

Practical Tips and Legal Strategies for Protecting Child-Victims While Testifying

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For a long time the expression, “children should be seen but not heard” was courtroom policy, where children were deemed incompetent witnesses and not allowed to testify.¹ Today, in the “pursuit of justice,” children are often forced to speak when they would rather remain silent. This is especially true in child sexual abuse cases where the child-victim plays a central role in the prosecution, and children as young as three and four are required to publicly recount the very events that traumatized them.

As the child-victim’s attorney and advocate, we are obligated to support the child through the criminal proceedings, yet we also share the community’s desire to pursue prosecution. Studies, cases and anecdotal evidence reveal these two goals are often in conflict as children who testify may suffer a second victimization.² In an effort to address this dilemma, many states have passed laws mandating special accommodations for child witnesses.³ For example, in Utah a trial court “should ensure children’s participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner.” Utah Code Ann. § 77-37-1. Even without such statutes, judges have discretion to fashion procedures to accommodate children’s special needs. 98 C.J.S. Witnesses § 397 (2008). This article discusses several accommodations a victim’s attorney can seek to minimize the revictimization a child suffers while giving evidence against her offender.⁴

I. Removing the Child from the Defendant's Presence

A child-victim can be protected during testifying by being outside defendant’s presence. This can be accomplished in two ways: 1) the victim can testify outside of the courtroom via closed circuit television (CCTV); or 2) the victim can testify from behind a witness screen. Each method has advantages and disadvantages.

A. Use of closed circuit television.

Many jurisdictions have codified the option of testifying via CCTV in child abuse cases.⁵ The benefit of CCTV is obvious: the child does not have to see her abuser or talk about painful events in a room of strangers. CCTV has been found to reduce children’s anxiety,⁶ and in so doing, to promote more accurate testimony from children.⁷

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While CCTV may be desirable, not every child will be permitted to testify via CCTV. Since CCTV removes the child from the defendant's presence, each case must be analyzed to protect both the rights and interests of the child-victim, and the defendant's constitutional right to confront his accuser.⁸ In *Maryland v. Craig*, 497 U.S. 836, 855-856 (1990), the Supreme Court held that a child may testify via CCTV without violating a defendant's Sixth Amendment rights when the trial court finds a compelling need to do away with faceto-face confrontation. The compelling need standard is satisfied where the child would suffer trauma from being in the presence of the defendant, such that it would impair the child's ability to communicate. *Craig*, 497 U.S. at 856. A desire to protect the child from mere nervousness, excitement, or general fear of testifying is not enough to justify CCTV. *Id.* See also *United States v. Bear*, 357 F.3d 730 (8th Cir. 2004) (finding general fear of participants and courtroom, rather than of defendant, inadequate to support finding of necessity); *Cumbe v. Singletary*, 991 F.2d 715 (11th Cir. 1993) (finding error where there was no evidence that 5-year old victim was afraid of defendant and no individual finding about possibility of harm); *Lewis v. State* 626 So. 2d 1073 (Fla Dist. Ct. App. 1993) (holding court's decision based on testimony of mother and child that child would be frightened to testify in front of defendant violated confrontation rights). Some states require that the compelling need finding be based on expert testimony. See, e.g., *People v. Cintron*, 551 N.E.2d 561 (N.Y. 1990) (holding court's observations of child without testimony regarding child's mental state insufficient).

Once ordered, CCTV procedures must provide defendant with adequate means to communicate with defense counsel during testimony, and must be conducted in a manner consistent with the impartiality and decorum of in-court testimony. See *Myles v. State*, 602 So. 2d 1278 (Fla. 1992) (finding procedure for oral relay of defendant's communications to attorney in the other room violated right to assistance of counsel); *People v. Fletcher*, 768 N.E.2d 72 (Ill. App. Ct. 2002)

(reversing where 9-year old assault victim testified in other room and defendant lacked electronic means to communicate with counsel); *State v. Michaels*, 625 A.2d 489 (N.J. Super. Ct. App. Div. 1993) (reversing where judge played ball with children, let them sit on lap, and encouraged and complimented them).

While CCTV saves the child from having to see her abuser, it is not without a downside. A significant concern is that a child's testimony may not be as effective at persuading jurors of defendant's guilt. Studies reveal that closed circuit testimony is associated with a negative juror bias.⁹ In fact, jurors viewed children who testified via CCTV as less believable, less attractive, less intelligent and more likely to be making up a story than children who testified in court.¹⁰ So while CCTV may reduce anxiety, thus allowing the child to have better recall and clearer testimony, it does not necessarily translate to jurors' ability to assess the increased accuracy.¹¹ For these reasons it may not be the ideal procedure from the stand point of ensuring a conviction.

