

# Creating Child and Adolescent Fair Courtrooms

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## A COURTROOM FOR ALL: CREATING CHILD- AND ADOLESCENT-FAIR COURTROOMS

*You are seven-years-old and just entered second grade. Your name is Maria. You are dressed in your favorite dress and cling tightly to the hand of your mom as you walk in to a building that you have not seen before. Mom hands you over to Janie, a nice lady that you have spent time with talking about what your mom's boyfriend did to you a year ago. You cling to Janie's hand as she walks you into a large room with tall ceilings. You look up at the ceiling because it's pretty, but then you notice that people in the big room are staring at you and look mad. Then you see him, sitting at a table with a lady in a suit who is giving you a scary look. You look at the other table and see Anna whom you met once; said she would help you, but then asked a lot of questions that made you uncomfortable. Janie walks you to a box that has a chair and helps you get comfortable. Your feet don't touch the ground and it's difficult to see over the box. An older man in a uniform walks to you, stands a little too close and you see a gun on his belt. He holds out a book, says to put your hand on the book and to swear to tell the truth. You tense up when you hear the word "swear" because mom always said never to swear, especially in public. You look to the side and see a man sitting high above you in a black robe. You look to him confused, not knowing whether you can swear. He tells you to answer the question. So you look back at the man in the uniform and mumble, "I guess so." Anna then stands next to the box you are sitting in, and asks about your favorite subject in school, who lives at home, about your dog named Rudy, and then asks about the bad day. You look over at mom's boyfriend and he sends a message with his eyes to shut up. He's done that before and you know what will happen if you disobey. And mom always said to do what adults say to do. So you look down at your hands and see they are red from wringing them. You think about your doll, Miss Bernadette, whom you had to leave at home because you were told you could not bring her. You think about Rudy and wish he were sitting at your feet because then you would feel strong. You look around the room and wish all of the adults stopped looking so mean and scary. You look back up at Anna and start to cry. The lady in the suit jumps up and starts yelling, the man in the black robe yells at Anna to control me, and you cry more. You say, "I want my mom." The man then slams a piece of wood on his desk and says we can go outside for recess. You stop crying because you like recess. Janie takes you outside to see mom and you cling to her waist. She has you sit in the hallway alone as the adults talk in whispers. The lady in the suit walks by and says "liar" to you and you see men in uniforms dragging a screaming girl down the hallway. Mom then takes you home and you never hear about her boyfriend again.*

### Introduction

Maria's story is all too familiar. Every day, thousands of child and adolescent victims of maltreatment are asked to enter the adult world of the criminal and family court justice system, to share their embarrassing and traumatic stories, and are expected to behave like adults. Those of us who work with youthful victims and witnesses know that the legal system can be overwhelming and intimidating to them. Many adults, even professionals who testify frequently, can be intimidated by the process. More must be done to create child and adolescent fair courtrooms because when a child feels comfortable, s/he will have better recall, testify more accurately and efficiently, and experience less re-traumatization. This is important for the well-being of the child, but also for a fair trial or proceeding of the defendant or parental respondents. The criminal justice system is increasing the demands of children following the United States Supreme Court's decision in *Crawford v. Washington*.<sup>1</sup> The *Crawford* decision and its progeny mandated that children testify more frequently and has limited the introduction of hearsay testimony in lieu of the child appearing in court. However, *Crawford* does not apply to civil dependency cases since it only addresses the Sixth Amendment right of a criminal defendant to confront witnesses.

This monograph will outline how to create child and adolescent fair courtrooms and address issues such as: Who would be a good support person for a young child who has to testify? Are therapy animals allowed as comfort items for a child who is afraid of testifying in court? Can you physically alter the courtroom set up? How can we make the oath more meaningful for the children who testify in our courts? Can the judge order the attorneys to speak and behave in a certain way around children? And how can you help a child that is experiencing difficulty in the courtroom.

### What Children and Adolescents Understand About Court

There is a common perception that young children (under the age of 7 or 8) should be shielded from testifying in court; whereas older children are better equipped to handle court if they undergo court preparation by the prosecuting attorney or other method. Every child's reaction to testifying is different, but understanding what children know about court can help you decide how to make the courtroom fair for each child.

A 2010 study sheds some much-needed light on what children really think and understand about court.<sup>2</sup> The researchers had a rare opportunity to interview 85 children (ages 7-10) in a jurisdiction that requested that children participate/testify in their dependency court cases. The maltreatment was equally split between sexual abuse, physical abuse and neglect. All of the children were removed from their home and would appear before the judge at each hearing for a short period (usually 5 minutes). Parents were in the courtroom 82% of the time.

