

A Trauma-Informed Courtroom



Seven Pre-Trial Motions Child Abuse Prosecutors Should Routinely File¹

By Victor I. Vieth²

Introduction

Testifying in court is often stressful for children. Numerous studies document that children have very little, if any, understanding of legal processes.³ 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.⁴

To protect children from confusing, even abusive practices while testifying, and 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.⁵

¹ This article is a revision of an earlier article from the author entitled *A Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, 1(2) CENTERPIECE (2008). The current article provides additional case law and statutory support and discusses the emerging trend of using a chaplain as a support person or as someone who can address the spiritual needs of maltreated children. The author is grateful to Zero Abuse Project legal externs Caralea Grant and Lauren Munday for their research assistance.

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³ Karen Saywitz, *Children's Conception of the Legal System: Court Is a Place to Play Basketball*, PERSPECTIVES ON CHILDREN'S TESTIMONY 131-157 (Ceci, Ross, & Togliola eds., 1989); Karen Saywitz et al., *Children's Knowledge of Legal Terminology*, 14 L. & HUM. BEHAV. 523 (1990); Rebecca Nathanson & Karen J. Saywitz, *The Effects of Courtroom Context on Children's Memory and Anxiety*, 31 J. PSYCHIATRY & THE LAW 67 (2003).

⁴ Michael R. Leippe et al., *The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitnesses: A Survey*, PERSPECTIVES ON CHILDREN'S TESTIMONY 110, 118 (Ceci, Ross, & Togliola 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 online at: www.stuff.co.nz/dominionpost/4457525a6479.html (last viewed April 20, 2008).

⁵ See, e.g., *People v. Tohom*, 109 A.D.3d 253, 265-266 (2013) ("...the clear mandate of [New York] Executive Law § 642-a is to render the judicial process less threatening to child victims who necessarily become engaged in that process. Hence, the statute sets out specific ways to accomplish its intended purpose, to wit, allowing children to testify 'via live, two-way closed-circuit television,' permitting a 'person supportive of the "child witness"' to accompany the child witness, and allowing the child witness 'to use anatomically correct dolls and drawings during his [or her] testimony'" (internal citations omitted); *State v. Millis*, 391 P.3d 1225, 1234 (2017) ("Although § 13-4442 was not in effect at the time of Millis's trial, it shows the policy of the State of Arizona to accommodate crime victims' use of a dog.").

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 following 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.⁶ It is equally true that when oaths and competency questions are posed in a developmentally appropriate manner, even very young children can articulate both the difference between a truth and lie and that it is "bad" to lie in court.⁷ Accordingly, the court should order that the administration of an oath to any child witness be done in a manner that is developmentally appropriate.⁸

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

Law school Professor John Myers notes that 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 relatively unpolished language skills, opportunities for miscommunication abound, and the court is in a good position to ensure that attorneys ask comprehensible questions."⁹

Accordingly, judges and attorneys must question children in a developmentally and linguistically appropriate manner.¹⁰ A simple guideline with children under eight years old "is to use short sentences, one to two syllable words, simple grammar, and concrete, visualizable words."¹¹

⁶ For a summary of this research, see John E.B. Myers, *Suggestions for Questions During Competency Examinations* § 3.21, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 274-283 (3rd ed. Aspen Law & Business).

⁷ See Thomas D. Lyon, *Young Maltreated Children's Competency to Take the Oath*, 3(1) APPLIED DEVELOPMENTAL SCIENCE 16-27 (1999); Thomas D. Lyon, 15 *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 69, 70 (Michel E. Lamb et al. eds., 2nd ed. 2011).

⁸ See *Jones v. State*, 410 Md. 681, 685 (2009) (affirming competency of victim in child abuse case where the prosecutor attempted to utilize a developmentally appropriate oath, specifically Lyon's "truth v. lie" and morality tasks, despite the child's difficulty in answering rehearsed questions) (citing Thomas D. Lyon & Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (Rev. ed. 2000); Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017, 1048 n.101 (2000)).

