


Slide 1



NCVLI
NATIONAL CRIME VICTIM LAW INSTITUTE

Protecting, Enforcing, & Advancing
Victims' Rights

310 SW 4th Ave., Suite 540, Portland, OR 97204

CHILD-VICTIMS:
**Providing Effective Rights
Enforcement Representation**

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A presentation slide with a blue header containing the word "Welcome!". Below the header is a decorative circle. The main content area is white and lists the following items: "MODULE # 1", "➤INTRODUCTORY ACTIVITY", "➤LOGISTICS", and "➤PROGRAM GOALS AND MODULES". A black box with the text "30 minutes" is positioned below the list. The footer is a grey bar with the text "© 2011 National Crime Victim Law Institute" on the left and "1-2" on the right.

Welcome!

MODULE # 1

➤INTRODUCTORY ACTIVITY

➤LOGISTICS

➤PROGRAM GOALS AND
MODULES

30 minutes

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Introductory Activity



GETTING TO KNOW YOU



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Logistics

- RESTROOMS
- CELL PHONES
- CLE CREDITS
- GROUND RULES
- OTHERS?

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Program Goal

Provide attorneys for child-victims with the tools to effectively represent child-victims and protect their rights in connection with criminal proceedings

How will we achieve the goal?

- By identifying the many systems child-victims must often navigate
- By providing specialized knowledge to work with child-victims in criminal court
- By articulating concrete strategies that can be used to protect the rights of child-victims in criminal proceedings

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Modules: *Day 1*

Day One

1. Welcome
2. Introduction to Rights Enforcement
3. Child Development and Interviewing Techniques
4. Issue-Spotting and Referrals + Lunch
5. Entering a Case
6. Protecting Victims' Identities in Court Proceedings

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I-6

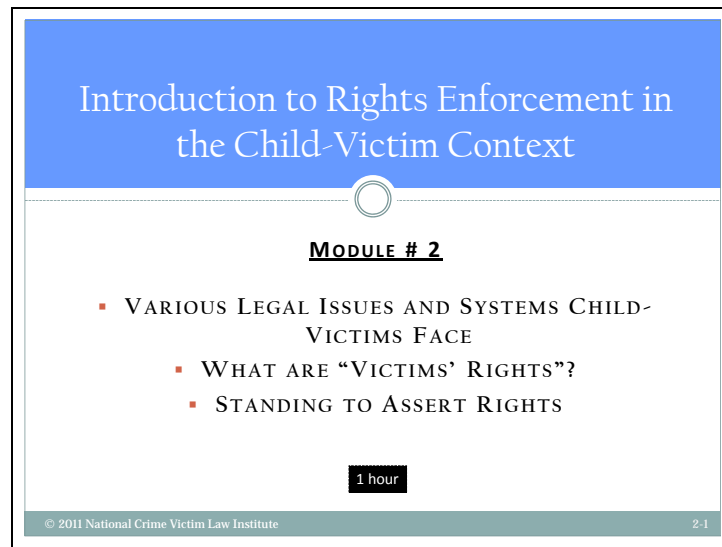
Modules: *Day 2*

Day Two

1. Privacy and Subpoenas
2. Release Conditions and Protective Orders
3. Right to Be Present
4. Testimonial Accommodations
5. Preparing the Child-Victim for Testimony and Victim Impact Statements
6. Right to Restitution
7. Pleas
8. Handling Limited Representation + Lunch
9. Ethical Issues
10. Review + Evaluations

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Introduction to Rights Enforcement in
the Child-Victim Context

MODULE # 2

- VARIOUS LEGAL ISSUES AND SYSTEMS CHILD-VICTIMS FACE
 - WHAT ARE “VICTIMS’ RIGHTS”?
 - STANDING TO ASSERT RIGHTS

1 hour

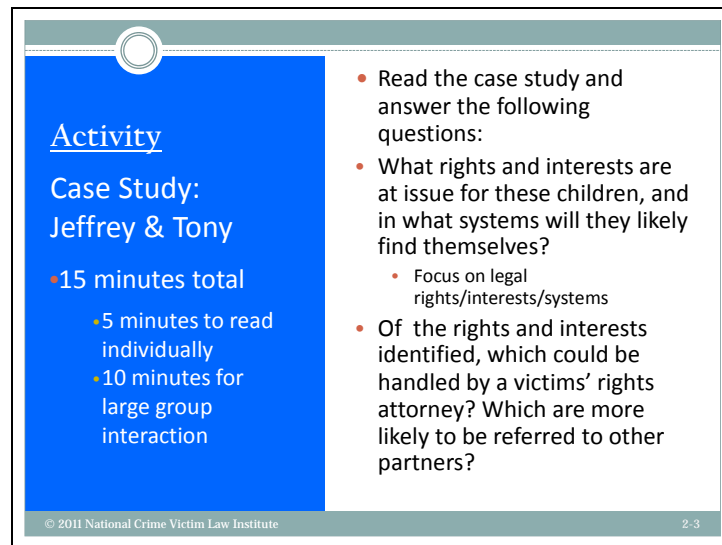
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Learning Objectives

After participating in this module, you will be able to:

- ❖ Identify common legal issues and systems that child-victims may confront
- ❖ Articulate the role of a victims' rights attorney
- ❖ Identify some common victims' rights
- ❖ Describe the test for standing to assert these rights in criminal proceedings

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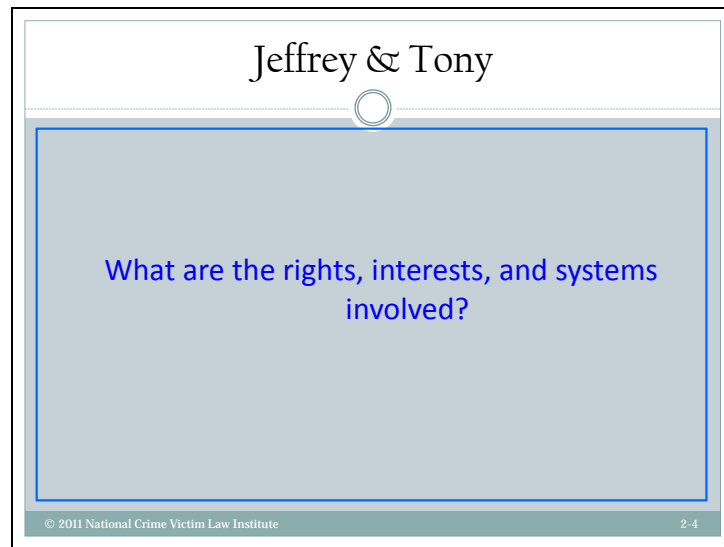
Activity

Case Study:
Jeffrey & Tony

- 15 minutes total
 - 5 minutes to read individually
 - 10 minutes for large group interaction

- Read the case study and answer the following questions:
- What rights and interests are at issue for these children, and in what systems will they likely find themselves?
 - Focus on legal rights/interests/systems
- Of the rights and interests identified, which could be handled by a victims' rights attorney? Which are more likely to be referred to other partners?

