CENTER PIECE

The Official Newsletter of the National Child Protection Training Center

A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment

By Victor I. Vieth[1]

Introduction

Testifying in court is often stressful for children. Numerous studies document that children have very little, if any, understanding of legal processes.[2] The confusing, often intimidating environment of a courtroom is exacerbated when judges and attorneys ask questions the child cannot understand. Even worse, some attorneys purposely ask questions that will confuse the child. In one study, for example, two thirds of the public defenders and one third of the prosecutors admitted questioning children in a manner designed to confuse the child.[3]

In order to protect children from confusing, even abusive practices while testifying, and in order to facilitate testimony that is fair and accurate, there are seven pre-trial motions prosecutors should file in most, if not every case of child maltreatment. Some of these "children's courtroom rights" have been codified into law in one or more states but no state has codified all seven of these rights. The National Association to Prevent the Sexual Abuse of Children is seeking to have each of these provisions codified into law in every state.[4]

Even in the absence of such laws, prosecutors can make a strong argument for a court order that ensures the taking of a child's testimony is sensitive and designed to ensure the accuracy of the evidence provided. Specifically, prosecutors should petition the court for the seven orders.

1. A court order requiring a "child friendly" oath

There is compelling research documenting that, when questioned without regard to developmental considerations, young children are often declared incompetent to testify.[5] It is equally true that when oaths and competency questions are posed in a developmentally appropriate manner, even very young children can articulate the difference between a truth and lie and that it is "bad" to lie in court.[6] Accordingly, the court should order that the administration of an oath to any child witness be done in a manner that is developmentally appropriate.

2. A court order requiring the attorneys to ask questions a child witness can understand

As noted by law school Professor John Myers:

> The linguistic complexity of courtroom banter surpasses anything children hear at home or school. Legal terms that are second nature to attorneys are completely beyond children. Considering children's unpolished language skills, opportunities for miscommunication abound. The judge is in a good position to ensure that attorneys ask comprehensible questions.[7]

Accordingly, judges and attorneys must question children in a developmentally and linguistically appropriate manner.[8] A simple guideline with children under eight "is to use short sentences, one to two syllable words, simple grammar, and concrete, visualizable words."[9]

If a witness could *only* speak Spanish, we would not pose questions in English but would instead provide an interpreter and make other accommodations to allow the witness to understand each of the questions posed. Similarly, we should not question children in a manner they cannot understand.

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It is irrefutable that certain questions are simply beyond a child's developmental and linguistic capabilities. Unfortunately, court and counsel often ask them anyway. Consider, for example, the following two questions posed to children in *actual* trials:

> 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?[10]

Commenting on abusive practices such as these, one commentator notes, "Is it any wonder children get confused? Judges have ample authority 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 a witness."[11]

Unfortunately, judges often fail to rein in such abusive practices and, perhaps unwittingly, sometimes contribute to the problem by themselves asking questions which are difficult for a child to understand.[12]

3. A court order requiring the child's testimony be taken at a time of the day when the child is functioning at her best and that provides the child with developmentally appropriate recesses

As noted by one commentator, "children perform best when they are rested. Up to age of five, many children nap in the afternoon, and, as any parent will testify, a child deprived of her nap is not at her best, behaviorally or intellectually. Whenever possible, therefore, a young child's testimony should be scheduled to accommodate nap time. Testifying in the morning is a good solution for many young children…With school age children, it is usually best to schedule testimony during school hours…a child who testifies following a full school day is a tired child who has spent the better part of the day worrying about going to court."[13]

Noting that educators provide children school recesses as a reflection of the limited attention span of children, Professor John Myers notes, "If children need recess to pay attention in the familiar environs of the classroom, how much more must they need recess during the stressful experience of testifying."[14] With respect to the necessity of judicial involvement in enforcing recesses, Myers notes:

> It is not sufficient to tell a child 'If you want a break, just ask.' Children will not take the initiative to request a recess. Moreover, young children have difficulty monitoring their own needs. A five-year-old is more likely to stop answering questions or cry than ask for a rest. Responsibility falls on the court and counsel to monitor a child's needs.

Appellate courts have found that judges have the authority to recess court proceedings at reasonable intervals.

4. A court order permitting the child to bring a comfort item to the witness stand

A stuffed toy such as a teddy bear often reduces a child's anxiety while testifying. Research documents that these "comforting objects are more than mere toys. They symbolically represent a little bit of a mother's ability to soothe the child when frightened or nervous. Their presence helps children calm themselves when parents are not immediately on hand."[17] If need be, a child should also be permitted to hold a pet or other animal while testifying.[18]

Allowing a child a comfort item, such as a teddy bear, has been upheld in courts of law. In Texas, for example, the defendant was convicted of sexually abusing his seven year old daughter. On appeal, the defendant contended the judge committed error in permitting the child victim to hold a teddy bear while testifying. The Texas Court of Appeals ruled:

> (W)e cannot conclude that the teddy bear constituted demonstrative evidence which engendered sympathy in the minds and hearts of the jury, validated the child-victim's unimpeached credibility, or deprived appellant of his constitutional right of confrontation. Indeed, the same accusation could as reasonably be made of the calculated attire of any witness. Rather, under this record, it seems more rational that the trial court, when faced with the general objection made, permitted the child-victim to retain the stuffed animal as one of the discretionary 'reasonable steps' authorized by the Code of Criminal Procedure in an effort to minimize the psychological, emotional and physical trauma of the child-victim caused by her participation in the prosecution, including her face-to-face confrontation with appellant (emphasis added).