This study challenges the belief by many attorneys and child protection professionals that children, especially younger children, should be shielded from court. In this 2010 study, findings included:

- Older children had more knowledge of dependency court, but still only scored on average with being "somewhat correct" in their knowledge.<sup>3</sup> Legal knowledge was not impacted by court-related anxiety,

- abuse type or ethnicity, thus suggesting that mere participation or exposure to court was not enough to increase their knowledge about the process;<sup>4</sup>
- Older children had more court-related anxiety with 54% of the children indicating that they were not informed of the case outcome.<sup>5</sup> “[K]nowledge was associated with a reduction in children’s anxiety. ... [N]ot understanding the court process, their rights, or even where they will be living can possibly result in or exacerbate negative attitudes [about the court process].”<sup>6</sup>
  - Older children were more likely to have a negative attitude towards dependency court, which is consistent with studies of their negative attitude towards criminal court;<sup>7</sup>
  - When the children participated in their cases, they had a better attitude towards the process; minority children had more positive attitudes towards dependency court than Caucasian children;<sup>8</sup>
  - There is greater adverse *emotional* effect on younger children being in court; there is a more profound adverse *attitudinal* effect on older children. This could be because older children “understand the shame and guilt associated with the abuse itself and with the family being in court, and are able to foresee the possibility of a permanent separation from loved ones.”<sup>9</sup>
  - Children who had cases in both criminal and dependency court had a greater negative attitude towards the process;<sup>10</sup>
  - 37% of the children did not believe that they were listened to in the courtroom;<sup>11</sup>
  - 77% of the children felt positive towards seeing their offending parent(s) in the courtroom<sup>12</sup> and 75% did not hear anything new about their parents that already did not know<sup>13</sup> (thus challenging the notion that they need shielding from testimony about their parents);
  - And 71% of the children wanted to go home, but some expressed the need for corrective action by the parent(s) (stop abusing them, get off of drugs, etc.).<sup>14</sup>

Based on the above, the researchers opined, “In many jurisdictions, court participation is limited, based in part on the premise that it may cause undue harm to the children. However, perceived participation was not negatively related to legal attitudes which sheds doubt on this premise. Moreover, the qualitative findings indicated that, if anything, many children wanted more say in the legal decision.”<sup>15</sup> The researchers concluded that the strongest predictor of a child’s attitude towards the court process is related to their level of anxiety. This anxiety could be related to insecure attachment and emotional problems, or to 54% of the children not knowing the outcome of their case and whether they were remaining in out-of-home placement or returning home.<sup>16</sup>

Before this 2010 study, the research told us that younger children know less about the legal system than older children,<sup>17</sup> but that older children still have significant misunderstanding about the people and processes of court. In addition, the type of abuse has an impact on a child’s knowledge of court. For example, neglected children on average score lower on intellectual tests and/or language development than physically abused children, which can impact how a child learns about the legal system.<sup>18</sup> Studies also related child witness’ anxiety to lack of courtroom knowledge.<sup>19</sup> Older children hold more negative attitudes towards criminal and dependency court than younger children.<sup>20</sup> This could be because older children are treated more harshly in court (i.e., cross-examination). Neglected children also have a greater negative attitude because, in their minds, their maltreatment was not sufficient for court involvement.<sup>21</sup>

What these studies tell us is that while children may not understand the players or terminology used during the court process, they know that the process impacts their happiness, safety, and well being; therefore, they want to be heard and have a say in what happens. Some methods to protect a child from any perceived adverse reaction to testifying in court would be to know the child victim/witness and determine (or ask) whether s/he wants to testify, speak with therapists and caregivers about whether the child is having negative reactions (such as nightmares, bed wetting, or acting out), and then make an individualized decision as to whether it is in the best interests of the child to testify. If the only option is for the child to testify (which is the likely requirement in criminal court), then the remainder of this article provides suggestions on how to make the process more fair.

### Court Preparation Tools and Schools

There are different methods for helping children prepare to enter the courtroom or participate in other legal proceedings. For those cases with a prosecuting attorney, it is essential that the prosecutor personally prepare the child for court, even if the child goes through a court preparation school. This process is important for establishing rapport and trust with the child before testifying, and it is an opportunity to determine if the child has additional information not already contained in investigative reports (which can help with preparing the case for trial or hearing, and may implicate discovery rules in providing the information to opposing counsel). For attorneys or prosecutors handling civil child dependency cases, children most often do not need to testify; however, it is important for the attorney to speak with the child if possible and, of course, prepare the child if testimony is sought by the judge.

The Canadian Society for the Investigation of Child Abuse has an interactive website specifically to help children and teens learn about testifying in court.<sup>22</sup> Given the technology and media savvy of many child victims and witnesses, the use of on-line tools can assist the development of rapport between the child and those preparing them for court. There is also information available to parents. For the children, they can enter a world called “Super Hero Island” where s/he can select from three different languages, enter his or her age, gender, hair color, eye color and skin color. The website creates an image in the child’s likeness to take his or her through the process. The child can even select a cat or dog as a tour guide for the journey. A child does not need to live in Canada to benefit from this website as it will ask in what country and/or state the child resides. For teens, there is an interactive video that is related to that age group and their experiences.