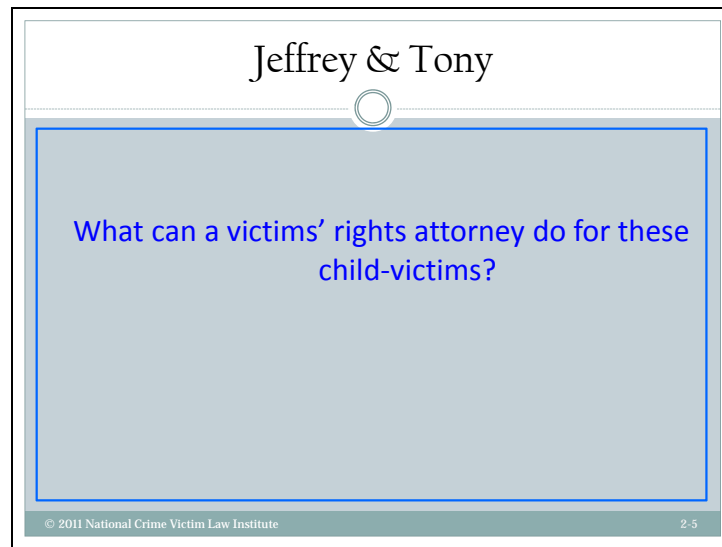
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Jeffrey & Tony

What are the rights, interests, and systems involved?

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Jeffrey & Tony

What can a victims' rights attorney do for these child-victims?

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What is a victims' rights attorney?

- “Child victims of crime are specially handicapped. First, the criminal justice system distrusts them, and puts special barriers in their path of prosecuting their claims to justice. Second, the criminal justice system seems indifferent to the legitimate special needs that arise from their participation.” *Final Report President's Task Force on Victims of Crime*, 51 (Dec. 1982).
- ABA Resolution on Child-Victims
<http://www.abanet.org/crimjust/policy/my09101d.pdf>

2-6


What does independent counsel achieve?

- Frees up the prosecutor to prosecute the case
- Provides child-victims with confidentiality and privilege and avoids potential *Brady* obligations
- Ensures that child-victims have an independent voice in the proceedings

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- NCVLI, *Child-Victims: Better Served By A Traditional Attorney Or By A Guardian Ad Litem?* (2011).

What are victims' rights?



- The Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)
- The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509
- More than 30 states have constitutional amendments affording victims' rights, and every state has victims' rights statutes

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What can a victims' rights attorney do?

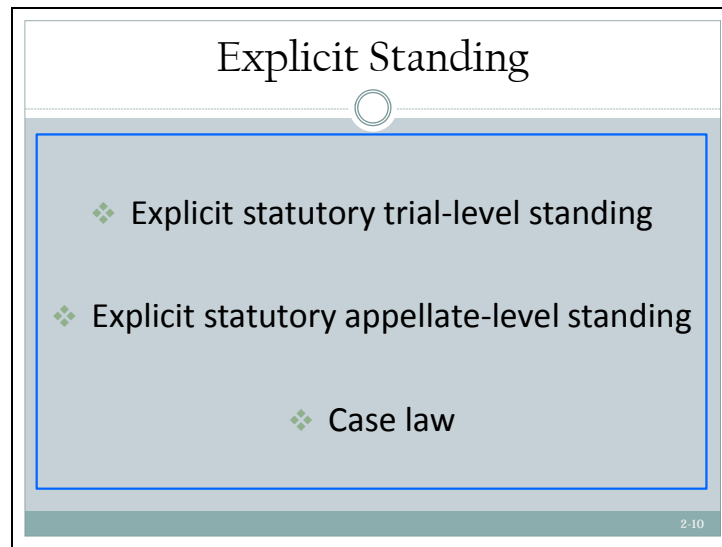
We start with standing!

And debunking some myths.

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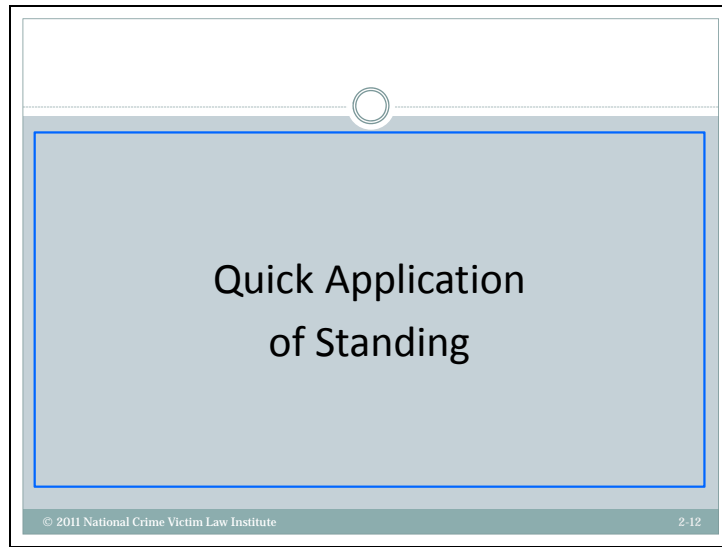
- *Marbury vs. Madison*, 5 U.S. 137 (1 Cranch 1803).



- 18 U.S.C. § 3771(d)(1-3).
- Or. Rev. Stat. § 147.502(1).
- Md. Code Ann., Crim. Proc. § 11-103(b).
- Ariz. Rev. Stat. Ann. § 13-4437(A).
- Ariz. Const. art. II, § 2.1.
- *Doe v. United States*, 666 F.2d 43 (4th Cir. 1981).
- *Ford v. State*, 829 So.2d 946 (Fla. Dist. Ct. App. 2002).

In other jurisdictions, you must analyze standing	
Constitutional	Prudential
<p>Supreme Court 3-part test:</p> <ol style="list-style-type: none">1. Litigant suffered “injury in fact”2. Nexus between the injury and the conduct complained of3. Injury is redressable by a favorable decision	<ul style="list-style-type: none">• Victim must demonstrate that the injury the victim will suffer is to a legally protected right
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- *Lujan v. Defenders of Wildlife*, 504 U.S. 565 (1992).
- *Hoblitt v. Commissioner of Natural Res.*, 678 P.2d 1337 (Alaska 1984).
- *Trustees for Alaska v. State*, 736 P.2d 324 (Alaska 1987).



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So where are the hurdles?


The hurdles to independent standing:

- Cultural Resistance
- Legal Obstacles

2-13

The slide features a title 'So where are the hurdles?' at the top. Below it is a decorative horizontal line with a circle in the center. A blue-bordered box contains the text 'The hurdles to independent standing:' followed by a bulleted list with two items: 'Cultural Resistance' and 'Legal Obstacles'. The slide number '2-13' is in the bottom right corner.

Cultural Resistance Examples



History

- The criminal justice system has always been about the defendant and the state. It has worked well and we shouldn't change it now

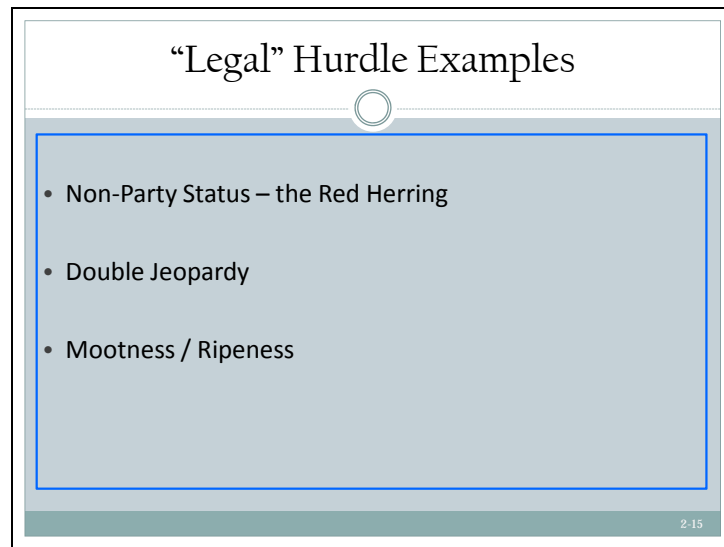
Scope of Rights

- If a victim has an attorney working for them, they will control the case and innocent defendants will be sent to jail, or worse

