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NATIONAL CRIME VICTIM LAW INSTITUTE

PROTECTING, ENFORCING & ADVANCING VICTIMS' RIGHTS

# PRACTICAL TIPS AND LEGAL STRATEGIES FOR EASING VICTIMS' CONCERNS ABOUT TESTIFYING

Victims often feel apprehension and fear over testifying in court. Frequently the courtroom encounter with the defendant is the first time the victim has seen the perpetrator since the crime occurred. The trial itself creates added pressure with the verdict affecting whether the victim obtains justice and future safety. Additionally, while speaking in public to strangers is always stressful, it is even more challenging for victims who are discussing what is often the most traumatizing event of their lives. An extra concern for the crime victim is the thought of being cross-examined by a skilled defense lawyer who the victim knows intends to attack his or her credibility, memory, character, and choices leading up to the crime.

There are a number of strategies that can be implemented to ease victims' concerns about testifying. By filing appropriate motions with the court and preparing the victim for testifying, the practitioner, be it a prosecutor or victim's attorney, can take proactive measures to protect the victim at trial.

## *Strategies to implement in the early stages of the criminal proceeding*

To ease victims' concerns about testifying, the practitioner should implement a number of strategies that begin early in the litigation and continue throughout the criminal proceedings. As soon as possible the practitioner should provide the victim with an advocate, who is a person in addition to the practitioner who will provide emotional support to the victim, refer the victim to outside resources, and be a second voice to explain the proceedings to the victim. One advocate should be assigned to the victim to build a trust relationship and develop continuity. The victim should be advised whether there is a confidentiality statute governing the private communications made by the victim to the advocate. Thirty-two states have victim-advocate confidentiality laws.[1]

The advocate and practitioner should make appropriate counseling referrals for the crime victim. Crime victims often have psychological and emotional scars from the crime. If the victim has taken the remedial steps of obtaining counseling, they will likely be better prepared to assist in the prosecution and face the perpetrator in court. More importantly, the victim will begin the healing process.

Many jurisdictions have statutes that authorize the advocate to accompany child victims to the witness stand.[2] While the advocate's presence near the witness stand can be comforting to the victim, there are limitations. The advocate cannot prompt or assist the child's testimony. Further, the advocate's actions while accompanying the child to the stand will be scrutinized following convictions to determine if such presence violated defendant's right to a fair trial.[3]

## *Motions to consider in the pretrial stages of criminal proceedings*

In cases where the victim is a child, the practitioner should consider alternatives to open courtroom testimony. One alternative is moving the court to allow the child to testify by closed-circuit television. The child victim can testify by closed-circuit television without violating defendant's right to confrontation when the court finds face-to-face confrontation with the alleged perpetrator is likely to cause the victim serious emotional distress.[4] The trial court must make individualized case-specific findings, and in doing so, must address the particular child's susceptibility to the particular defendant.[5]

A second alternative is closing the courtroom. The Sixth Amendment grants a defendant the right to a public trial, but the presumption of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values. Closure of the courtroom may be permissible if an open court would cause substantial psychological harm to the child.[6]

In addition to alternative means of testifying, practitioners should be aware of options in cases where defendants have waived their right to counsel and are proceeding pro se. For many victims, especially victims of sexual or violent offenses, facing cross-examination by the perpetrator can be a traumatic experience. To combat this troubling dynamic, the practitioner should consider filing a motion requiring defendant's questions to the victim be in writing and read by the court or stand-by counsel.[7] Courts have held that to justify limiting a defendant's right to personal cross-examination, the state or practitioner must show that there is an "important state interest" that outweighs defendant's right. Protecting child-witnesses from emotional trauma has qualified as such an interest.[8] A comprehensive analysis of limiting the pro se cross-examination can be found in the Spring/Summer 2007 edition of NCVLI News.[9]

The practitioner should consider filing additional pretrial motions which will protect the victim's rights to privacy, to be present, and to be treated with dignity, fairness, and respect. The practitioner should also consider filing motions to exclude rape shield evidence or prior convictions, which are irrelevant and potentially embarrassing to the victim. Victims will likely feel more comfortable testifying if they have been treated with dignity and fairness throughout the criminal justice process. Victims whose rights have been violated will walk into the courtroom with a psychological disadvantage compared to those victims whose rights have been protected.