Many jurisdictions have court schools where, once or more per month, child witnesses scheduled to testify will meet at the courthouse, tour the courtroom, and learn about the court process. The programs are often helpful to demonstrate to abused children that they are not the only child in the world that has been maltreated and will have to testify. King County Kids’ and Teen Court in King County, Washington is one such program that has been helping children prepare for court since 1989. The program is held on Saturdays in a courtroom. The children are guided through fun and informative sessions that teach them about courtroom personnel and procedures. They have an opportunity to speak with a local judge and prosecutor. They also learn about the importance of self-confidence and techniques for reducing stress.<sup>23</sup> While the children are attending these sessions, concurrent sessions are offered for parents and caretakers to address their needs and answer any questions that they might have.<sup>24</sup>

If your jurisdiction does not have a court school, a similar benefit to the child witness can be achieved during a one-on-one meeting with the child, prosecutor, and victim advocate. The advocate and prosecutor can provide the child with a tour of the courtroom. While they are there, the child may sit in the various chairs and talk about what each person's job is in the courtroom. The victim advocate can talk with the child about what to wear, the type of language that they will hear in court, and how some of those words have a different meaning in the courtroom setting. The most important thing to share with the child is that his or her job is to tell the truth. This should be stressed above all other concepts. There are also coloring books<sup>25</sup> and other supportive activities that can be used to engage the child. It is also crucial to spend time preparing the caregiver. The court process should be explained and they should be allowed to see where the child will wait and have some input on who will wait with the child if it will not be them. It is also important for them to have a chance to express their concerns and ask questions to the attorney.

### **Courtroom Logistics**

Another important consideration for child witnesses is how the courtroom is set up physically. There may be beliefs within some jurisdiction that the courtroom setting cannot be altered, but there are no laws or legal prohibitions to support this assertion. In fact, the federal rules of evidence, upon which many states base their rule of evidence, give the court wide discretion on how the courtroom is set up as well as how the trial is conducted. It is often the judge's preference that rules the day. Preparing a pre-trial motion to educate the judge can go a long way in easing some of the problems that children face when testifying in a court. One method would be to move the defendant to a location within the courtroom that is not in the direct line of sight of the witness. Also, consider submitting a motion to have a small child sit in a chair in front of the witness stand instead of being hidden behind the witness box which helps keep the child focused on speaking with the jury and not looking at the person who abused them. This will allow the child to be seen and be comfortable. Consider asking the court to allow the prosecution and defense to switch tables if the defendant's table is closest to the witness stand. Objections to these requests often expose whether defense counsel will behave in an abusive manner towards the child witness. This can give the court an early indicator of the potential for this behavior.

Consider a request that the judge not wear the black robe, which can be intimidating to a young child. There is nothing fixed in any law that requires a judge to wear a black robe during proceedings. If the judge sits on the bench elevated above the witness chair, ask the judge to come out from behind the bench and sit at the same level as the child. This will be less intimidating to the child witness. Also ask the court or court administrator to set aside waiting rooms specifically for child witnesses. One of the authors herein would arrive to court early to reserve a witness room specifically for her child witnesses and their supportive family. She would place a sign on the door indicating that it was strictly for prosecution witnesses, would bring coloring books and crayons, and would ask the family to bring homework or books to keep the child occupied. It is important to not have child witnesses waiting in the hallway of the courthouse; they need a private location as they prepare to face the person/people who have abused them. They could become nervous with strangers nearby, overhear discussions of sensitive and disturbing court information, feel intimidated by police officers in uniform who carry weapons, or receive threatening looks from the

defendant's supporters. Sequestering the child witness with supportive people is important to ensuring that s/he is fit to testify.

In addition to the logistical set up, it is also important to ask the court to expedite cases with child witnesses, especially if your state has a statute that calls for the speedy trial of child abuse matters<sup>26</sup> and to not permit unnecessary delay in scheduling the case for hearings or trial, to schedule the testimony of the child in the morning (discussed later), and to clear the courtroom of observers, when appropriate, during the child's testimony (discussed later).

### Support Person

This is one pre-trial motion that should be filed in most, if not all, cases involving child victims and witnesses. Sympathetic friends and family members often serve as a support system for adults who have to testify in court cases across the country. The same option is available in most courtrooms for children. Currently, 48 states plus American Samoa, District of Columbia, Guam, Puerto Rico, Virgin Islands and federal jurisdictions<sup>27</sup> have statutes that address support persons and most are discretionary laws that leave the decision to the judge. If your state does not have a support person statute, you can still make the request absent any law that prohibits the accommodation.

Choosing the right support person is very important in helping to ensure that a child is as comfortable as possible in the witness chair. While a parent or close relative can be a good choice, be aware that they may be listed as a witness for the state or the defense. This can preclude them from being in the courtroom prior to their testimony. Arrange for a back-up support person (someone of the child's choosing) just in case the primary support person is not allowed to be in the courtroom during the child's testimony. A new twist on "support person" techniques involves children who request a therapy animal to accompany them to the witness chair and offer support (discussed in a later section).

For judges who routinely deny a support person for a child, consider arguing that children undergoing a medical procedure are routinely given the support of someone. There is no legal reason for a child to be alone on the witness stand and isolating them there can actually harm the integrity of the trial and result in delays if the child's participation is inhibited by fear.