Zero Sum Game

- If victims are afforded rights, it takes away defendants' rights

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“Legal” Hurdle Examples

- Non-Party Status – the Red Herring
- Double Jeopardy
- Mootness / Ripeness

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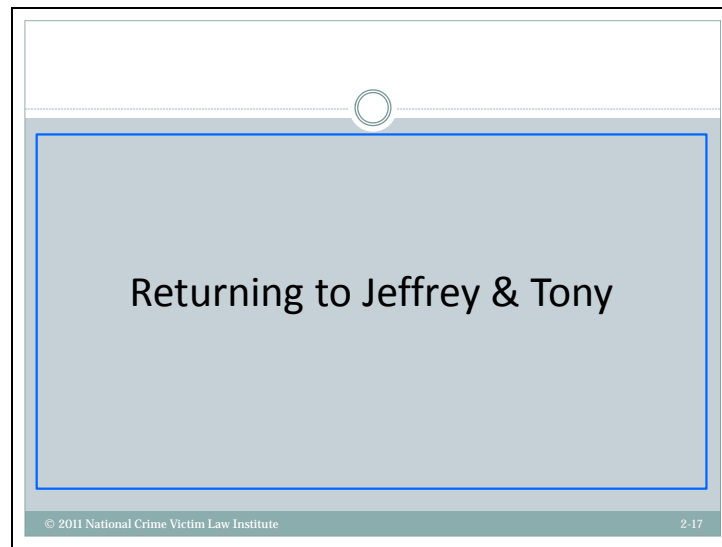
- U.S. Const. amend. V.
- *Benton v. Maryland*, 395 U.S. 784 (1969).
- *Barrett v. State*, 255 P.3d 472 (Or. 2011).

What does all of this mean?

- The individual child-victim, his or her attorney, or the prosecutor (depending upon the jurisdiction) can file motions in criminal trial courts asserting the child-victim's rights and, if those rights are denied, seek appellate relief.

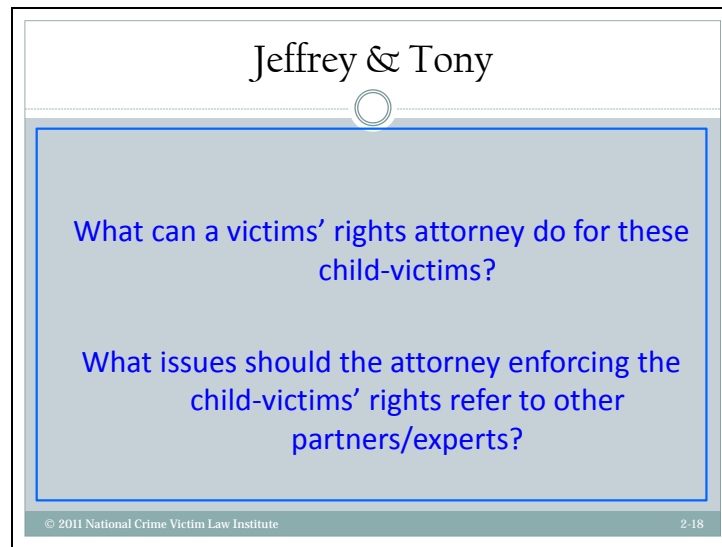
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- 18 U.S.C. § 3771(d).
- Utah Code Ann. §77-38-9(6).
- *Commonwealth v. Lam*, 827 N.E.2d 209 (Mass. 2005).
- *People v. Spykstra*, 234 P.3d 662 (Colo. 2010).



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Jeffrey & Tony

What can a victims' rights attorney do for these child-victims?

What issues should the attorney enforcing the child-victims' rights refer to other partners/experts?

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Bottom Line

- Child-victims face many challenges, requiring them to navigate a multitude of systems (legal and otherwise) and raising questions about how to best protect their rights and interests (legal and otherwise)
 - ✦ Victims' rights attorneys can help assert and seek enforcement of the child-victim's rights in the criminal and juvenile justice systems
 - ✦ When the victims' rights attorney cannot help, referrals and partnerships come into play

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Review of Objectives


Participants can now:

- ❖ Identify common legal issues and systems that child-victims may confront
- ❖ Articulate the role of a victims' rights attorney
- ❖ Identify some common victims' rights
- ❖ Describe the test for standing to assert these rights in criminal proceedings

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BREAK

15 Minutes



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Child Development &
Interviewing Techniques

MODULE # 3

- UNDERSTANDING COGNITIVE DEVELOPMENT
- IMPLICATIONS FOR INTERACTING WITH AND INTERVIEWING CHILD-VICTIMS

3 hours

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Child Development and Interviewing Techniques: [Outline](#)

- **Child Development**
 - Sensorimotor Stage
 - Preoperational Stage
 - Concrete Operational Stage
 - Formal Operational Stage
 - Introduction to Implications for Questioning/Interviewing
- **Interviewing Techniques**
 - Evidence-Based Recommendations
 - Distinguishing Client Interactions from Forensic Interviews
 - The Setting
 - Beneficial Techniques

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Child Development and Interviewing Techniques: *Objectives*

Because of a gained knowledge and understanding of children's cognitive processing at different developmental levels, you will be able to:

- Use effective phrasing and questioning techniques appropriate for eliciting information from and interacting with children
- Use appropriate tools to encourage more detailed and effective communication from children


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Cognitive Development: *Outline*

○

Four Primary Stages of Development:

- Sensorimotor
- Preoperational
- Concrete Operational
- Formal Operational




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Sensorimotor Stage

0-2 years

- Coordination of sensory experiences with motor action
- Initial use of memory, imitation and thought
- Perform goal-directed activity
 - Move through tasks with deliberation and purpose
- Achieve “object permanence”




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Sensorimotor Stage: *Object Permanence*

Object permanence involves the realization that objects continue to exist over time

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Preoperational Stage

2-7 years

	Ability to think in symbolic form
Logical operations	$4+2 = 6$
Egocentric thinking	"Mary, is Mommy there?" (Child nods, but is on the phone).
Lack of conservation	Would rather have 6 dimes than 1 dollar bill
Centration	Focusing on one aspect to make a judgment
Animism	Belief that inanimate objects have "lifelike" qualities and are capable of action

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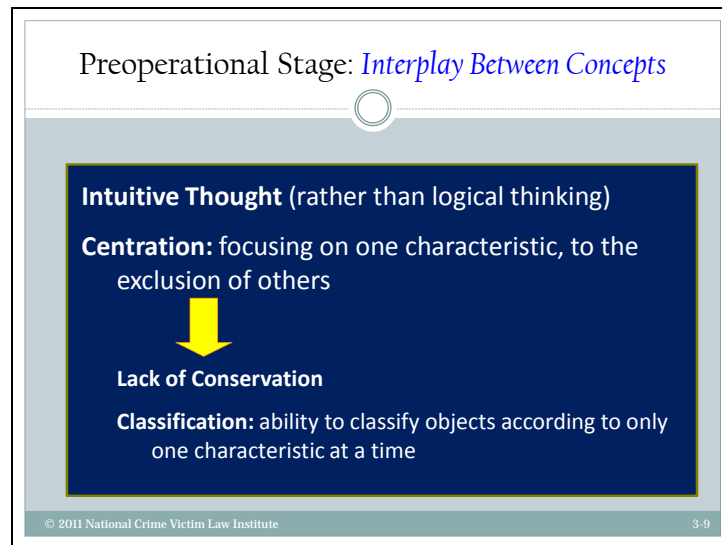
Preoperational Stage: *Intuitive Thought*

Intuitive Thought:

- Why, why, why?
- An emergence in the interest of reasoning and learning why things are the way they are