⁹ John E.B. Myers, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 141997 (3rd ed.); *Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse*, 4, 13 Army Law. (2013). See generally *State v. Delarosa-Flores*, 799 P.2d 736, 738 (Wash. Ct. App. 1990).

¹⁰ See generally Anne Graffam Walker, Ph.D., HANDBOOK ON QUESTIONING CHILDREN (2nd ed. ABA Center on Children and the Law 1999); Christina Rainville, *Prosecuting Cases for Children on the Autism Spectrum*, ABA: CHILD L. PRAC. TODAY (Apr. 1, 2013), available at www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_32/april-2013/prosecuting-cases-for-children-on-the-autism-spectrum; Christina Rainville, *Prosecuting Cases for Children with Intellectual Disabilities*, ABA: CHILD L. PRAC. TODAY (Dec. 1, 2012), available at www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/december_2012/prosecuting_casesforchildrenwithintellectualdisabilities.

¹¹ John E.B. Myers, Karen J. Saywitz, & 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, 147 (Aspen Publishers 2005).

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.

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:

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?

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?¹²

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."¹³

Unfortunately, judges often fail to rein in such abusive practices and, perhaps unwittingly, sometimes contribute to the problem by themselves asking questions that are difficult for a child to understand.¹⁴

3. A court order requiring the child's testimony be taken at a time of the day when the child is functioning at their 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 five, many children nap in the afternoon, and any parent will testify that a child deprived of naptime is not a happy camper. A young child's testimony should be scheduled to accommodate naptime. 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."¹⁵

Noting that educators provide school recesses as a reflection of children's limited attention spans, Professor John Myers observes, "If children need recess to pay attention in the familiar environs of

¹² John E.B. Myers, *A Decade of International Reform to Accommodate Child Witnesses* 221, 231-232, INTERNATIONAL PERSPECTIVES ON CHILD ABUSE AND CHILDREN'S TESTIMONY (Bette L. Bottoms & Gail S. Goodman eds., Sage Publications 1996).

¹³ *Id.* at 232.

¹⁴ See, e.g., Emily Gurnon & Shannon Prather, *Child as Witness: A Challenge for Courts*, PIONEER PRESS 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.")

¹⁵ John E.B. Myers, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 197 (5th ed. 2011).

the classroom, how much more must they need recess during the stressful experience of testifying."¹⁶ 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.¹⁷

Appellate courts have found that judges have the authority to recess court proceedings at reasonable intervals.¹⁸

4. A court order allowing children 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."¹⁹ If need be, a child should also be permitted to hold a pet or other animal while testifying.²⁰ Children may also wish to use toys such as fidget items to aid in their focus and attention, while improving the child's accuracy and responsiveness of their testimony.²¹

Allowing a child a comfort item, such as a doll²² or teddy bear, has been upheld in courts of law.²³ In Texas, for example, the defendant was convicted of sexually abusing his seven-year-old daughter.

¹⁶ *Id.* at 213.

¹⁷ *Id.* See *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); See also *State v. Vasquez-Ramirez*, 210 So.3d 521, 528-529 (La. Ct. App. 2016) (finding that limiting defense attorney's time to cross-examine child victim still allowed him adequate time to question). *Id.* See also Note: Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses, 14 Nev. L.J. 236, 240 (citing Susan R. Hall & Bruce D. Sales, COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS 66 (2008)).

¹⁸ "...the evidence established a clear basis for granting the Commonwealth's motion for a brief recess. The victim later explained that her earlier reticence in testifying was a result of being embarrassed. The trial judge concluded 'the recess was appropriate to comfort the witness in an admittedly very foreign environment that she was in... [Also,] the recess and the counsel given the child of this age and the circumstances and the environment in which she has testified, was entirely appropriate.'" *Will v. Commonwealth*, 31 Va. App. 571, 580 (2000). *State v. Hillman*, 613 So.2d 1053, 1058-1059 (La. Ct. App. 1993) (finding trial court had authority to interrupt cross examination when child appeared to be breaking down); *Delarosa-Flores*, 799 P.2d 736, 738 (Wash. Ct. App. 1990) (upholding trial court's allowance of "a short recess to consult with the victim and then allowing her to answer leading questions").