### Non-Supportive Family

Studies have long held that maternal support in child abuse cases can lessen the long-term emotional impact of the abuse for the child.<sup>28</sup> Child abuse cases often divide families, and the child is often seen as the cause of the problem. It is imperative the multidisciplinary team members engage and work with non-offending family members as early in the investigative process as possible. When family members are not supportive, testifying can be particularly challenging. If caretakers are pressuring the child to change his or her statement or threatening harm in some manner, serious consideration needs to be given to removal of the child from their home. If removal is not possible, then the prosecutor and victim advocate should work together to try to build a support network for that child. Perhaps a trusted schoolteacher or counselor can be available to the child when s/he need to talk. Sometimes an extended family member can be engaged to



sit with the child while they wait to testify. Those working with the child will need to think “outside of the box” in order to ensure that the child feels safe during the process.

## Comfort Item

A pre-trial motion to allow the child witness to have a comfort item on the witness stand is growing in popularity and expanding what qualifies as a comfort item. A pre-trial motion to allow a comfort item should routinely be filed on behalf of children who are nervous about testifying regardless of whether your state has a law addressing comfort items.<sup>29</sup> The most basic request for a comfort item involves the child bringing a favorite toy, stuffed animal or blanket into court.

The 2010 case of *State v Powell*<sup>30</sup> addressed the issue of a child witness holding a teddy bear. An 11- and 16-year-old were allowed to testify against their uncle while holding a teddy bear. At trial, the judge referenced the new state Child Witness Protection Act, but not by name since the law had not yet gone into effect. The appellate court upheld the trial court’s decision to allow the children to hold a teddy bear during testimony with recognition that the trial judge had an opportunity to view the children and weigh the prejudicial effect. Further, it was determined that the teddy bears were not used in a way to emotionally sway the jury.<sup>31</sup>

Growing in popularity are requests to have therapy animals accompanying the child onto the witness stand. Therapy animals, as their name indicates, can calm and comfort a child, while helping the child feel safe during testimony. When a child feels safe and calm, s/he may have better recall and can testify more effectively and accurately. Contact NCPCA to obtain a sample pre-trial motion to allow a therapy animal as a comfort item for a child witness.

## Animal Advocates in Court

In 2004, one of the authors herein recognized how trained therapy animals could benefit child witnesses in court and the phases leading up to testifying. After spending years speaking with animal-assisted therapy professionals, as well as criminal justice professionals beginning to utilize this practice, she co-authored *Therapy Animals Supporting Kids (TASK) Program and Manual*, which outlines six phases where therapy animals can benefit children, including in court preparation and testimony.<sup>32</sup>

There are a variety of “working” animals that are being incorporated in work with child victims. Service animals have been helping children in many different ways; however, the March 2011 amendments to the Americans with Disabilities Act states that a service animal can only provide service to one person with a disability, assist with that disability, is not to be considered a “pet,” and is not to provide comfort or emotional support as its sole function.<sup>33</sup> If a child has a service animal due to a recognized disability, the service animal must be allowed access to the courtroom to help the child per the ADA. Assistance animals are similarly defined as service animals in that they provide assistance to someone with a disability.

Therapy animals are family pets that have been evaluated and registered by an organization specializing in animal-assisted therapy or activities. A therapy animal works with one handler (the animal’s owner).

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Therapy animal-handler teams who are registered with a therapy animal organization typically will have liability insurance coverage if they volunteer their time. This can be an important consideration at a time when agencies do not have discretionary funds to pay for these services. It is also an important consideration for agency staff who wish to bring in their own registered therapy animal as the insurance coverage may not apply when working.

Not all therapy animals (or their handlers/owners) will be appropriate to work with maltreated children due to the sensitive nature of the child's situation. You should ask whether the therapy animal/handler team has an aptitude of working with children to determine if the animal and handler team are appropriate for working with child witnesses.

Increasingly each year, child advocacy centers and prosecutors across the country are inviting therapy animal teams to help child witnesses. Therapy animals are helping children in the areas of the forensic interview, medical examination, therapy session, court preparation, and in giving testimony. Many are even official greeters at children's advocacy centers or sit in the courtroom hallway to give comfort to waiting families and after the child testifies.

There are many successful therapy animal programs across the country. One program is Courthouse Therapy Dogs, which is a partnership between the Tallahassee Memorial HealthCare Animal Therapy Program, the State Attorney's Office, Victim Assistance Program and Office of Court Administration of the 2<sup>nd</sup> Judicial District of Florida. The first of its kind in the state, it began in 2007 to assist young victims of violent crimes prepare for testimony. The program expanded in 2009 to include dependency court and currently includes 21 therapy dog teams. These teams have not only been evaluated and registered through a national registry, but have received additional evaluations and screening regarding working with children. Court teams receive additional training, including protocols for working in courtrooms during trials.

