of putting something to a witness would have been to say, "You are lying". Well, that is no longer acceptable. If you have a young witness and they are alleging something has happened to them, and your defendant is saying, "No, it has not", there is a very simple way you can deal with it. You can say, "Uncle George says he has not touched your fanny. Is Uncle George telling the truth or a lie"? That means you are not asking the witness if they are lying and therefore you are not causing them distress in that regard; you are asking them if the defendant is lying. That would be suitable for a young witness. For an older witness, who is perhaps much more able to deal with a slightly more robust cross-examination, you can put something like, "Did Uncle George really touch your fanny" or "Are you sure Uncle George touched your fanny"?

In so far as what is to be said to the jury after the evidence, the Lord Chief Justice in *Barker* has said:

> "Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. … Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence."

So how is that to be done? The case of *Re L* in 2015 deals with that. That was a decision of His Honour Judge Marson at Leeds Crown Court subsequently approved by the Court of Appeal. What he said was:

> "So far as [the] defendant is concerned you must bear in mind the difficulty which [counsel] had in cross-examination of the children. It is not possible to cross-examine children in the same way as you would an adult, it necessarily has to be more simple and inevitably cannot be as incisive as cross-examination of an adult. So please bear that disadvantage in mind."

That is all that needs to be said if there has been such a cross-examination. It is not appropriate for counsel to start complaining to the jury that they have not been able to do things the way they wanted to because what they will have been able to do is put the case as agreed between them and the Judge to the witness.

Now, I have dealt previously with how you are going to put lying. If you do not want to put it that way, of course, what you can say to the Judge is, "Do I actually need to put these questions at all"? That is not, not putting your case; that is only the final challenge. So if the Judge has said to you, "The way

you can put your case to this witness is, "Uncle George says he has not touched your fanny. Is Uncle George telling the truth or a lie", and you do not want to put that question, then the answer is quite simple. You ask the Judge and the likelihood is the jury will be fully aware that your case is that Uncle George has not touched the child. And the Judge may well say to you, "Well, no, if you do not to put that one question, you do not need to because your case has been properly put". That does not, however, then give you the opportunity to be able to say to the jury, "I have not been able to put my case", because you have.

In a nutshell, those are the 20 principles of questioning. I hope they are all ones now that you can take away and put into practice.

Thank you for listening.