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Concrete Operational

7-11 years

Able to solve tangible (concrete) problems


- Conservation
- Reversible Thinking
- Advanced Classification/Decentering
- Seriation
- Transitivity



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Concrete Operational



Logical reasoning replaces intuitive thought, but only in concrete situations.	
Conservation	The idea that some characteristics of an object stay the same, even though the object might change in appearance
Reversible Thinking	$4+2 = 6$; $6-2 = 4$
Decentering/ Advanced Classification	Coordinate several characteristics rather than focusing on a single property of an object
Seriation	Order stimuli along some quantitative dimension
Transitivity	Combine relations to understand certain conclusions If $A>B$, and $B>C$, then $A>C$

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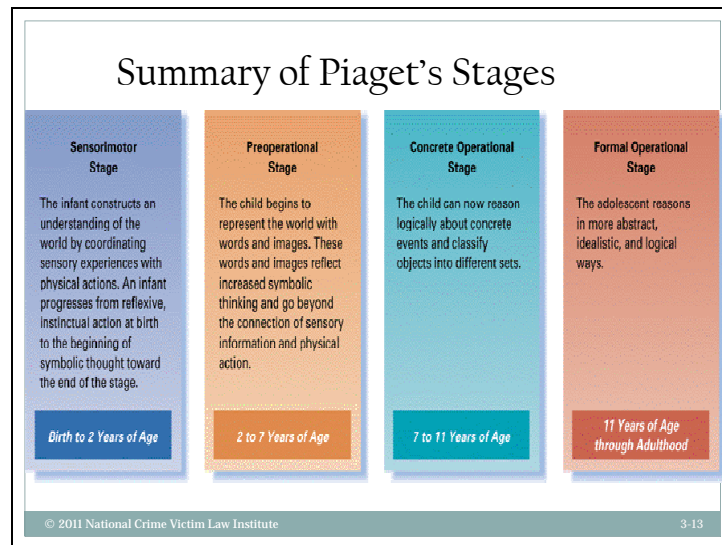
Formal Operational

11-adult

- Abstract Reasoning
- Hypothetical-Deductive Reasoning
- Scientific Thinking
- Advanced Symbolic Thinking
- Concerns about larger social issues
- Adolescent Egocentrism



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The slide features a central blue rectangular box with a black border, containing the text "Implications for Questioning/Interviewing" in a white, serif font. The box is set against a white background. At the bottom of the slide, there is a thin grey horizontal bar containing the copyright notice "© 2011 National Crime Victim Law Institute" on the left and the slide number "3-14" on the right.





Implications for Questioning/Interviewing

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Slide 43


Implications for Questioning/Interviewing						
Infants/Toddlers 	Gauge physical reactions to normative physical interactions (medical professionals)	Record themes during playtime	May be important to engage trusted caregivers to increase comfort level	May be important to create comforting area with "security" items		
Pre-school children 	Use developmentally appropriate language	Note where "centration" occurs	Use graphics, visual aids, personal drawings, and writing	Utilize story-telling (notice themes)	Consider TV/media interests and involve those characters	Limited attention span
School-age children 	Use concrete analogies/examples	Integrate hobbies and interests and utilize those analogies, terminologies	Peer-like approach	Use graphics to maintain a timeline	Consider using visual aids to explain and clarify	
Older adolescents/adults 	Possibly more direct approaches	May utilize hypotheticals to analyze options				
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BREAK

15 Minutes




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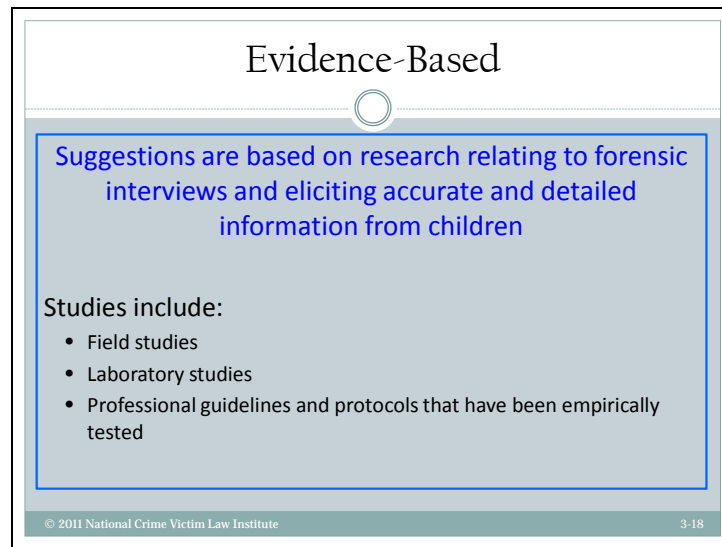
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Interviewing Techniques: *Outline*

- Evidence-Based
- Distinguishing Client Interactions From Forensic Interviews
- Setting
- Beneficial Techniques



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A presentation slide titled "Evidence-Based" with a decorative circle below the title. The main content is enclosed in a blue-bordered box. The text inside the box states that suggestions are based on research relating to forensic interviews and eliciting accurate and detailed information from children. It then lists the types of studies included: field studies, laboratory studies, and professional guidelines and protocols that have been empirically tested. The footer of the slide contains the copyright information and a slide number.

Evidence-Based

Suggestions are based on research relating to forensic interviews and eliciting accurate and detailed information from children


Studies include:

- Field studies
- Laboratory studies
- Professional guidelines and protocols that have been empirically tested

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Distinguishing Client Interactions From Forensic Interviews	
Forensic Interviews	Client Interactions
<ul style="list-style-type: none">• Designed to gather evidence by eliciting detailed facts and information about any crimes committed against the child-victim• Often testimonial in nature	<ul style="list-style-type: none">• <u>Client interactions are not forensic interviews</u>• Rights and options are central• Designed to facilitate communication with the child-victim, who is the client• Focus on obtaining educated client direction regarding rights and options
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- *Davis v. Washington*, 547 U.S. 813 (2006).
- *Crawford v. Washington*, 541 U.S. 36 (2004).



Setting

- Age-appropriate
- Child-friendly
- Minimal Distractions
- Private



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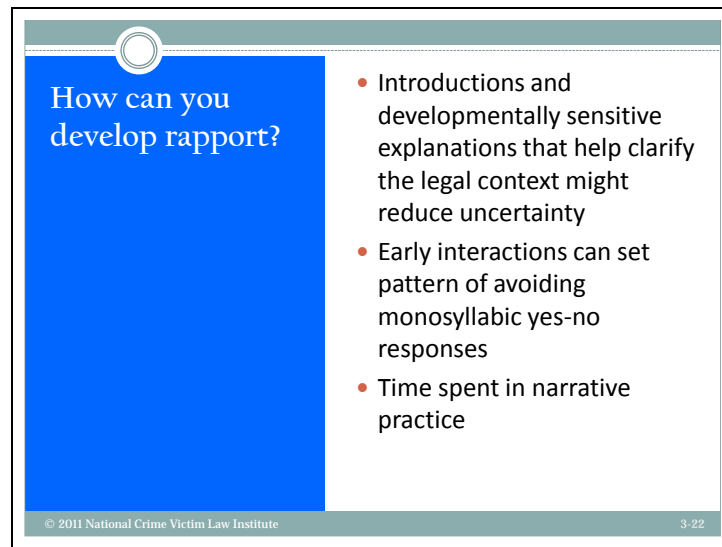


The slide features a blue rectangular area on the left containing the title "Beneficial Techniques". To the right of this area is a bulleted list of seven techniques. The slide is framed by a light green border at the top and bottom. The bottom border contains copyright information on the left and a slide number on the right.