Chuck Mitchell is involved with the program and shares, "Despite many years and several hundred visits with my therapy dogs in a wide variety of facilities, few are ever as compelling as those involving young victims of violent crimes. When a grateful mother tells me that her young daughter did not have the strength to confront her predator or testify until she met my dog, and that Rikki's presence enabled her to get through the entire process and actually begin to heal, I know that therapy dogs can play a vital role in many other judicial proceedings."<sup>34</sup>

Chuck also shares this quote from the mother of a child victim of sexual abuse: "I don't think my child could have testified without the therapy dog. I don't think she could have done the deposition without the dog, and I just don't think she would be doing as well now without this program, because that was her comfort. That dog was her friend."<sup>35</sup>

The Alliance for Children in Tarrant County, Texas is one of several children's advocacy centers in Texas with a thriving therapy animal program. They have about a dozen therapy dogs that come to the center on a rotating basis to greet children, and provide comfort during the forensic interview, therapy, and court preparation. The Bexar County District Attorneys Office in San Antonio, Texas has a therapy dog that assists children with court preparation and even in-court testimony.

An increasing number of prosecutors and child protection agencies are recognizing the positive benefits that therapy and other “working” animals can bring to a maltreated child. “Allowing a canine companion to accompany a child into a courtroom has ‘immediate and profound’ effects. The mere presence of a friendly dog has been documented to change the physiology of the nervous child, facilitating more efficient testimony.”<sup>36</sup> In recognition of this movement, Florida passed a law in 2011 that allows a judge to specifically consider the inclusion of a therapy or service animal in court during a child’s testimony.<sup>37</sup>

It is not just dogs that are helping children. Some agencies have therapy cats, hamsters, birds, and even horses to help children. It is important to reach out to your community therapy animal teams to find out who is available and interested in helping. If you have children who are afraid of or allergic to dogs, having other therapy animal species available can greatly help a child navigate the process with less trauma.

For more information, you can download a copy of the *TASK Manual* from the NDAA website<sup>38</sup> which outlines the legal issues as well as objections and proposed responses. A videotaped webinar given by one of the authors on this topic is also available on the NDAA on-line learning web page.<sup>39</sup>

## Child Fair Oath

The words we use in court every day are often not developmentally appropriate for many of the children that will testify. In far too many courtrooms, the “adult” oath is given to children who do not understand the words and, therefore, stumble or hesitate when agreeing to tell the truth. This may then impact whether the child may be ruled competent to testify. When a child’s competency to testify is being assessed, s/he must be given an age-appropriate oath.

Tom Lyon, a leader in the field of child competency and testimony, suggests that a child be asked “Do you *promise* that you *will* tell me the truth?”<sup>40</sup> Employing this type of oath can increase the child’s competence without increasing false disclosures.<sup>41</sup> Studies have shown that even very young children can correctly identify truthful statements thereby enabling them to testify in court.<sup>42</sup>

To further establish competency in court it is important to use a method that is developmentally appropriate, does *not* invite fantasy, and is child fair. One such resource is the Truth vs. Lie Task and the Morality Task.<sup>43</sup> This exercise encompasses a series of drawings of children identifying pictures (of animals and common items) and talking to adults about consequences, which are effective tools to help establish competency. By having a series of pictures the child has several opportunities to show that they understand the concepts and it is not just chance.

### Testimonial Aids

Children may feel calmer and more relaxed, thus testify more efficiently and accurately, if testimonial aids are available for their use in court. Aids can include anatomical dolls for demonstrating to the jury where they were harmed, diagrams of a child's body that they can point to, or a drawing board with markers. "Using testimonial aids such as anatomically correct dolls and drawings to facilitate a child's testimony may help the child overcome fear or inability to find the right words to use. Particularly in cases of sexual abuse, young children have often never described their own body parts, especially not in the kind of detail required by a court. The use of anatomical dolls can facilitate and enhance interviews and questioning of children."<sup>44</sup>

Testimonial aids can help a child better relate his or her testimony to the jury, enhance the information shared, and even demonstrate competency to testify. The use of such aids can also benefit your juror and judge in understanding the child's description of the abuse they suffered. A local child protection agency or children's advocacy center may be able to provide these aids during trial.

### Attorney Conduct

A video produced by the Virginia Department of Criminal Justice Services entitled *Through a Child's Eyes: Innocence in the Courtroom*<sup>45</sup> is a wonderful educational tool that depicts how children view courtrooms and testifying. One obstacle for children can involve the conduct of the attorneys. Prosecutors and child protection attorneys should routinely file motions requesting appropriate behavior by all attorneys. When a child is frightened, especially by opposing counsel, it inhibits his or her ability to recall facts and testify truthfully. If a child simply shuts down on the witness stand, that can actually harm the defendant and leave an impression on the judge and jury about the defendant's culpability. It is in the best interest of all parties involved that children be effective witnesses.