¹⁹ Myers et al., note 11, at 71, citing Ellen Mathews & Karen J. Saywitz, *Child Victim Witness Manual*, 12 CENTER FOR JUD. EDUC. & RES. J. 5, 34 (1992); Note: Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses, 14 Nev. L.J. 236, 254 (2013).

²⁰ 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*, ORLANDO SENTINEL (August 26, 2006); Associated Press, *Bexar County Allows Dog to Calm Children in Court*, DALLAS MORNING NEWS (September 6, 2006).

²¹ See Lindsey Biel, MA, OTR/L, *Fidget Toys or Focus Tools?, Sensory Smarts: Autism File* (June 2017), available at www.sensorysmarts.com/AADJun17.pdf; see also National District Attorney Association: National Center for Prosecution of Child Abuse, *A Child Fair Courtroom—Comfort Items*, 2-3 (Oct. 14 2014) available at https://ndaa.org/wp-content/uploads/Comfort_Items_11_7_2014.pdf (discussing how comfort items such as blankets or stuffed animals can calm a child during stressful situations and allow them to communicate more effectively).

²² *State v. Hakim*, 98 P.3d 809, 811 (Wash. Ct. App. 2004) (upholding the trial court's decision allowing the child victim to hold a doll while testifying, due to a "peculiar need to find some security in an otherwise insecure setting").

²³ The majority of courts have held that the prosecution is *not* required to demonstrate "that the item is necessary to facilitate the witness's testimony." *People v. Collins*, 2021 COA 18 (2021) at para. 49; *State v. Devon D.*, 138 A.3d 849, 864 (Conn. 2016). *But see Gomez v. State*, 25 A.3d 786, 798-99 (Del. 2011). See also *People v. Tohom*, 109 A.D.3d 253, 265 (2013); *State v. Dickson*, 337 S.W.3d 733, 743-744 (Mo. Ct. App. 2011) (upholding use of comfort item by child victim after balancing prejudice to the

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:²⁴

[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.

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

Research shows that the presence of a support person helps children to respond to direct and cross-examination questions.²⁵ Moreover, a number of state legislatures and a "substantial body of case law" approve such support.²⁶

To better understand the simple compassion in permitting the child victim a support person, Professor John Myers poses the following scenario:

Imagine 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.

defendant with benefit to the witness, noting that the teddy bear was never used to "engender [the jury's] sympathy"); *State v. Powell*, 318 S.W.3d 297, 304 (Mo. Ct. App. 2010) (upholding use of teddy bear during testimony by 16-year-old).

²⁴ See, e.g., *Sperling v. State*, 924 S.W.2d 722, 726 (Tex. Ct. App. 1996); See also *Powell v. State*, No. 04-04-00683-CR, 2005 WL 1629838 at *2 (Tx. Ct. App. 2005) (citing *Sperling* and noting that trial court's allowance of child victim to hold stuffed toy while testifying was a "reasonable step" in minimizing stress and trauma) (not designated for publication).