Beneficial Techniques

- Rapport Development
- Narrative Practice
- Instructions that Improve Communication
- Using Open-Ended Questions
- Eliciting More Detailed Communication from Child-Victims
- Phrasing Questions in Language Children Understand
- Wait-Time

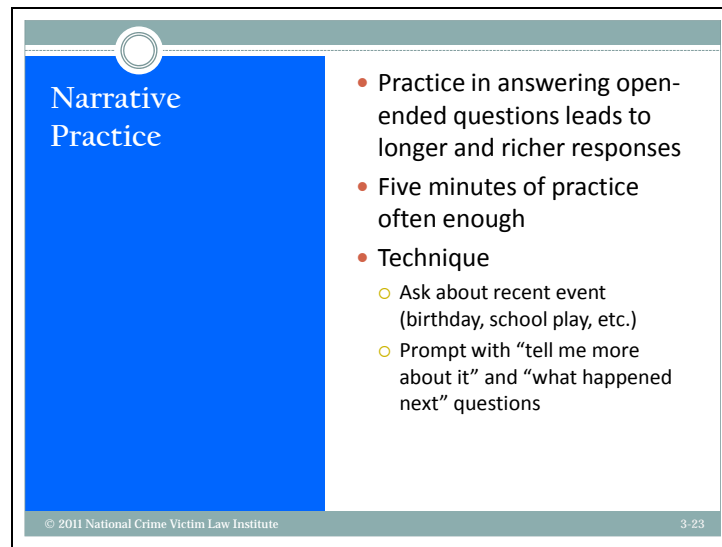
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How can you develop rapport?

- Introductions and developmentally sensitive explanations that help clarify the legal context might reduce uncertainty
- Early interactions can set pattern of avoiding monosyllabic yes-no responses
- Time spent in narrative practice

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Narrative Practice

- Practice in answering open-ended questions leads to longer and richer responses
- Five minutes of practice often enough
- Technique
 - Ask about recent event (birthday, school play, etc.)
 - Prompt with “tell me more about it” and “what happened next” questions

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3-23

Instructions that Improve Communication

- Give permission to say, "I don't know"
- Give permission to say, "I don't understand"
- Tell child-victim clients to correct your mistakes
- Tell child-victim clients that you can't answer questions about what they should do for them

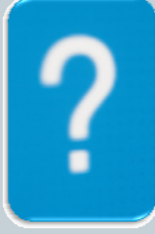
Instructions should be given one at a time, be easy to understand, and be given with appropriate feedback.

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Ask Open-ended Questions

- Who
- What
- Where
- When
- Why
- How
- Tell me more about . . .

These questions do not suggest an answer or limit responses.



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Closed-Ended Questions

- Yes/no questions
- Forced-choice questions

Closed-ended questions are less likely to elicit *complete* responses (even when they elicit *accurate* information from children).

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Benefits to Minimizing Closed-Ended Questions

Closed-ended questions:


- are often answered with a single word, rather than with a detailed response
- often reflect what the questioner thinks, rather than what the child believes
- tend to be more suggestive and more prone to response biases than open-ended questions
- encourage guessing and are less likely to be answered with “I don’t know”

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Eliciting More Detailed Communication from Child-Victims

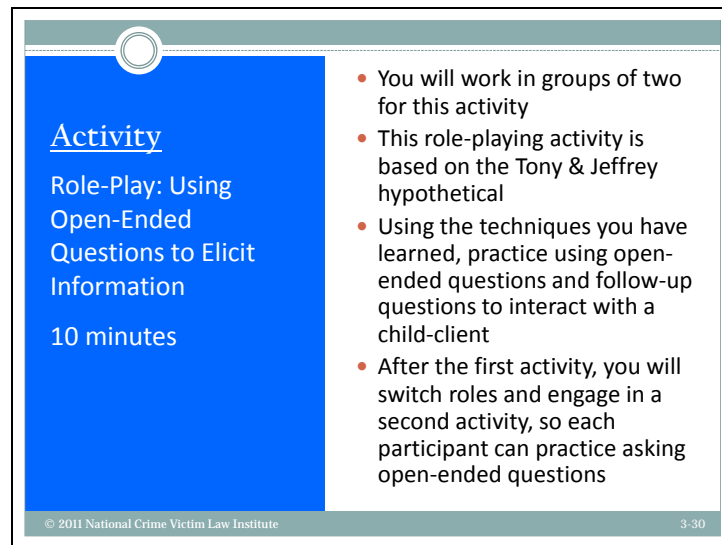
“Tell me more about . . .” Questions

- Use to clarify issues of concern
- Use the child’s language to prompt additional information about a topic



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Eliciting More Detailed Communication	
Clarify Issues of Concern	Using Child's Language to Prompt for More Information
<ul style="list-style-type: none">• Example:<ul style="list-style-type: none">○ The child-victim says: "I don't know if I want to give an impact statement at sentencing."• Follow up:<ul style="list-style-type: none">○ "Tell me more about what you're thinking about the impact statement" or "Tell me more about your feelings about the impact statement"	<ul style="list-style-type: none">• Example:<ul style="list-style-type: none">○ The child-victim says: "I don't want to have to answer questions in a courtroom. It's scary."• Follow-up:<ul style="list-style-type: none">○ "Tell me more about what's scary to you about answering questions in the courtroom"
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Activity

Role-Play: Using
Open-Ended
Questions to Elicit
Information


10 minutes

- You will work in groups of two for this activity
- This role-playing activity is based on the Tony & Jeffrey hypothetical
- Using the techniques you have learned, practice using open-ended questions and follow-up questions to interact with a child-client
- After the first activity, you will switch roles and engage in a second activity, so each participant can practice asking open-ended questions

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Phrasing Questions in Language Children Understand

- Clarify terms in advance
- Use short sentences
- Use simple grammar
- Use examples, if helpful



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The slide features a title at the top, a bulleted list of four points on the left, and a photograph of three children on the right. The photograph is set within a rounded rectangular frame that has a subtle drop shadow. The footer contains the copyright notice and a slide number.

The slide features a blue vertical bar on the left side containing the text: Activity, Translating "Lawyer-ese" into "Child-ese", and 15 minutes. To the right of this bar, there is a list of two bullet points. The slide has a light green header and footer. The footer contains the copyright information on the left and the slide number on the right.

Activity
Translating
"Lawyer-ese" into
"Child-ese"
15 minutes


- You will work individually on this activity
- Using the techniques you have learned, translate the questions and explanations in "lawyer-ese" into "child-ease" for school-age and adolescent victims

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Be Patient

Wait-Time

- Children take more time than adults to process information, so be prepared for longer delays between questions and answers
- Gives the child time to consider and think about the question
- Allows children to build the courage to talk about unpleasant subjects



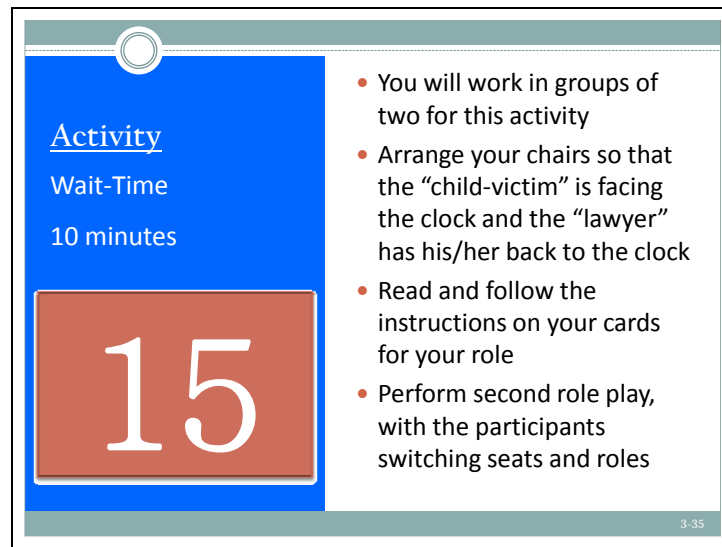
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Wait-Time: *Reviewed*

Placeholder slide for video clip of Dr. Lyon explaining the importance of wait-time.

