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When the Child "Freezes" in Court Part One: Prevention

By Tom Harbinson¹

It is common for child witnesses to "freeze," or become unable to communicate, in the courtroom. Many factors contribute to this phenomenon. Each child's emotional state is unique, children differ in age, biologically, and in their resiliency, and each child has different cognitive, developmental, and language abilities. Additionally, the facts in each case are unique, prosecutors have different child interviewing skills, and the child's level of emotional support will vary. The atmosphere in different courtrooms, including actions of the judge, defense attorney, and the defendant's presence, all affect the child's ability to communicate.² Prosecutors and child protection attorneys should always assume that the child will have difficulty in court and plan accordingly.

Preparation Before the Child Takes the Stand

1. *Assess your child interviewing and rapport building skills.*

All prosecutors and child protection attorneys working with children should complete a forensic interviewing course such as *Finding Words* offered by APRI. Asking questions appropriate for the child's developmental level will affect whether the child will be able to understand your questions in order to answer them.

2. *Assess the child's developmental, cognitive, and communication skills.*

In your first meeting, assess the child's developmental, cognitive, and language abilities while establishing a rapport with the child. Join him in an activity such as coloring a picture. After introducing yourself, ask about pets, television shows, activities, books, toys, comfort items, friends, a description of his room, his home, and which persons to whom he feels closest. Is the child talkative or shy? Does he separate easily with caretakers? When you ask him a question calling for free recall, can he give a narrative answer? Does he require focused questions? Does he require directed questions in order to answer?³ When the child has difficulty in court, this information will help you.

3. *Assess the severity of the abuse.*

Was violence used? Was an object or weapon used? Was there physical injury? Were verbal or non-verbal threats made? Is the accused close to the child? What is the length of time during which abuse occurred? Did penetration occur? What is the extent of emotional injury to the child? How much time has passed between when the abuse occurred and when the child will testify? Often, the more severe the abuse, the more traumatic it will be for the witness to testify in

the courtroom.⁴

4. *Assess the Judge.*

Does she control her courtroom? Will she be responsive to motions to require only developmentally appropriate questions? Does she allow for some leading questions on direct with child witnesses? If the judge will not require the child to be treated respectfully, consider filing a motion to remove the judge from your case.

5. *Assess the defense attorney.*

If you have not tried child abuse cases with the defense attorney, talk to other prosecutors or child protection attorneys who have. Obtain transcripts where he has cross-examined children. If he is particularly loud or purposefully intimidating, uses compound, "trick questions," or other abusive techniques, file motions *in limine* to prevent or limit such tactics.⁵ In general, prepare the child for the defense attorney's style.⁶

6. *Assess what courtroom arrangements can be made for the child.*

If the mother is both a prosecution witness and your support person, call her before the child, and also file a motion ahead of time asking that she be allowed to be the support person.⁷ Always ask the child who she would like to have present. Seat that person, if possible, next to the child or in her line of vision. Always sit at the counsel table directly in front of the witness stand so the child will not have to turn her head to look at you. Consider a motion requiring defense counsel to remain seated (the bailiff can show the child defense exhibits), and one requiring silent objections.⁸ If the defendant's family members are present in the courtroom, put them on your witness list and motion for sequestration. Bring a motion that individuals cannot leave or enter the courtroom while the child testifies. Children are easily distracted by such noise.⁹

7. *Assess how much emotional support the child has.*

Meet with the child's caretakers and ask if they support the child's testifying. Ask whether they think the child will be able to talk. Does the child have maternal support? Studies show this is the most important factor in predicting whether a child will be able to testify.¹⁰ If the child does not have maternal support, assess whether another adult close to the child can provide that emotional support.

8. *Assess whether the child will be able to communicate in the courtroom.*

After showing the child where everyone will sit in the courtroom, including the defendant, ask her how she feels about the defendant being present. Ask the child if she will be able to talk about the abuse in court when the accused is present. If she tells you she will be unable to talk, ask her

what you can do to help her feel more at ease.¹¹ Preferably, young children should be scheduled for a time in the morning. Children usually communicate better then.¹²

It is most often the defendant's physical presence that is most distressing for the child.¹³ Explain to the child that, although the defendant is allowed to be in court, he cannot talk, stand up, or get out of his chair. Stress that the bailiff will keep her safe. Under *Crawford v. Washington*,¹⁴ exclusion of the defendant is not possible. You can, however, tell the child she does not have to look at the defendant; she can always look at you or the support person.