In light of the required findings and manner of implementation, and the possible risk of negative juror bias, it is critical to carefully analyze the desirability of CCTV on a client-by-client basis. If it is in the best interests of the child-victim to pursue CCTV, the victim's attorney should seek specific findings on the record sufficient to support its use, and ask for only necessary accommodations to avoid reversal and retrial that could further harm the child.

B. Use of screens.

A child-victim may testify out of view of the defendant through use of a witness screen. Before using a screen, courts must make the same findings of compelling need as with CCTV. See *State v. Vogelsburg*, 724 N.W.2d 649 (Wis. Ct. App. 2006) (applying *Maryland v. Craig* to use of barrier between defendant and child); *State v. Welch*, 760 So. 2d 317 (La. 2000) (finding use of screen based on a generalized statement of possible trauma was error in light of *Maryland*

v. Craig). The most beneficial characteristic of screens may be that they are portable and easily used during emergencies, such as when a child freezes on the stand. Notably, however, a screen may not be as effective as CCTV in removing anxiety since the child is still in the room with defendant.¹² An additional downside is that a screen may block the child from seeing support people in the courtroom.¹³

II. Comforting the Child-Victim: Support Persons and Facility Dogs

It is generally accepted that a court has discretion to permit the child to hold a comfort item such as a doll or teddy bear while testifying if it makes findings that there is a “particular” or “compelling” need for the comfort item.¹⁴ Two additional “comfort items” to consider: 1) a support person, and 2) a facility dog.

A. Use of support persons.

Studies reveal that the presence of a support person increases some children’s capacity to testify and enhances the child’s direct and cross-examination.¹⁵ Several states have specific statutes governing support person procedures.¹⁶ Generally, the record must reflect a need for the support person, a showing that is significantly less than that required for CCTV. For example, California merely requires that a support person is desired and would be helpful. *See People v. Lord*, 36 Cal. Rptr. 2d 453, 455 (Cal. Ct. App. 1994). While a support person does not implicate a defendant’s confrontation rights, a defendant may still object, arguing that the person’s presence prejudicially implies that the child is so emotionally scarred that she needs support, or that the support person is vouching for the child’s veracity.¹⁷ *People v. Patten*, 12 Cal. Rptr. 2d 284, 289 (Cal. Ct. App. 1992) (noting defendant’s opposition to the support person’s presence). Fortunately, a practitioner can nullify such arguments with some forethought.¹⁸

Statutes may dictate who can fill the role of support person. In states lacking such

specification, it is generally seen as less prejudicial for family members to accompany the child, whereas reviewing courts view victim advocates as more prejudicial because of the appearance of vouching for credibility. *See, e.g., State v. Suka*, 777 P.2d 240 (Haw. 1989) (noting accompaniment by parent or close relative as less prejudicial than accompaniment by a victim/witness counselor as former is more likely to be seen as support rather than vouching for credibility). Prosecutors and clergy have been found to be improper support choices because of the potential for an improper impression on the jury. *See, e.g., Sexton v. State*, 529 So. 2d 1041, 1044 (Ala. Crim. App. 1988) (noting general impropriety of prosecutor sitting with witness during testimony because of possible interpretation that action demonstrates personal belief in witness’ credibility or guilt of the accused); *Brooks v. State* 330 A.2d 670, 675 (Md. Ct. Spec. App. 1975) (noting practice of clergy accompaniment is not recommended).

A victim’s attorney must also give consideration to where the support person is positioned in the courtroom. Generally, the greater the distance from the child, the less the risk for prejudice; however, as long as the support person does not communicate (verbally or nonverbally) with the victim or the jury, it has been found permissible for the child to sit on the support person’s lap or to hold his or her hands. *See, e.g., Holmes v. United States*, 171 F.2d 1022 (D.C. Cir. 1948) (allowing 9-year old to sit on mother’s lap); *State v. Johnson*, 528 N.E.2d 567 (Ohio 1986) (allowing 8-year old to sit on aunt’s lap); *Baxter v. State*, 522 N.E.2d 362 (Ind. 1988) (allowing 9-year old to hold hand of support person); *Soap v. State*, 562 P.2d 889 (Okla. Crim. App. 1977) (allowing 7-year old to hold hands with support person).