²⁵ John E.B. Myers, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 207 (5th ed. 2011). Note: Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses, 14 Nev. L.J. 236, 240 (2013) ("... the support person's attendance can also increase the child's capacity to answer more questions during direct examination, and to provide more consistent testimony about peripheral details during cross-examination. Further, when asked precise questions, a child with a support person is more apt to respond correctly on a more frequent basis, and less apt to recant any testimony during cross-examination.") (citing Am. Bar Ass'n Criminal Justice Section Task Force on Child Witnesses, *The Child Witness in Criminal Cases* 28 (2002) at 31 ("The presence of a parent or loved one was ... associated with children answering more questions during direct examination at trial."); Jennifer Marie Batterman-Faunce & Gail S. Goodman, *Effects of Context on the Accuracy and Suggestibility of Child Witnesses*, CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 301, 321 (Gail S. Goodman & Bette L. Bottoms eds., 1993); Rebecca Nathanson & Karen J. Saywitz, *The Effects of the Courtroom Context on Children's Memory and Anxiety*, 31 J. Psychiatry & L. 67, 89 (2003) (finding that "the greater children's self-perception and perceived social support, the less the anticipatory anxiety they reported and the more often they responded correctly to specific questions").

²⁶ John E.B. Myers, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 207 (5th ed. 2011). A support dog "is not inherently prejudicial, just as [a] support person [is] not inherently prejudicial." *State v. Millis*, 391 P.3d 1225, 1234 (2017) (citing *People v. Chenault*, 227 Cal. App. 4th 1503, 1514 (2014)). Providing support for child victims at trial does not violate a defendant's confrontation rights. See *People v. Collins*, 2021 COA 18 (2021) ("...permitting a witness to testify in the presence of a comfort animal doesn't violate a defendant's confrontation rights," *id.* at para. 45); *People v. Tohom*, 109 A.D.3d 253, 271-73 (2013) (citing the trial court's discretion to "fashion an appropriate measure to address a testifying child witness's emotional or psychological stress, based upon the particular needs of that child"); *State v. Dye*, 309 P.3d 1192, 1194 (Wash. Ct. App. 2013) (rejecting defendant's confrontation challenge based on the use of a support dog).

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. Moreover, the nurses and doctors understand the importance of emotional support for young patients. Unless there is some medical reason to exclude mother during the procedure, she is welcome.²⁷

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 that 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."²⁸

There is a growing body of research documenting that many children are spiritually impacted as a result of child maltreatment.²⁹ This may be because religion was incorporated into the abuse or simply because the child has spiritual questions,³⁰ such as why God did not answer the victim's prayers to end the abuse.³¹ In one case, a child walked into a crowded courtroom, saw her ministers there to support the offender, and openly asked if God was also against her.³²

Given these dynamics, as well as the research finding that spirituality may be an important source of resilience for maltreated children,³³ some child advocacy centers have implemented chaplaincy programs. One purpose of these chaplains is to be a support person for the child if he or she wishes.³⁴

With respect to the use of a facility dog or other animal in support of a child, there is case and statutory law supporting this.³⁵ As one New York appellate court noted, "[W]e perceive no rational reason why...a court's exercise of sensitivity should not be extended to allow the use of a comfort dog where it has been shown that such animal can ameliorate the psychological and emotional stress of

²⁷ John E.B. Myers, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 207 (5th ed. 2011).

²⁸ *Id.*

²⁹ Donald F. Walker et al., *Changes in Personal Religion/Spirituality During and After Childhood Abuse: A Review and Synthesis*, 1 PSYCH. TRAUMA: THEORY, PRAC. & POL'Y 130 (2009); Amy Russell, *The Spiritual Impact of Child Abuse & Exploitation: What the Research Tells Us*, 45 CURRENTS IN THEOLOGY & MISSION 14 (2018).

³⁰ As one survivor writes, "Why did God let me suffer the agonies of [child abuse]? Why did God not intervene when I cried out to him night after night for relief? I have imagined at times my guardian angel pulling on God's sleeve and saying 'Don't you hear little Wesley? Don't you see his pitiful tears? Can't you do something to deliver him from this monstrous evil?'" Wess Stafford, TOO SMALL TO IGNORE: WHY THE LEAST OF THESE MATTERS MOST 158 (2007).