5. A court order allowing the child the presence of a support person

Research shows that the presence of a support person helps children to respond to direct and cross examination questions.[20] Moreover, a number of state legislatures and a "substantial body of case law approves of such support."[21]

To better understand the simple compassion in permitting the child victim a support person, Professor John Myers poses the following scenario. "Imagine," Myers writes, "five-year-old Susie, about to enter the hospital for the first time. Susie is scheduled to undergo an unfamiliar and painful medical procedure. Mother drives Susie to the hospital, stops in the parking lot, opens the car door, and says 'Okay, honey, run along into the hospital and find the doctor. I'll be back in a couple of hours to pick you up. Bye.' Mother drives off, leaving little Susie standing all alone outside the hospital. Preposterous you say? Mother won't do that. She'll walk Susie into the hospital and remain at her side to provide comfort, reassurance, and support."[22]

Just as it would be cruel to deny a child a support person during a difficult medical procedure, Myers' argues it is equally cruel to deny a support person to a child testifying in a case of child abuse. Specifically, Myers writes at "the hospital, emotional support is part of treatment, and parents are partners in therapy. At the courthouse, however, things are different. The tradition in court is that the child must go it alone."[23]

6. A court order prohibiting intimidating questioning

Testifying in court can be extremely stressful for children. As noted by several commentators, "(c)hildren's lack of knowledge of the legal system can lead to unrealistic fears and false expectations about testifying…some children believe that if they make even a minor mistake they will go to jail. Some children are concerned that they might be assaulted by the defendant. On a more realistic level, children express fear of the unknown, of public speaking, embarrassment, loss of control, being yelled at in court, and facing the defendant."[24]

These fears can be exacerbated if counsel raise their voices when questioning a child or presenting argument or otherwise engage in conduct that a child may interpret as an angry confrontation.[25]

7. A court order modifying the courtroom to meet the child's needs

Few, if any, courtrooms were constructed with the needs of child witnesses in mind. Accordingly, the courtroom should be adjusted to fit the needs of the child witness. For example, if a child cannot see over the witness box, the child should be given a pillow or allowed to sit in front of the box. If a child needs a stool to prevent feet from dangling in the air, or any other reasonable accommodation to make him/her feel comfortable, the court should ensure the courtroom is properly equipped to address the child's need.

Commenting on the ability, even necessity of court and counsel to alter courtrooms to accommodate children, law school Professor John Myers opines "(n)othing in 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."[26]

Conclusion

Several years ago, I had the honor of editing and contributing to the manual *Investigation and Prosecution of Child Abuse*.[27] This is the manual of the National Center for Prosecution of Child Abuse – a program of the National District Attorneys Association. In this manual, prosecutors are urged to file pre-trial motions to "modify courtroom procedures and setups that were designed for adults in mind."[28] The manual further encourages pre-trial motions to permit comfort items, to limit the length of the child witness' testimony, and for regular recesses.[29]

As a result of the leadership of the nation's prosecutors in filing these and similar motions, many courts have reined in abusive practices toward child witnesses. Moreover, a number of courts and legislatures have enacted legislation providing for some of these reforms – such as the right to a support person.[30]

Hubert Humphrey once said "Each child is an adventure into a better life – an opportunity to change the old pattern and make it new."[31] Through vigilance in filing motions that will spare child witnesses from intimidating courtroom practices and maximize their ability to provide accurate testimony, prosecutors will change the old pattern of re-victimizing child witnesses.

End Notes

[1] Director, NAPSAC's National Child Protection Training Center

[2] Karen Saywitz, *Children's Conception of the Legal System: Court is a Place to Play Basketball* in PERSPECTIVES ON CHILDREN'S TESTIMONY 131-157 (CECI, ROSS, TOGLIA EDS 1989); Karen Saywitz, et al, *Children's Knowledge of Legal Terminology*, 14 L. & HUM. BEHAV. 523 (1990).

[3] Michael R. Leippe, et al, *The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitnesses:* A Survey in PERSPECTIVES ON CHILDREN'S TESTIMONY 110, 118 (CECI, ROSS, TOGLIA EDS 1989). Recent research from New Zealand also found that "many defence (sic) lawyers use aggressive, misleading cross-examination and play on myths about child abuse to get their clients off." Emily Watt, Courts *'fail child sex-abuse victims'*, THE DOMINION POST, March 31, 2008, available on-line at: http://www.stuff.co.nz/dominionpost/4457525a6479.html (last viewed April 20, 2008).

[4] For more information, visit the NAPSAC website at: www.napsac.us

[5] For a summary of this research, *see* JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES THIRD EDITION section 3.21, *suggestions for questions during competency examinations,* pages 274-283 (Published by Aspen Law & Business).