B. Use of facility dogs.¹⁹

Facility dogs are used in various jurisdictions, including Washington, Florida, Texas and Maryland with resounding success.²⁰ Research indicates that companion animals can decrease a person’s heart rate and blood pressure, increase

mental clarity, and alleviate depression.²¹ The presence of the dog during a child's testimony has been shown to reduce anxiety by promoting a safe feeling and providing contact comfort to the child.²² A certified facility dog, like a seeing eye dog, can remain quiet and still for long periods of time, such that the child can pet the dog and feel it next to her, thereby gaining all the calming benefits without disrupting the courtroom. Because the judge can give a special instruction and the dog can remain virtually unnoticeable at the child's feet during testimony, the risk of prejudice to the defendant is minimal.

Substantial and positive anecdotal evidence is coming from courtrooms that use facility dogs to aid child witnesses. Prosecutors and judges have noted that the effects of a dog as support are stronger than when the child holds a doll or sits with a support person.²³ Presently, there is no case law regarding facility dogs accompanying witnesses during testimony, however, if the dogs are available to all witnesses by request, including the defendant, a proper jury instruction should minimize any potential prejudice to the defendant.²⁴ For more information on facility dogs visit NCVLI's website.

III. Conclusion

Justice cannot require a child to suffer emotional harm in order to convict a guilty person. Fortunately, laws now exist to protect children when testifying. According to victim need, a victim's attorney should ask the court to make findings on the record that particular accommodations are necessary. This will promote the child's interest by protecting her in the courtroom, while also protecting the conviction on appeal. Accommodating the child witness in the adult world of criminal justice is the crucial first step in the process of creating a new adage that, "children should be heard, but not harmed."

¹ Nancy Walker Perry & Lawrence S. Wrightsman, *The Child Witness: Legal Issues and Dilemmas*, 37 (1991).2

² George K. Goodhue, Comment, *Maryland v. Craig: Balancing Sixth Amendment Confrontation Rights with the Rights of Child Witnesses in Sexual Abuse Trials*, 26

New Eng. L. Rev. 497, 498 (2001).

³ See Ala. Code §§ 15-25-1; Ark. Code Ann. § 16-43-1202; Ga. Code Ann. §17-8-54 (55); 725 Ill. Comp. Stat. 5/106B-5; In. Code. § 35-37-4-6; Ky. Rev. Stat. Ann. § 26A.140; Mo. Ann. Stat. § 491.675-705 (Child Victim Witness Protection Law); N.D. Cent. Code §§ 12.1-35.02 to .06. See also 18 U.S.C. § 3509 (Child victims' and child witnesses' rights added Nov 29, 1990).

⁴ This article addresses only those methods used during testimony. The process of accommodation does not begin or end here, however, as a child must have assistance during investigation, pretrial and post trial of the criminal proceeding to best alleviate trauma.

⁵ Thirty-eight states have an affirmative Closed Circuit Television (CCTV) statute. For a list of the state statues see http://www.ndaa.org/pdf/ncpca_statute_tv_testimony_may_06.pdf (list is incomplete in that it is missing Michigan and West Virginia). Some states have the language "face to face" included in their constitution, for example: Tennessee's Constitution provides, "in all criminal prosecutions, the accused hath the right ... to meet the witnesses face-to-face." Tenn. Const. art. I, § 9. It is unclear whether the state's highest court would interpret this to be a literal requirement, but Tennessee does have a CCTV provision. See *State v. Deuter*, 839 S.W.2d 391 (Tenn. 1992) (not reaching the issue of whether Tennessee affords greater protection than federal); Pennsylvania and Illinois both had similar "face to face" language and were both amended to remove the explicit requirement following *Maryland v. Craig*. Prior to the amendment, Illinois cases held that CCTV violated a defendant's state right to confrontation. *People v. Dean*, 677 N.E.2d 947 (Ill. 1997).

⁶ Goodman, Gail et. al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Juror's Decision*, 22 Law & Hum. Behav. 165, 187 (1988) (finding children's average score on the State Anxiety Scale were significantly lower for children who were anticipating testifying via CCTV).

⁷ *Id.* at 197.

⁸ *Maryland v. Craig*, 497 U.S. 836, 856 (1990)

⁹ Goodman, *supra* note 6, at 199.