Consider these two questions posed to a child during an actual trial:

1. "On the evening of January third, you did, didn't you, visit your grandmother's sisters' house and didn't you see the defendant leave the house at 7:30, after which you stayed the night?"
2. "Well, I have jumped ahead a bit, so you will have to go back to what you were telling us about before the first incident. You told us of what you did and what he did to you. On the next occasion you went there, what kind of thing happened to you?"<sup>46</sup>

As noted by John Myer, "Is it any wonder children get confused? Judges have ample authority, under the Federal Rules of Evidence and most state rules of evidence, to stop such nonsense. A judge also has the authority to forbid unduly embarrassing questions ... The judge may disallow cross-examination on irrelevant issues and may forbid confusing, misleading, ambiguous, and unintelligible questions. Finally, the judge has the authority to curtail questions designed merely to harass or badger the witness."<sup>47</sup> In addition, since the goal of a trial is to obtain justice and truth, why do we let defense attorneys question a child in a manner that is contrary to the accepted best practices of a forensic interview? The use of direct and leading questions has been clearly established to result in children providing responses that are less trustworthy than answers provided in response to open-ended narrative inviting questions.

Defense attorneys are not the only ones to blame for inappropriate conduct and use of confusing questions and words; prosecuting attorneys, child protection attorneys and even judges need to ask simple questions with child-fair words. All professionals should be cognizant that their demeanor in the courtroom will be watched by the child. Be aware that if you behave in an aggressive manner in the courtroom that is observed by the child, the child may come to view you as unsupportive.

Pre-trial motions regarding attorney conduct can include: (1) tone of voice, (2) developmentally appropriate oath, (3) age-appropriate language during questioning, (4) avoiding complex sentences and words, (5) use of non-leading questions by the defense attorney, (6) intimidating behavior or questions, (7) requiring attorneys to stand at the podium and not approach the child, and (8) silent objections.

### **Child-Fair Hours and Breaks**

As an attorney and child protection professional, you organize the case and work with the witnesses to have them testify at certain times, while also being sensitive to their schedules. The same considerations must be given for working with child witnesses. Ask the child's parent/guardian/caregiver what times during the day the child is the most attentive. If a child is accustomed to having a nap between 3-4 p.m. each day, do not schedule his or her testimony near that time because s/he will likely be sleepy and have poor recall. Testifying in the morning is a good rule for most young children. It avoids the child going to school and worrying all day; they are also more alert.

It is also important to educate the judge on providing more frequent breaks when having child witnesses testify. A break every 20-30 minutes is optimal to make sure that the child is alert and has a chance in private to share concerns or feelings with his or her caregiver, caseworker or attorney. But do not put the burden on the child to ask for a break. S/he may feel intimidated and unsure of their right to speak up. Attorneys should build in the breaks for children, or watch their body language to know when they need a break.

### **Shielded or Closed-Circuit Television Testimony**

The Sixth Amendment to the Constitution provides a defendant the right to be confronted with all witnesses against him/her in criminal cases only (not a Constitutional right in civil child dependency cases). If the child witness is terrified to look at his or her abuser or testify in the same room, and if there is a therapist or parent/guardian who can provide testimony regarding the fear, there are three options to consider: (1) place the defendant in a separate room outside of the courtroom while watching the child's testimony in the courtroom via closed-circuit television (CCTV), (2) allow the child to testify in the judge's chambers, with all attorneys present, while the defendant and the jury remain in the courtroom and watch the testimony via CCTV, or (3) physically shield the child from being able to see the defendant in the courtroom.

CCTV can be a two-way system where the defendant can see the child and the child can see activity in the courtroom, including the defendant, and has the option to not view the monitor. Or it can be one-way

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where the child cannot see into the courtroom, but the jury, defendant and courtroom observers can see the child. Testimony of children via one-way CCTV has been validated in numerous cases, including the landmark case of *Maryland vs. Craig*, 497 U.S. 836 (1990).

There are typically several factors that must be proven by the prosecution before a judge can order CCTV for a child witness. One factor traditionally includes providing evidence, particularly through an expert witness, of harm to the child if required to testify in front of the defendant. For a listing of state statutes on CCTV or other means of electronic testimony, visit NCPCA's website.<sup>48</sup>

One of the authors herein struggled with this issue in her practice as her jurisdiction at the time did not have CCTV. While one judge did allow her to roll in a large chalkboard and place it between the defendant and the child (so as to block the child's view of the defendant), other judges did not support such an obstructive method. So as an alternative, she would do one of two things depending on the size of the courtroom: (1) she would situate herself at the farthest location away from the defendant so that the child would look at her and not at the defendant; or (2) she would physically place herself in front of the defendant (including the podium) to help block the child's view of the defendant. While this may seem contrary to what you would want, the podium helped to block much of the view and was often the only option in a small courtroom. It also would be clear to the jury if the defendant was extending his/her body to maintain eye contact with the child. On most occasions, the obvious efforts of the defendant to maintain eye contact and/or physically intimidate the child witness would result in a verbal admonition from the judge in front of the jury.