³¹ Victor Vieth & Pete Singer, *Wounded Souls: The Need for Child Protection Professionals and Faith Leaders to Recognize and Respond to the Spiritual Impact of Child Abuse*, 45(4) MITCHELL HAMLIN L. REV. 1213 (2019).

³² Victor I. Vieth, Mark D. Everson, Viola Vaughan-Eden, Suzanna Tiapula, Shauna Galloway-Williams, & Rev. Carrie Nettles, *Keeping Faith: The Potential Role of a Chaplain to Address the Spiritual Needs of Maltreated Children and Advise Child Abuse Multi-Disciplinary Teams*, 14(2) LIBERTY L. REV. 351, 364-365 (2020).

³³ Thema Bryant-Davis et al., *Religiosity, Spirituality, and Trauma Recovery in the Lives of Children and Adolescents*, 43 PROF. PSYCHOL.: RESEARCH & PRACTICE 306 (2012); Terry L. Gall et al., *Spirituality and the Current Adjustment of Adult Survivors of Childhood Sexual Abuse*, 46 J. FOR SCI. STUDY RELIGION 101 (2007); Jungeen Kim, 32 CHILD ABUSE & NEGLECT 711 (2008); Katie G. Reinhert et al., *The Role of Religious Involvement in the Relationship Between Early Trauma and Health Outcomes Among Adult Survivors*, 9 JOURNAL OF CHILD & ADOLESCENT TRAUMA 231 (2016); Ernest N. Jouriles et al., *Divine Spiritual Struggles and Psychological Adjustment Among Adolescents Who Have Been Sexually Abused*, 10(3) PSYCHOLOGY OF VIOLENCE 334 (2019).

³⁴ Victor I. Vieth et al., *Keeping Faith: The Potential Role of a Chaplain to Address the Spiritual Needs of Maltreated Children and Advise Child Abuse Multi-Disciplinary Teams*, 14(2) LIBERTY L. REV. 351, 78-380 (2020).

³⁵ See, e.g., *Michigan v. Johnson*, 889 N.W.2d 513 (2016); *Smith v. Texas*, 491 S.W.3d 864 (Tex. App. 2016); *People v. Spence*, 151 Cal. Rptr. 3d 374, 405 (Cal. Ct. App. 2012) (trial court "appropriately exercised its discretion" by providing a therapy dog in this exercise of "special care to protect [the witness] from undue harassment or embarrassment"). See also *People v. Chenault*, 227 Cal. App. 4th 1503, 1515 (2014) (rejecting defendant's assertion that "the one-sided deployment of a universally beloved animal...unfairly bolsters the prosecution's case by aligning witnesses with a powerful symbol of trustworthiness and vouching for their credibility as victims.").

the testifying child witness.”³⁶ Indeed, at least 17 states have laws in place to allow the use of an animal for witness support. In February, 2021 the American Bar Association passed a resolution urging the passage of statutes and laws allowing facility dogs for witness support.³⁷ The resolution states, “The American Bar Association urges federal, state, local, territorial and tribal governments and foreign governments to enact laws authorizing courts to allow specially trained dogs (called facility dogs) to assist victims/vulnerable witnesses in their participation at any stage of the criminal justice system, including during their testimony in any judicial proceedings, and, to ensure the health and well-being of the facility dogs.” A support animal can assist a child in testimony and protect the child’s rights as a victim.³⁸

6. A court order prohibiting intimidating questioning

Testifying in court can be extremely stressful for children. As noted by several commentators, “Children’s lack of knowledge of the legal system can lead to unrealistic fears and false expectations about testifying.... [S]ome 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.”³⁹ The resulting “anxiety subverts justice,” potentially unfairly impacting the child’s “performance, credibility, and memory.”⁴⁰

These fears can be exacerbated if counsel raise their voices when questioning a child or presenting argument or otherwise engaging in conduct that a child may interpret as an angry confrontation.⁴¹