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The slide features a title 'Wait-Time: Reviewed' with 'Reviewed' in blue italics. Below the title is a decorative horizontal line with a small circle in the center. A large blue rectangular box contains the text 'Placeholder slide for video clip of Dr. Lyon explaining the importance of wait-time.' The bottom of the slide has a dark teal footer with the copyright notice '© 2011 National Crime Victim Law Institute' and the page number '3-34'.



Activity
Wait-Time
10 minutes

15

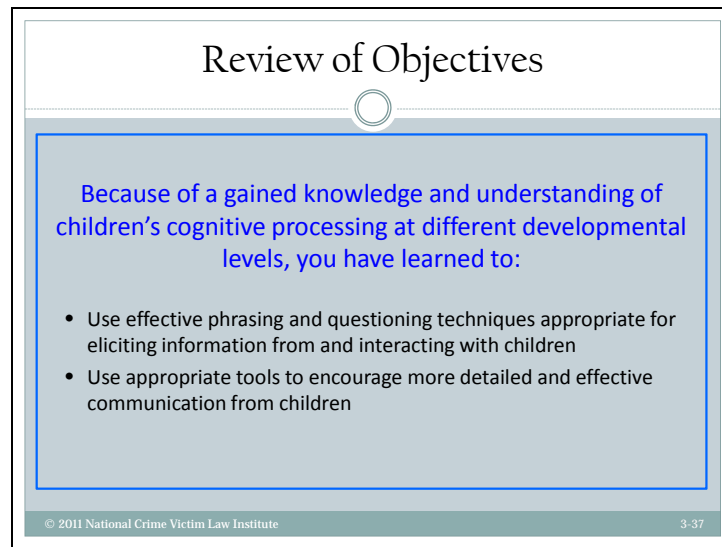
- You will work in groups of two for this activity
- Arrange your chairs so that the “child-victim” is facing the clock and the “lawyer” has his/her back to the clock
- Read and follow the instructions on your cards for your role
- Perform second role play, with the participants switching seats and roles

3-35

Wait-Time: *In Practice*

Placeholder slide for video clip excerpt from an actual forensic interview of a child-victim that successfully utilizes wait-time.

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A presentation slide titled "Review of Objectives" with a decorative circle below the title. The main content is enclosed in a blue-bordered box. It states that due to gained knowledge and understanding of children's cognitive processing, the audience has learned to use effective phrasing and questioning techniques, and appropriate tools to encourage more detailed and effective communication from children. The footer contains the copyright information and a slide number.

Review of Objectives

Because of a gained knowledge and understanding of children's cognitive processing at different developmental levels, you have learned to:

- Use effective phrasing and questioning techniques appropriate for eliciting information from and interacting with children
- Use appropriate tools to encourage more detailed and effective communication from children

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BREAK

15 Minutes



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3-38

Issue Spotting & Referrals

MODULE # 4


Lunch Presentation

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The slide features a blue header with the title 'Issue Spotting & Referrals' in white serif font. Below the header is a thin white line with a small circle in the center. The main body is white and contains the text 'MODULE # 4' in bold black font with a red underline, and 'Lunch Presentation' in white text on a black rectangular background. A thin grey line separates the main body from the footer, which contains the copyright notice '© 2011 National Crime Victim Law Institute' in small black font.

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Practical Litigation Strategies

DAY 1
ENTERING A CASE
PROTECTING CHILD-VICTIMS' IDENTITIES IN COURT PROCEEDINGS
1 hour, 5 minutes

DAY 2
PRIVACY AND SUBPOENAS
RELEASE CONDITIONS AND PROTECTIVE ORDERS
RIGHT TO BE PRESENT
TESTIMONIAL ACCOMMODATIONS
PREPARING THE CHILD-VICTIM FOR TESTIMONY AND BEING HEARD
RESTITUTION
PLEAS
3 hours, 50 minutes

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Practical Litigation Strategies:
Day 1 Outline

▪ENTERING A CASE

▪PROTECTING VICTIMS' IDENTITIES IN
COURT PROCEEDINGS

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Practical Litigation Strategies: *Day 1 Objectives*

- Describe how to make an effective initial appearance on behalf of a child-victim
- Anticipate several commonly occurring litigation issues that present opportunities for motion practice
- Describe key methods used to protect a child-victim's identity

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Entering a Case/Preserving Rights

Module # 5

20 minutes

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Entering a Case/Preserving Rights

You have been retained to enforce the rights of a child-victim with respect to a criminal prosecution...

Now what?

- Identify the stage of the prosecution/investigation
- Identify which victims' rights are implicated at this stage and future stages
- Identify which victims' rights were implicated by developments prior to your involvement in the case
- Which right(s) does the child-victim client wish to assert?
- Has a violation of those rights already occurred, or do you begin preparing for the future assertion of rights?

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5-2

- *Beck v. Prupis*, 529 U.S. 494 (2000).
- *In re Dean*, 527 F.3d 391 (5th Cir. 2008).
- 18 U.S.C. § 3771(a)(5).
- *Does v. United States*, --- F. Supp. 2d ---, No. 08-80736-CIV, 2011 WL 4793213 (S.D. Fla. Sept. 26, 2011).
- *United States v. Okun*, No. 08-132, 2009 WL 790042 (E.D. Va. Mar. 24, 2009).
- *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453 (D.N.J. 2009).
- *United States v. BP Prods. N. Am. Inc.*, Crim. No. H-07-434, 2008 WL 501321 (S.D. Tex. Feb. 21, 2008).
- *United States v. Rubin*, 558 F. Supp. 2d 411 (E.D.N.Y. 2008).
- *United States v. Turner*, 367 F. Supp. 2d 319 (E.D.N.Y. 2005).
- *United States v. Merkosky*, No. 1:02CR-0168-01, 2008 WL 1744762 (N.D. Ohio Apr. 11, 2008).
- U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *Attorney General Guidelines for Victim and Witness Assistance* 8 (2011), available at http://www.justice.gov/olp/pdf/ag_guidelines2011.pdf.

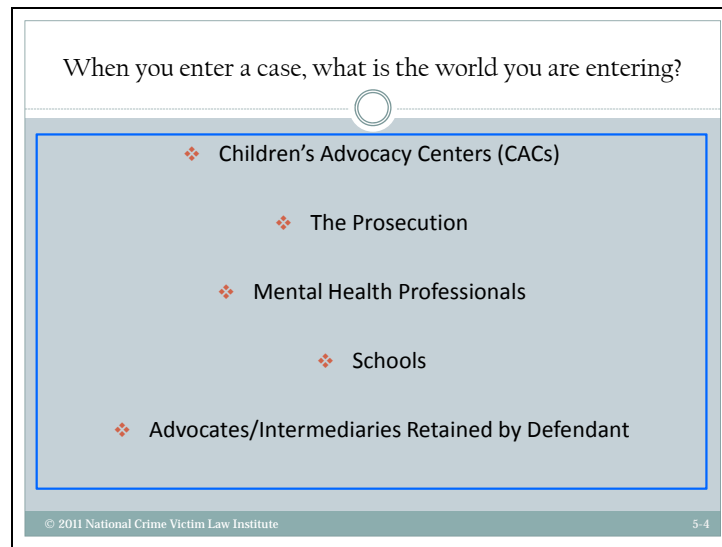
Entering a Case/Preserving Rights

[File a Notice of Appearance](#)