Technology for CCTV is more readily available these days and is frequently used in forensic interviews. For a detailed analysis of using CCTV, we recommend reading NCPCA's Update Newsletter entitled *Facilitating Children's Testimony: Closed Circuit Television* and viewing the series of video's produced by NCPCA on the use and application of CCTV and child witnesses.<sup>49</sup>

### Courtroom Closed to Public

Most witnesses, whether adult or child, will feel greater comfort and security when testifying about personal, embarrassing, or traumatic events if done in a closed courtroom. Being required to testify publicly about certain crimes, especially sexual abuse, can have a chilling effect on victims. Closing a courtroom to observers can help to protect the sanctity of the process, but it also has constitutional implications. The defendant has a Sixth Amendment right to a public trial in a criminal case. Further, even the media has a right to attend criminal trials pursuant to the First Amendment. However, the rights of the child can be balanced with these Constitutional rights in an effort to ask that the courtroom to be closed. This request can be made for court observers, non-testifying family of the witness or defendant, the media and even the defendant (see prior section on CCTV).

The U.S. Supreme Court addressed the issue of media attendance in *Globe Newspaper Co. vs. Superior Court*, 457 U.S. 596, 615 (1982) and held that the prosecution must demonstrate a compelling government interest, and that the request be narrowly tailored to serve that interest. The Court held that the prose-

cution had met its burden by showing that safeguarding the child's physical and psychological wellbeing was a compelling government interest. Therefore, the media was precluded from being in the courtroom during the child's testimony.

At a minimum, the prosecutor or child protection attorney should be aware of everyone in the courtroom, even asking an investigator or other allied professional in the courtroom to watch out for intimidating looks or behavior and to immediately report it (usually by passing a note) to the prosecutor or attorney. When a child is testifying and looking directly at those in the courtroom, a threatening look can easily go unnoticed by the judge and court staff. It is important for the prosecutor or attorney to take on the role of ensuring that those in the courtroom do not negatively impact the nature of the child's testimony. If that happens, a request to the judge to have that person or persons removed is usually granted.

### **Adolescent-Fair Courtrooms**

Because adolescents may not see themselves as victims, particularly when they have been a victim of someone whom they view as a "boyfriend" or "girlfriend," or if they have otherwise have been a compliant victim, it is helpful if you allow them to have their own view of what happened and not force them to acknowledge that they were a "victim." Adolescents may also be afraid that they will not be believed or that someone will find out and spread it around their school or through social media.

Fear and embarrassment can be big issues for adolescents, so it is important to be sure to question them in a way that is not judgmental or blaming. If there are observers in the courtroom that could hinder the adolescent witness from testifying fully and completely, the attorney should bring this to the attention of the judge and ask that those individuals be removed.

Teens also may have a greater understanding of the consequences of testifying. They may not want to be "responsible" for sending a parent or loved one to jail. It is important that the teen understand that his or her only job is to tell the truth about what happened. The judge and jury will decide what the final outcome will be. One helpful resource for teens is *A Teens Guide through the New Hampshire Criminal Court System* by Nancy Harris.<sup>50</sup> This online resource can be used to have an open discussion with adolescents as they prepare for court.

### **Considering Culture in Courtrooms**

Our country has undergone a significant demographic change in recent decades. This shift calls for us to be more aware of the various cultural groups in the communities that we serve and to provide better service, especially to child witnesses.

There exists an overrepresentation of ethnic minorities in the child welfare system. Research shows that African-American children are overrepresented in report substantiation at a rate of two and one-half times that of the next highest group: Native American children. African-American children were overrepresented in substantiated reports at four times that of Latino children, and Asian and Pacific Islander children were

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underrepresented when compared to White children.<sup>51</sup> There are also numerous sub-cultures within the various ethnic groups that differ in beliefs and practices as it relates to care of children. These statistics call for us to educate ourselves on how to best provide competent services to the children that we serve.

The following is a listing of common mistakes you should be cognizant of in cross-cultural interactions:<sup>52</sup>

- Interrupting interviewees or witnesses;
- Viewing a behavior or statement as problematic when it is a cultural difference;
- Using a word in one language in a way that inadvertently offends the interviewee;
- Misunderstandings related to touch or entry (penetration);
- Mistakenly thinking you understand the words and behaviors of the interviewee;
- Failing to accommodate the interviewee's culture in ways that damage rapport; and
- Believing a given behavior is cultural when it is due to individual or systemic factors.

When we think of culture we usually think first of ethnicity and race, but, in fact, culture is a much broader topic. Several other factors to consider regarding culture might include language, socio-economic status, age, gender, religion, sexual orientation, and disability. We are all part of many different cultural groups and our job as a prosecutor, investigator, or advocate for all have their own unique cultural aspects.

If the child speaks another language (if the child is not a native English speaker), it is important to arrange for a court certified interpreter in advance. If the child is multi-lingual s/he may choose to answer some questions in his or her native language while responding to others in English.

There is a high correlation of children with disabilities and abuse.<sup>53</sup> These statistics can be as high as 35.5 children out of 1000 being abused in comparison to 21.3 children without disabilities out of 1000 suffering abuse. Talking with the child and his or her parents ahead of time to determine if any accommodations need to be made will allow the child to participate in the court process and will make the child feel more comfortable when s/he comes to court.