### *Strategies leading up to and during trial*

As the trial approaches, the practitioner needs to prepare the victim to testify. Preparation requires multiple meetings between the victim and the practitioner to build a trust relationship. A single meeting the day before trial is too little too late. During these meetings, the victim should be advised on how to be an effective witness. Victims will make more effective witnesses if they understand it is important to treat the courtroom in a dignified manner; examples to communicate: listening carefully to the question, speaking loudly so the judge and jury can hear the answer, answering only the question asked, not exaggerating facts, and understanding the importance of attitude, facial expressions, and body language. If the victim understands how to be an effective witness, it will ease his or her concerns when entering the courtroom.

In preparation for trial, the practitioner should take the victim to the courtroom to become comfortable with the environment. The courtroom visit is an ideal opportunity to explain to the victim the roles of the people in the courtroom (e.g. lawyers, judge, jury, bailiff, clerk, and jailor). If possible, the victim should sit in the witness stand and answer some generic questions. One effective method of easing the victim's concerns for testifying is allowing the victim to ask the practitioner some questions as the practitioner sits on the witness stand. Having the victim watch other trials can also be helpful. These measures will help the victim realize that the courtroom is a safe place where evidence is submitted, people talk, and decisions are made.

Victims should be advised that defendants are generally on their best behavior in court. The trial places defendant's liberty and criminal record in jeopardy. Defendants have likely been advised by their

attorneys to avoid bad behavior which can negatively influence the judge and jury who will be deciding their legal fate. Additionally, the practitioner should advise the victim of the measures in place to maintain safety in the courtroom (e.g. metal detectors, guards, and the judge's emergency buttons). The knowledge of these safety measures will make the victim feel more secure while testifying, and build trust that the practitioner is concerned not only about the past crime but also about the victim's present and future safety.

Practitioners should always be mindful of creating a safe pathway for the victim to the witness stand. Victims should always have a safe and private waiting area, limited waiting time, and a pathway to the courtroom not near defendant or defendant's supporters. In the courtroom, the victim should be able to sit in an area with the advocate and away from defendant's supporters. Finally, the practitioner should help the victim create an action plan for encountering the defendant, or the defendant's supporters, in and around the courthouse.

The two most stressful times for the victim during trial are: 1) while testifying, and 2) when the verdict is rendered. During these times, especially in trials of violent offenders, the practitioner should attempt to make the courtroom even safer. Increased security can be accomplished by requesting an additional guard from the jail, or asking the law enforcement officer involved with the case to be present. The law enforcement officer that investigated the case or who arrested defendant has usually proven to the victim that he or she is concerned about the victim and has taken action to prevent future harm. The presence of these officers at stressful times of the trial can ease the victim's safety concerns.

During testimony, the practitioner should ensure the protection of the victim's legal right to be treated with fairness, dignity, and respect. Objections by the appropriate lawyer should be made on these grounds if the defense attorney's tone and questions are unfair or disrespectful. The practitioner should request breaks in the testimony if the victim becomes upset or is subject to lengthy cross-examination.

The victim can be positioned so he or she is facing the practitioner while testifying. The placement of support persons, advocates, and law enforcement behind the practitioner can enhance the victim's sense of security. Defendant's constitutional right to confrontation does not require the victim to be staring at defendant during testimony. Many courts have found no confrontation violations where the testifying victim is seated turned away from defendant.[10] However, the Confrontation Clause does prohibit barriers or seating arrangements where defendant cannot see the victim.[11]

Courtroom aids should be used to help describe the crime and deflect attention and pressure away from the testifying victim. Diagrams, models, charts, maps, photographs, and other types of evidence used to illustrate and explain testimony may be admissible if they are substantially accurate representations of what the victim is endeavoring to describe.[12]

### *Conclusion*

By implementing the above strategies, the practitioner has taken proactive measures to ease victims' concerns and enhance their effectiveness as witnesses.

Many thanks to Heidi Nestel of the Utah Crime Victims' Legal Clinic who co-presented on how to protect victims while testifying at NCVLI's 2007 6th Annual Law & Litigation Conference.