This has been held to be a reasonable way to assert a victim's rights and to ensure that you receive copies of filings in the criminal matter


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- *United States v. Mahon*, No. CR 09-712-PHX-DGC, 2010 WL 94247 (D. Ariz. Jan. 5, 2010).
- 18 U.S.C. § 3509.
- *United States v. Carroll*, 105 F.3d 740 (1st Cir. 1997).
- *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495 (W.D.N.C. May 26, 2009).
- *People v. Smakaj*, No. 03867-2008, 2010 WL 2574051 (N.Y. Sup. Ct. June 14, 2010).
- *People v. Robinson*, 898 N.Y.S.2d 438 (N.Y. Sup. Ct. Apr. 2, 2010).
- Motion by Nathan Simon, Real Party in Interest, to be Designated by the Court as an Appellee in this Case or, in the Alternative, Motion to be Allowed to Intervene in Defense of Judgment Below, *United States v. Keifer*, No. 11-3940 (6th Cir. Nov. 30, 2011).



Children's Advocacy Centers (CACs)

- Multidisciplinary team approach to cases involving child-victims
- Designed to remedy common problems:
 - Multiple unnecessary interviews
 - Interviewers inexperienced in dealing with children
 - Frightening settings
- Team may include representatives from:
 - Law Enforcement
 - Child Protective Services
 - Prosecution
 - Mental Health Professionals




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- National Children's Alliance, *Providing Child Advocacy Services for Victims of Child Abuse*, available at <http://www.nationalchildrensalliance.org/index.php?s=6> (last accessed Oct. 12, 2011).
- Theodore P. Cross, U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Evaluating Children's Advocacy Centers' Response to Child Sexual Abuse*, Juvenile Justice Bulletin (Aug. 2008), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf>.
- *Crawford v. Washington*, 541 U.S. 36 (2004).

The Prosecutor

- Even if a CAC is involved, a prosecutor will be assigned to most cases (depending on stage of the case)
- Reach out before filing your Notice of Appearance
- Try to convince the prosecutor to support your position(s)



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Mental Health Professionals

- The child-victim may be seeing a mental health professional
- Be wary of any potential waiver of the patient-therapist privilege




- If you need to consult with a mental health professional, you may wish to:**
 - Have the child evaluated by an independent therapist you retain who has not consulted with the treating therapist
- or-
- Retain the treating therapist to advise you

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Interacting with Schools

- When you undertake representation, be sure to provide the child-victim's school with notice that you are representing him/her with respect to the enforcement of the child-victim's rights
- Reach out to the school directly whenever possible

Schools are central in ensuring that release conditions are enforced and any necessary accommodations are made for the child-victim



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- Wash. Rev. Code § 13.40.215(5).

Advocates or Intermediaries

○

When dealing with “advocates” or “intermediaries” hired by defense counsel:

- If the defendant/defendant’s counsel knows the child-victim has retained counsel, any attempts to contact the victim should be made through the lawyer
- You should clearly explain the role of this “advocate” or “intermediary” to the child, distinguishing it from your role as the child’s lawyer

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Protecting Child-Victims' Identities in Court Proceedings

Module # 6

- RIGHT TO PRIVACY AND TO ACCESS COURTS
 - CLOSING THE COURTROOM
- EMPLOYING PSEUDONYMS AND INITIALS
 - REDACTION
 - SEALING ORDERS

45 minutes

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Child-Victims' Right to Privacy

Child-victims have a right to privacy
Where is it found?

- Federal Constitution
- Crime Victims' Rights Act, 18 U.S.C. § 3771 (CVRA)
- The Child Victims' and Child Witnesses' Rights Act, 18 U.S.C. § 3509
- State victims' rights statutes and constitutions
- Court practice/case law

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- *Roe v. Wade*, 410 U.S. 113 (1973).
- *Whalen v. Roe*, 429 U.S. 589 (1977).
- 18 U.S.C. § 3771.
- *United States v. Clark*, No. 08-1808, 2009 WL 1931172 (3d Cir. July 7, 2009).
- 18 U.S.C. § 3509.
- *United States v. Duncan*, 2008 U.S. Dist. LEXIS 59066 (D. Idaho Aug. 5, 2008).
- Cal. Const. art. I, § 28 (b)(1).
- Cal. Const. art. I, § 1.
- N.J. Const. art. I, § 22.
- Idaho Code Ann. § 19-5306.
- N.M. Stat. Ann. § 31-26-4.
- S.C. Code Ann § 16-3-1505.
- Ariz. R. Crim. P. 39.

Avoiding a “Hobson's Choice”

Child-victims have a right to access the courts that is protected by the 1st and 14th Amendments, as well as by the Privileges and Immunities Clause

Threatened loss of privacy can result in a chilling effect on the reporting and pursuit of cases

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- *Chappell v. Rich*, 340 F.3d 1279 (11th Cir. 2003).
- *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983).
- Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule that Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. Cin. L. Rev. 125 (1998).
- *Globe Newspaper Co. Inc. v. Clerk of Suffolk County Superior Court*, No. 01-5588F, 2002 WL 202464 (Mass. Super. Ct. Feb. 4, 2002).
- Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. Chi. L. Rev. 1375 (2007).

*Overview: Competing Interest to Privacy Rights and Right to Access:
The Presumption of Open Access*

Both the public and defendants have a right to open proceedings:

- The public's right arises under the 1st and 14th Amendments
- A defendant's right arises under the 6th and 14th Amendments

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- Or. Const. art. I, §10.
- *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979.)
- *In re Hearst Newspapers, L.L.C.*, 641 F.3d 168 (5th Cir. 2011).
- *Press-Enterprise Co. v. Super. Ct. (Press-Enterprise I)*, 464 U.S. 501 (1984).
- *Press-Enterprise Co. v. Super. Ct. (Press-Enterprise II)*, 478 U.S. 1 (1986).


Bases for Closing the Courtroom

- Privacy rights discussed on previous slides
- 18 U.S.C. § 3509(e)
- 18 U.S.C. § 3771
- State statutes

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- 18 U.S.C. § 3509(e).
- 18 U.S.C. § 3771(a)(8).
- *United States v. Hitt*, 473 F.3d 146 (5th Cir. 2006).
- *In re The Spokesman-Review*, 569 F. Supp. 2d 1095 (D. Idaho 2008).
- Cal. Penal Code § 868.7.
- Fla. Stat. Ann. § 918.16.

The Test



The proponent of the closure must demonstrate that:

- The child-victim has a “compelling” or “overriding” interest in disclosure;
- The closure is narrowly tailored to meet this interest;
- There are no alternatives to closure that would adequately protect this interest; and
- The trial court has made finding sufficient to support the closure.

Waller v. Georgia

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- *Richmond Newspapers, Inc. v. Virginia et al.*, 448 U.S. 555 (1980).
- *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).
- *Waller v. Georgia*, 467 U.S. 39 (1984).
- *United States v. Thunder*, 438 F.3d 866 (8th Cir. 2006).
- *In re The Spokesman-Review*, 569 F. Supp. 2d 1095 (D. Idaho 2008).