[6] See Thomas D. Lyon, *Young Maltreated Children's Competency to Take the Oath*, 3(1) AOOLIED DEVELOPMENTAL SCIENCE 16-27 (1999).

[7] MYERS, note 3, at page 14.

[8] *See generally*, Anne Graffam Walker, Ph.D., HANDBOOK ON QUESTIONING CHILDREN 2ND EDITION (1999 published by the ABA Center on Children and the Law).

[9] John E.B. Myers, Karen J. Saywitz, and Gail S. Goodman, *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PACIFIC LAW JOURNAL 3, 63 (1996); See also JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES page 147 (2005 ASPEN PUBLISHRS).

[10] John E.B. Myers, *A Decade of International Reform to Accommodate Child Witnesses*, in BETTE L. BOTTOMS & GAIL S. GOODMAN, EDS, INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN'S TESTIMONY 221, 231-232 (Sage Publications 1996).

[11] Id. at 232.

[12] See e.g. Emily Gurnon & Shannon Prather, *Child as Witness: A challenge for Courts*, PIONEER PRESS, page 1A, 4A, November 12, 2007 (noting the developmentally inappropriate questions posed by a judge during a competency hearing with a child witness). See also, Correy E. Stephenson, *Child Witnesses More Common With Adult Awareness and Education*, LAWYERS WEEKLY USA, October 27, 2003 (quoting one expert as claiming "Where children get hung up, confused or exploited is in the questions adults ask them. You can obtain all the same details from children as (you can from) adults, but using different questions.")

[13] Myers, et al, note 7, at 71.

[14] JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES page 162 (2005 ASPEN PUBLISHRS)

[15] Id.

[16] *See e.g. State v. Hillman*, 613 So.2d 1053, 1058-59 (La. Ct. App. 1993) (trial court did not err when interrupting cross examination when child appeared to be breaking down).

[17] Myers, et al, note 7, at 71, citing Ellen Mathews & Karen J. Saywitz, *Child Victim Witness Manual*, 12 CENTER FOR JUD. EDUC. & RES. J. 5, 34 (1992).

[18] See Allie Phillips, *The Dynamics Between Animal Abuse, Domestic Violence and Child Abuse: How Pets Can Help Abused Children,* 38(5) THE PROSECUTOR 22-28 (Sept/Oct 2004). See also, Amy L. Edwards, *Four Legged Advocates Help Sex Abuse, Violence Victims,* (published August 26, 2006 in the ORLANDO SENTINEL); Associated Press, *Bexar County Allows Dog to Calm Children in Court,* (published September 6, 2006 in the DALLAS MORNING NEWS).

[19] *Sperling v. State*, 924 S.W.2d 722, 726 (Tex. Ct. App. 1996).

[20] Myers, note 7, at 71-73 citing Goodman, et al, Testifying in Criminal Court, 57 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 1 (1992).

[21] *See also* JOHN E.B. MYERS, MYERS ON EVIDENCE IN CHILD, DOMESTIC AND ELDER ABUSE CASES page 157 (2005 ASPEN PUBLISHRS)

[22] MYERS, note 3, at page 54.

[23] *Id.*

[24] Myers, et al, note 7, at 70.

[25] Myers, et al, note 7, at 73. Specifically, Myers and colleagues write: "Children can be quite frightened by raised voices and animated argument. Legal argument that seems quite normal and restrained to the professionals may sound like an angry confrontation to the child. Moreover, because young children view the world from an egocentric perspective, they are likely to assume that arguments between attorneys are a sign that they – the child – did something wrong." *Id.*

[26] MYERS, note 3, at page 36.

[27] INVESTIGATION AND PROSECUTION OF CHILD ABUSE THIRD EDITION (SAGE 2004)

[28] *Id.* at 469.

[29] *Id.* at 469-470.

[30] *Id.* at 464.

[31] ANNE GEDDES, CHERISHED THOUGHTS WITH LOVE (PHOTOGENIQUE PUBLISHERS 2005)

INSIDE the next issue

The December issue of *CenterPiece* will feature an article entitled *Testifying in Court as a Forensic Interviewer.* This article will offer suggestions for forensic interviewers as they present expert testimony in a court of law and in responding to cross examination questions. The article will also discuss the emerging case law on the use of forensic interviewers as expert witnesses.

For More Information

The National Child Protection Training Center (NCPTC) at Winona State University is a training program of the National Association to Prevent Sexual Abuse of Children (NAPSAC). NCPTC provides training, technical assistance and publications to child protection professionals throughout the United States. In addition, NCPTC assists undergraduate and graduate programs seeking to improve the education provided to future child protection professionals. In partnership with CornerHouse, NCPTC also assists in the development and maintenance of forensic interview training programs utilizing the RATAC® forensic interviewing protocol. For further information, contact NCPTC at **507-457-2890** or visit our website at **www.ncptc.org.** For further information about NAPSAC, call **651-340-0537** or visit our website at **www.napsac.us.**

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