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1 *See ABA Comm. On Domestic Violence summary of DV/SA advocate confidentiality laws* (2007), www.abanet.org/domviol/docs/AdvocatesConfidentialityChart.pdf.

2 *See, e.g.*, 18 U.S.C. § 3509(i); Cal. Code § 868.5; Col. Rev. Stat. § 16-10-401; and Haw. Rev. Stat. § 621-28.

3 *See Sexton v. Howard*, 55 F.3d 1557, 1559 (11th Cir. 1995); *People v. Dablon*, 34 Cal. Rptr. 2d 761, 768-769 (1996); *State v. Suka*, 777 P.2d 240, 243 (Haw. 1989); *Brooks v. State*, 330 A.2d 670, 675 (Md.

Ct. Spec. App. 1975); *State* v. *Dompier*, 764 P.2d 979, 979 (Or. Ct. App. 1988); and *State v. Hoyt*, 806 P.2d 204, 210 (Utah 1991).

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

5 *See* 18 U.S.C. § 3509.

6 *See, e.g*., 18 U.S.C. § 3509(e); *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984); and *Garcia v. Bertsch*, 470 F.3d 748, 754 (8th Cir. 2006).

7 *See Fields v. Murray*, 49 F.3d 1024, 1037 (4th Cir. 1995); *Massachusetts v. Conefrey*, 570 N.E.2d 1384, 1390-91 (Mass. 1991); *State v. Taylor*, 562 A.2d 445, 454 (R.I. 1989); and *State v. Eastbrook*, 842 P.2d 1001, 1006 (Wash. Ct. App. 1993).

8 *See Fields v. Murray*, 49 F.3d 1024, 1037 (4th Cir. 1995).

9 *See, e.g., Navigating the Perils of Pro Se: How to Protect your Client from Cross-examination by a Pro Se Defendant,* Greg Rios, NCVLI NEWS SPRING/ SUMMER 2007.

10 *See United States v. Ellis*, 313 F.3d 636, 649 (1st Cir. 2002) (holding special seating arrangement where the victim testified facing the jury with her back to the defendant did not violate the defendant's right to confrontation where there was evidence of defendant's attempts to intimidate the witness); *People v. Sharp*, 29 Cal. App. 4th 1772, 1781 (1994) (disapproved on other grounds) (holding where prosecutor sat or stood next to witness stand so victim could look away from defense table while she testified did not violate the defendant's right to confrontation); *Brandon v. State*, 839 P.2d 400, 409-410 (Alaska Ct. App. 1992) (holding victim seated perpendicular to defendant did not violate the defendant's right to confrontation); *State v. Hoyt*, 806 P.2d 204, 209 (Utah Ct. App. 1991) (holding defendant's right to confrontation not violated where court allowed prosecution to switch tables with the defense so the victim, while seated in the witness stand, looked directly at the prosecutor); *Stanger v. State*, 545 N.E.2d 1105, 1114 (Ind. Ct. App. 1989) (holding where victim seated at angle toward jury and away from the defendant did not violate right to confrontation); and *People v. Tuck*, 537 N.Y.S. 2d 355, 355 (N.Y. App. Div. 1989) (holding victim seated at table facing jury did not violate the defendant's right to confrontation).

11 *See Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (holding the placement of a screen that prevented two child witnesses in a child abuse case from seeing the defendant while they testified violated the defendant's right to confrontation); *State v. Smith*, 894 P.2d 974, 977 (Nev. 1995) (holding where the prosecutor positioned his body between the child-victim and the defendant during direct examination denied the defendant his right to confrontation); *State v. Casada*, 544 N.E. 2d 189, 196 (Ind. App. 1989) (holding placement of chalkboard between the victim and the defendant violated the defendant's right to confrontation); and *People v. Herbert*, 117 Cal. App. 3d 661, 671 (1981) (holding configuration of the courtroom preventing defendant from seeing victim violated defendant's right to confrontation).

12 *See* 3 Wigmore, Evidence §§ 790-791 (Chadbourn rev. 1970).

Originally published in NCVLI News Winter 2007-2008