Bases for the Use of Pseudonyms/Initials

Some federal rules and statutes provide for the use of pseudonyms or initials to protect child-victims

- Fed. R. Crim. P. 49.1 and Fed. R. App. P. 25(a)(5)
- 44 U.S.C. § 3501

Some state jurisdictions explicitly allow use of pseudonyms by statute

- Some are related generally to sexual crimes
- Others are specifically geared toward child-victims, although they often require the crime to contain a sexual element

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- *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869 (7th Cir. 1997).
- *Does I through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058 (9th Cir. 2000).
- Fed. R. Crim. P. 49.1.
- *United States v. Broxmeyer*, 616 F.3d 120 (2010).
- Fed. R. App. P. 25(a)(5).
- 44 U.S.C. § 3501.
- Judicial Conference of the United States' Committee on Court Administration and Case Management, *Privacy Policy Recommendations*, available at <http://www.privacy.uscourts.gov/crimimpl.htm>.
- Nev. Rev. Stat. § 200.3772.
- N.D. Cent. Code § 12.1-35.03.
- N.J. Stat. § 2A:82-46(a).
- *In re T.K.Y.*, 205 S.W.3d 343 (Tenn. 2006).
- *In re K.F.*, 797 N.E.2d 310 (Ind. Ct. App. 2003).
- *Doe v. Eason*, CIV.A. 3:98-CV-2454-, 1999 WL 33942103 (N.D. Tex. Aug. 4, 1999).

Pseudonyms/Initials: *Weighing Rights to Access*

When weighing open access against a child-victim's right to privacy, most courts find that the child-victim's privacy rights prevail – usually without discussion

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- *United States v. Carroll*, 105 F.3d 740 (1st Cir. 1997).
- *United States v. Iron Cloud*, 312 F.3d 379 (8th Cir. 2002).
- 18 USC 3509(d).
- *Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005).
- *Plaintiff B. v. Francis*, 631 F.3d 1310 (11th Cir. 2011).
- *James v. Jacobson*, 6 F.3d 233 (4th Cir. 1993).
- *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).
- *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010).

Pseudonyms/Initials: *Requirements for Sound Indictments*

Defendant has the rights to be informed of the charges against him, the nature of those charges, and to be protected against Double Jeopardy

An indictment is sound if it:

- contains the elements of the offense(s) charged and fairly informs a defendant of the charge(s) s/he must defend against
- provides a bar against future prosecutions for the same offense(s)



- *People v. Kossman*
- *United States v. Powell*
- *Sellers v. State*

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- *People v. Kossman*, 46 A.D.3d 1104 (N.Y. App. Ct. 2007).
- *United States v. Powell*, 1 F. Supp.2d 1419 (N.D. Ala. 1998).
- *Sellers v. State*, 587 S.E.2d 276 (Ga. 2003).

Pseudonyms/Initials: *How to Proceed*

- Notice of Appearance
- Motion to Proceed by Pseudonym or in the Alternative to Close the Courtroom During Testimony

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Remedying Violations of a Child-Victim's Privacy: *Redaction*

What if anonymous initials/pseudonyms were not used?

- Redact or ask court to redact documents that would allow identification of the child-victim
- If the document has already been published online:
 - ✦ Seek redaction of the document
 - ✦ Send letter to search engines asking them to remove the document

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- *United States v. Gavin*, No. 90-10580, 1992 U.S. App. LEXIS 15092 (9th Cir. Jun. 26, 1992).
- *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Sealing/Impoundment

Potentially Problematic “Remedy”

- Because sealing orders may be lifted at the conclusion of a case, use of a pseudonym/initials may be the only effective method of protecting identity of a child-victim

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- *United States v. Darcy*, No. 1:09CR12, 2009 WL 1470495 (W.D.N.C. May 26, 2009).
- 18 USC § 3509(d)(2).
- *Nixon v. Warner Communications*, 435 U.S. 589 (1978).
- *United States v. Church*, 702 F. Supp. 2d 615 (W. D. Va. 2010).
- *United States v. Broussard*, 767 F. Supp. 1545 (D. Or. 1991).

Review of Objectives: *Day 1*

- Describe how to make an effective initial appearance on behalf of a child-victim
- Describe key methods used to protect a child-victim's identity


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Review: Day 1

15 minutes


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The slide features a blue header with the text "Review: Day 1" in white. Below the header is a large white area with a black border. In the center of this area is a black box with the text "15 minutes" in white. At the bottom of the slide is a green footer with the text "© 2011 National Crime Victim Law Institute" in white.



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Practical Litigation Strategies

DAY 1
ENTERING A CASE
PROTECTING CHILD-VICTIMS' IDENTITIES IN COURT PROCEEDINGS
1 hour, 5 minutes

DAY 2
PRIVACY AND SUBPOENAS
RELEASE CONDITIONS AND PROTECTIVE ORDERS
RIGHT TO BE PRESENT
TESTIMONIAL ACCOMMODATIONS
PREPARING THE CHILD-VICTIM FOR TESTIMONY AND BEING HEARD
RESTITUTION
PLEAS
3.75 hours

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Practical Litigation Strategies:
Day 2 Outline

PRIVACY AND SUBPOENAS
RELEASE CONDITIONS AND PROTECTIVE ORDERS
RIGHT TO BE PRESENT
TESTIMONIAL ACCOMMODATIONS
PREPARING THE CHILD-VICTIM FOR TESTIMONY
AND BEING HEARD
RESTITUTION
PLEAS
3.75 hours

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Practical Litigation Strategies: *Day 2 Objectives*



- Anticipate several commonly occurring litigation issues that present opportunities for motion practice
- Identify key grounds for resisting “discovery” requests for medical, psychological, educational records, and other information
- Describe common testimonial accommodations for child-victims
- Articulate several considerations involved in preparing child-victims for testimony and for being heard
- Identify losses that are recoverable in restitution, and anticipate key restitution issues
- Describe how to advocate for child-victims in the context of plea agreements, release conditions, and protective orders

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Reintro-iii

Privacy and Subpoenas

MODULE # 7

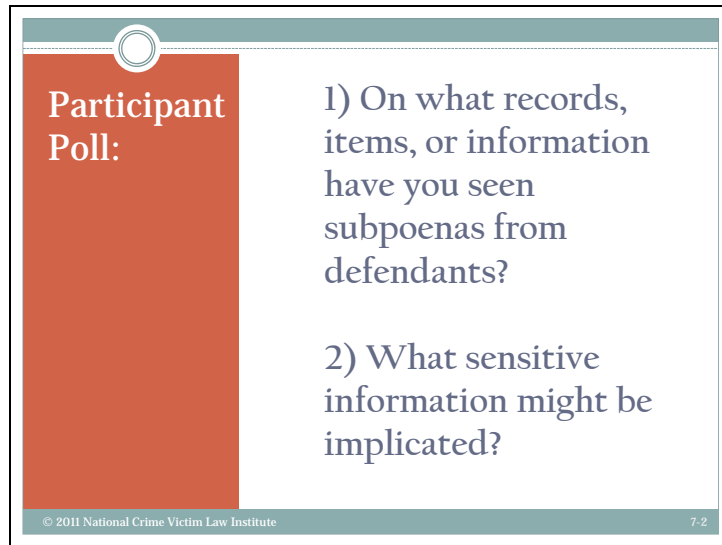
1 hour

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The slide features a blue header with the title 'Privacy and Subpoenas' in white serif font. Below the header is a thin horizontal line with a small circle in the center. The main content area is white and contains the text 'MODULE # 7' in a small, dark, sans-serif font, followed by '1 hour' in a black box. At the bottom, a dark green footer bar contains the copyright notice '© 2011 National Crime Victim Law Institute' and the slide number '7-1' on the right.

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A presentation slide titled "Participant Poll:" with two numbered questions. The slide has a teal header bar with a white circle icon, a red vertical bar on the left, and a teal footer bar. The questions are in a dark blue serif font.

Participant Poll:

- 1) On what records, items, or information have you seen subpoenas from defendants?
- 2) What sensitive information might be implicated?

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