³⁶ *People v. Tohom*, 109 A.D.3d 253, 265 (2013) (“testimony given...provided ample evidence that [the comfort dog] Rose’s presence alleviated J’s anxiety and allowed her to more easily discuss the conduct which was perpetrated against her”). “... [defendant] contends [the use of a comfort dog] present[s] a nonevidentiary message’ to the jury that the witness is an innocent victim. Other courts have rejected these arguments, as do we.” *State v. Millis*, 391 P.3d 1225, 1234 (2017). “Millis argued in the alternative that he too should be allowed to have a dog with him during trial as a matter of equal protection. ...[W]hen the trial court asked Millis if having a dog with him at trial would actually comfort him, he said he did not think so and he did not need one. The court then denied Millis’s request.” *Id.* at 1233.

³⁷ ABA Int’l L. Section, Gov’t & Pub. Sector Law. Div., *Resolution* (Feb. 2021) (urging the use of specially trained dogs to assist vulnerable witnesses).

³⁸ *State v. Dye*, 309 P.3d 1192, 1194 (Wash. Ct. App. 2013) (concluding that the “trial court acted within its broad discretion when it determined that...the facility dog provided by the prosecutor’s office to the victim...was needed in light of [the victim]’s severe developmental disabilities in order for [the victim] to testify adequately”).

³⁹ Myers et al., note 11, at 70.

⁴⁰ Note: Testifying Minors: Pre-Trial Strategies to Reduce Anxiety in Child Witnesses, 14 Nev. L.J. 236, 244 (2013) (citing *Coy v. Iowa*, 487 U.S. 1012, 1032 (1988) (Blackmun, J. and Rehnquist, C.J., dissenting) (“Thus, the fear and trauma associated with a child’s testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.”).

⁴¹ 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.*

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 their feet from dangling in the air, or any other reasonable accommodation to make them feel comfortable, the court should ensure that 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, "Nothing in the Constitution preordains that courtrooms be configured in a particular way. So long as the defendants' rights are protected, minor alterations to accommodate children are proper."⁴²

Conclusion

Nearly two decades ago, I had the honor of editing and contributing to the manual *Investigation and Prosecution of Child Abuse*.⁴³ In this manual, prosecutors were urged to file pre-trial motions to "modify courtroom procedures and setups that were designed for adults."⁴⁴ The manual further encouraged pre-trial motions to permit comfort items, to limit the length of the child witness testimony, and to allow for regular recesses.⁴⁵

As a result of prosecutors filing these and similar motions, many courts have reined in abusive practices toward child witnesses. Moreover, a number of courts and legislatures have enacted some of these reforms through legislation, such as the right to a support person.⁴⁶

Hubert Humphrey once said, "Each child is an adventure into a better life—an opportunity to change the old pattern and make it new."⁴⁷ Through vigilance in filing motions that will spare child witnesses from intimidating courtroom practices and maximize their ability to provide accurate testimony, prosecutors can change the old pattern of revictimizing child witnesses.

⁴² John E.B. Myers, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE 218 (5th ed. 2011). Courtroom modifications could include "a judge taking off her robe; stepping down from the bench; limiting the number of people in the courtroom; and allowing basic courtroom modifications, such as 'allowing a child to testify while sitting at a child-sized table and chair.'" Comment: Empowering Voices: Working Toward a Children's Right to Participatory Agency in Their Courtroom Experience, 64 BUFFALO L. REV. 609, 611 (2016) (citing Sherrie Bourg Carter, *Child Witnesses in the Courtroom*, in CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 121, 123-24 (2nd ed. 2009).

⁴³ INVESTIGATION AND PROSECUTION OF CHILD ABUSE (3rd ed. Sage Publications 2004).

⁴⁴ *Id.* at 469.

⁴⁵ *Id.* at 469-470.

⁴⁶ *Id.* at 464.

⁴⁷ Anne Geddes, CHERISHED THOUGHTS WITH LOVE (Photogenique Publishers 2005).



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