If a child with whom you are working identifies with the GLBTQ community, be sure to strive to provide a safe and open environment for him or her. You should also understand that s/he may or may not be "out" to their families. This issue needs to be considered if a child or adolescent who identifies as gay, lesbian, bi-sexual, transgendered or "queer" (as the term is non-offensively used within some communities) is going to participate in the court process.<sup>54</sup>

By approaching culture on the individual level and assessing each child we work with as a unique individual, we can provide better service to the victims with whom we work. This includes being aware of cultural norms, being flexible in our approach and being willing to step outside of our normal processes to do what is in the best of interest of the children we are serving.



## Defendants Acting as Their own Attorney

How do you protect the child witness from cross-examination when the defendant is representing him/herself? Defendants have a Constitutional right to defend and represent themselves. But this right is not absolute, as outlined in *Faretta v. California*.<sup>55</sup> A 2012 newsletter article from the National Center for Prosecution of Child Abuse addresses this issue in detail.<sup>56</sup> Briefly, here are some of the ways around this issue as addressed in the article:

(1) *Fields v. Murray* is the seminal case that specifically addressed a defendant's right to personally cross-examine his young accusers. The trial court held that the defendant could write out questions for his standby counsel to pose to the child victims. On appeal, the Fourth Circuit relied on *Maryland v. Craig* as a way to limit the manner of confrontation and held that a defendant can be restricted from personally cross examining his/her child accusers if the purpose of that right was "otherwise assured" (e.g., by having standby counsel ask questions while allowing the defendant to conduct other aspects of the trial himself) and "necessary to further an important public policy."<sup>57</sup> The appellate court found that the State had "an extremely important interest" in protecting young victims from personal cross-examination by their alleged abuser. If the attorney pursues a motion to have standby counsel question the child victim, s/he should come prepared with a tailored jury instruction that addresses the issue.

(2) If your state has a Crime Victims Bill of Rights for children, utilize language to argue that the victim has a right to protection in the courtroom. If your state does not have a Crime Victims Bill of Rights, look to your crime victim's rights law about crime victims being treated with fairness and dignity, or even protection from harassment and intimidation.<sup>58</sup>

(3) Prosecutors must be vigilant in educating the court that victims, too, have rights in the courtroom that need to be balanced against the defendant's rights. Talking with the child's therapist, child protection worker, teacher, parent, and/or guardian will help to determine if evidence should be presented to the court regarding probable emotional harm to the child if the defendant is allowed to personally cross examine him or her.

(4) If none of the above options are successful, the prosecutor should petition the court to require the defendant to submit questions to the court ahead of time and to remain seated during questioning. The prosecutor could also consider placing a one-way screen between the victim and the defendant where the defendant can observe the victim, but the victim cannot see the defendant.

## When Things Go Wrong: Help on the Witness Stand

Invariably there will be some child witnesses who freeze, cry, giggle or simply do not fare well in the witness chair. If this happens, quietly ask to approach the bench and explain to the judge that the child needs a recess. Then do your best to determine what the child is feeling to cause the freezing, crying, giggling, or other behavior that is affecting the testimony. Having a waiting room for the child will help for having this discussion. Ask the child's therapist, child protection worker, supportive family, or advocate to assess why the behavior is happening. Ask the child what s/he needs in order to feel better in the witness chair.<sup>59</sup>

It is important to remember that while the goal of testimony is to obtain information and present it to the trier of fact, this never justifies re-traumatizing young and/or vulnerable children in the process. So if a child's discomfort means asking the judge for a recess for the day so that s/he can collect himself/herself, make that request. Doing so is in the best interests of the child, which should always be paramount in every case involving young witnesses.

### Resources

Listed below are some helpful resources on how to properly prepare children for court and the court for children.

- *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment* by Victor Vieth (2008), CENTER PIECE, Vol. 1, Issue 2.<sup>60</sup>
- *Child-Friendly Courtrooms: Items for Judicial Consideration* by the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, Children's Advocacy Centers of Texas, Inc., Children's Justice Act, and Texas Center for Judiciary.<sup>61</sup>
- *Helping a Child be a Witness in Court* by Alison Cunningham and Lynda Stevens (Centre for Children and Families in the Justice System, Ontario, Canada).<sup>62</sup>

### Conclusion

When a child has been victimized or witnessed an event requiring testimony, it is important to remember that the child is not stepping into the courtroom in adult shoes. Accommodations should be made to ensure the child testifies accurately and efficiently so as to minimize anxiety and trauma. Educating the court is an important step in the effective administration of justice. But above all, remember putting the child first will result in a case that has a much higher probability of success and allow for the child to be adequately protected.

## Endnotes

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- 8 *Id.* at 663.
- 9 *Id.* at 666.
- 10 *Id.* at 666.
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- 23 For more information on this program, please contact King County Kids' and Teen Court, Office of the Prosecuting Attorney, Special Assault Unit, 704 228th Avenue Northeast, PMB 323 Sammamish, WA 98074-7222, Phone 206-386-KIDS.

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- 38 Download the TASK Manual at <http://www.ndaa.org/pdf/TASK%20Manual.pdf>.
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- 43 *Id.*
- 44 *Child-Friendly Courtrooms*, 20.
- 45 You can download a free copy of the video at <http://www.dcjs.virginia.gov/juvenile/resources/videos/>.
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