

Investigation and Prosecution of Child Abuse

THIRD EDITION



APRI

National Center for Prosecution of Child Abuse



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B. Courtroom Procedures to Assist the Child While Testifying

1. Courtroom Seating Arrangements

The trial judge has wide discretion over courtroom seating arrangements. "Nothing in the law or the Constitution preordains that courtrooms be configured in a particular way, and, so long as the defendant's rights are protected, minor alterations to accommodate children are proper" (*Hicks-Bey v. United States*, 649 A.2d 569 [D.C. 1994]). Generally speaking, positioning the child so that the defendant is not in the direct view of the child does not deny the defendant his right to a face-to-face confrontation as long as a defendant can view the witness. (See, e.g., *Commonwealth v. Sanchez*, 670 N.E.2d 377 [Mass. 1996].) Totally blocking the defendant's view of the child is likely to raise constitutional issues.

The trial judge may have some discretion in where attorneys stand while questioning the child. For example, counsel may be directed to stand at a neutral place in the courtroom while questioning the child.

A miniature chair may be provided to a child so that the child's feet can reach the floor. Sitting in a large chair where her feet cannot reach the floor can be intimidating to a child. If a child wants to sit in the witness box, make sure she can see over the railing of the box. A simple solution is to place an extra cushion on the witness chair.

2. The Use of a Support Person During the Child's Testimony

Many courts follow the provisions of the Child Victims' and Child Witnesses' Rights Act and allow a child to be assisted by another person to provide "emotional support to the child" (18 U.S.C. § 3509[e]). For additional statutes, see Table VI.6.

Sometimes, as with many procedures designed to assist children while testifying, a showing of a "compelling necessity" should be made prior to using a support person. Otherwise, the defense may argue that the support person unfairly bolsters the child's credibility and denies the defendant a fair trial. (See *State v. Suka*, 777 P.2d 240 [Haw. 1989].) Although not all statutes require a showing of necessity, it is certainly prudent to establish on the record a factual predicate and need for a support person. The court can also instruct the jury that no inference should be drawn from the fact that the child has a support person.

A parent may be a poor choice as a support person since it may be difficult to reveal the nature and extent of the abuse in front of a parent. The child's testimony may also be upsetting to the parent. The parent is also likely to be a witness.

If the support person is a prospective witness, most courts will hold that a sequestration order does not preclude the support person from testifying. This is likely a matter of a court's discretion, although some statutes specifically address the issue. It may still be wise to have the support person testify before the child to prevent any issue of prejudice.

It is important to instruct any support person not to lead or prompt the child witness during testimony. Any effort to encourage or affect the child's testimony may well be a basis for mistrial or an appeal.

3. Comfort Items for the Child Witness

Most courts will allow a child to hold a doll, teddy bear, blanket, or some other object that comforts the child. Once again, some courts may require some showing

of necessity before permitting the procedure. However, be careful about having the child hold something that may be distracting, as you do not want the child playing instead of testifying. Also keep in mind that any deviation, however slight, from what you told the child to expect may cause problems. Not being allowed to hold the teddy bear while testifying as you promised may totally disrupt the child's ability to concentrate. Accordingly, file a motion and get the judge to agree that the child can bring a comfort item before pronouncing this to the victim.

4. The Timing of the Child's Testimony and Breaks

Alert the trial court to the possible necessity of frequent breaks or the need to present a child's testimony at a particular time. Prearranged breaks, every 15 minutes for children under five and at longer intervals for older children, relieve the child of the responsibility of asking for breaks. Schedule testimony early in the day instead of during the afternoon session if possible. For young children, it can make the difference between no testimony and great testimony. If the child must wait, try to arrange for someplace other than the courtroom hallway where she can color, play a board game, or read. A calm victim-witness advocate can make waiting much easier.

As the attorney questioning a child, one must be very sensitive to signs that a child is tired, hungry, or needs a comfort break. Be sensitive that the child may have a limited attention span and that direct examination should be limited for that reason. Also, consider asking the judge to take a break before the child is cross-examined so that the child has an appropriate period to rest.

One issue that surfaces during recesses or breaks is the permissibility of the prosecutor discussing the case or testimony with the child or witness. While generally this is permitted, it is appropriate for a defense attorney to cross-examine the witness about the nature of any contact with the prosecutor during the recess or break. If at all possible, a break should be a true break for the child, an opportunity to relax and rest. The purpose of the recess or break should not be to prepare the child for the next round of questioning.

5. Developmentally Appropriate Questions, Oaths, and Silent Objections

With young children, it is appropriate to ask the court to administer an oath the child can understand and to require both the prosecutor and defense counsel to ask questions the child can understand. It may also be wise to have both attorneys object silently by raising their hands instead of their voices. For further information on these motions, see Chapter IV and Appendixes Chapter IV.