¹⁰ *Id.*

¹¹ Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. Traumatic Stress 149, 153 (2003) (concluding jurors perceived children who testified via CCTV to be less credible than those who testified in court).

¹² Allison Cunningham & Pamela Hurley, *Witness Screens, in A Full and Candid Account: Using Special Accommodations and Testimonial Aids to Facilitate the Testimony of Children* 2007,

at 14 (Centre for Children and Families in the Justice System, Handbook No. 3, 2007).

¹³ *Id.*

¹⁴ See *Smith v. State*, 119 P.3d 411 (Wyo. 2005) (15-year old allowed to hold teddy bear); *State v. Cliff*, 782 P.2d 44 (Idaho Ct. App. 1989) (8-year old holding doll upheld); *State v. Hakimi*, 98 P.3d 809 (Wash. Ct. App. 2004) (7-year old allowed to carry a doll).

¹⁵ Amer. Bar Ass'n, *The Child Witness in Criminal Cases* 31 (2002); Sherrie Bourg Carter, Nat'l Inst. For Trial Advocacy, *Children in the Courtroom Challenges for Lawyers and Judges* 98 (2005).

¹⁶ For example, Connecticut law reads, "an adult who is known to the child and with whom the child feels comfortable shall be permitted to sit in close proximity to the child during the child's testimony, provided such person shall not obscure the child from the view of the defendant or the trier of fact." Conn. Gen. Stat. Ann. § 54-86g(b). See also Ark. Code Ann. § 16-42-102 (West 2008); Cal. Penal Code § 868.5; Haw. Rev. Stat. § 621-28; Idaho Code Ann. § 19-3023; Mich. Comp. Laws Ann. § 24.275a (4); Minn. Stat. Ann. § 631.046; N.Y. Exec. Law § 642-a (McKinney 2008); Okla. Stat. tit. 12, § 2611.2 (F); Wash. Rev. Code Ann. §§ 7.69.030 (10), 030A (3). Several states have a general language statute regarding support persons that may be used as authority for accompaniment during testimony: Ariz. Rev. Stat. Ann. § 13-4403; Del. Code Ann. 11, § 5134; 725 Ill. Comp. Stat. 120/4 (a)(9); Ky. Rev. Stat. Ann. § 421.575; R.I. Gen. Laws § 12-28-9. Four states allow a support person to accompany the minor witness during testimony when an alternate mode of testifying has been ordered by the court and testimony is being videotaped to be played back during trial: Neb. Rev. Stat. § 29-1926; Ohio Rev Code Ann. § 2945.481; Ohio Rev Code Ann. § 2907.41 42 Pa. Cons. Stat. §§ 5981, 85.

¹⁷ Carol A. Croca, Annotation, *Propriety and Prejudicial Effect of Third Party Accompanying or Rendering Support to Witness During Testimony*, 82 A.L.R. 4th 1038 (I)(2)(a) (2008).

¹⁸ *Cunningham & Hurley*, *supra* note 12.

¹⁹ These dogs are often referred to as "therapy dogs." This label is discouraged by some practitioners as defendants may object on the basis that use of a "therapy dog" is prejudicial as it labels the child witness a victim who is in need of therapy. Use of the terms "facility" or "assistance" helps avoid this objection.

²⁰ See *Children's Victim Advocates have Four Legs, Fur*, The Gainesville Sun, Aug. 26, 2006, Gainesville.com; *Therapy dog works in prosecutor's office to calm victims*, The Baltimore Sun, June 8, 2008, at 1, available at WTOPnews.com; Christine Clarridge, *Dedicated service dogs recognized at courthouse function*, The Seattle Times, June 29, 2007, at 1, available at Seattletimes.nwsourc.com; *Therapy Dogs Healing Kid's*

Hearts with Love, <http://www.childadvocacycenter-jc.org/Therapy%20Dogs.htm>.

²¹ Rena Marie Justice, *Animal Assistance Part I: The Use of Animal Assistance at Child Advocacy Centers*, Update (APRI's Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2007, at 1.

²² Rena Marie Justice, *Animal Assistance Part II: Pets in the Courtroom: The New "Comfort Item,"* Update (APRI's Nat'l Ctr. for Prosecution of Child Abuse, Alexandria, Va.), 2007, at 1.

²³ *Id.*

²⁴ Sample instruction: Testifying in court is an unfamiliar and stressful event for most people, these dogs are used in the courthouse setting to help reduce witness anxiety and are available to any witness who requests one.

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