9. *Assess the child's emotional state when talking about the abuse.*

Ask the child to describe the abuse, perhaps only once, before she actually testifies. Having a victim-witness coordinator present will allow you to rebut arguments that you influenced the child's testimony. If the child is unable to discuss the abuse with you ahead of time, the child will probably have difficulty in the courtroom. Your coordinator can document any fears expressed by the child. You can later ask the coordinator to testify at a hearing if you bring a motion for special courtroom procedures.

10. *What was the child's emotional state before, during, after the abuse, and while in court?*

Many commentators state that testifying is not traumatizing to children.¹⁵ These conclusions are often beside the point, for most of these studies review long-term emotional effects to the child.¹⁶ It is the child's degree of trauma while she is in the courtroom that will affect her ability to communicate as a witness.¹⁷ Trauma is not caused simply by the child testifying.¹⁸ It is the child's whole experience combined with the defendant's presence—not the defendant's mere presence—which can make testifying traumatizing.¹⁹

You should be familiar with the *Diagnostic and Statistical Manual of Mental Disorders-TR* (DSM-IV-TR), American Psychiatric Association. In this way, if the child has exhibited mental illness symptoms or does not respond well to stressful events, you will be able to make an informed decision about what impact it will have on the child's communication abilities. The odds that your witness may be suffering from Post Traumatic Stress Disorder (PTSD) is significant.²⁰

Ask family members, caretakers, teachers, counselors, doctors, and any therapist the child has seen whether she has ever exhibited any psychological symptoms or responds poorly to stressful events. If a therapist opines that the child would be too traumatized to testify, one option is to continue the case while the child receives therapy. Call the child as a witness once the therapist is confident that the child is able to communicate in court. Another option is to bring a motion pursuant to *Maryland v. Craig*²¹ requesting special procedures for taking the child's testimony. Currently, *Craig* is good law in spite of *Crawford*.

11. *Prepare questions to ask the child.*

Based on your assessments, begin thinking about which questions you will ask in court, their length, in what order you will ask them, and the exact words you will use. Keep questions simple and short. With young child witnesses it is appropriate to write down, ahead of time, the exact words of the questions you will ask. You will need to revise the questions as the child testifies.

Monitor the child's emotional state while the child is in court. If the child is experiencing emotional difficulty, make sure the record reflects it. This can assist an expert, or the court, in opining that the defendant's presence is traumatizing the child. If the child appears to be having a dissociative²² episode, do not keep questioning. Ask for a recess.

Conclusion

Adequate training and background, combined with simple but thorough preparation, can prevent many of the difficult episodes experienced when children freeze on the witness stand.

- 1 Senior Attorney, National Child Protection Training Center, Winona State University, Winona, MN. Children probably are called as witnesses before a jury in Child Protection cases more often than is realized. A few states have statutes allowing parents to demand a jury trial in a Termination of Parental Rights case. See e.g. ARIZ. REV. STAT. § 8-223 (2005); OKLA. STAT. tit. 10, § 7003-3.8 (2005); TEX. FAM. CODE ANN. § 105.002 (Vernon 2004); WIS. STAT. § 48.422 (4) (2005); WYO. STAT. ANN. § 14-2-312 (Michie 2004).
- 2 Child courtroom trauma is best understood as involving the interaction of multiple variable factors resulting in inability to communicate.
- 3 For examples of child development factors see American Prosecutors Research Institute (APRI), INVESTIGATION AND PROSECUTION OF CHILD ABUSE, 22-27 (3rd ed. 2004). Pre-school and developmentally delayed children are usually more susceptible to "freezing" and require focused questions more often than do older children. Physically abused children over process harm associated signals, have cognitive atypicalities, and brain changes affecting attending functioning. See Pollack, Seth, and Tolley-Schell, Stephanie, *Attention, Emotion, and the Development of Psychopathology* in COGNITIVE NEUROSCIENCE OF ATTENTION, Posner, Michael, ed., pp. 364 (2004).
- 4 See Karen Saywitz, *Interdisciplinary Exchange Preparing Child Witnesses: An Interview with Dr. Karen Saywitz*, AMERICAN BAR ASSOCIATION CHILD LAW PRACTICE, vol. 16, no. 11 (January 1998). Little corroborative evidence also increases child stress. Stress can be reduced by limiting the number of interviews, and by asking (in most cases) for a speedy trial. See *id.*
- 5 Harsh cross-examinations can cause trauma. See *id.* Examples of motions can be found in APRI, *supra* note 3 at 272-281.
- 6 For examples of preparing the child for cross-examination, see *id.* at 323-325.
- 7 For a list of statutes and cases regarding support persons see *id.* at 464-466.
- 8 See *id.* at 280, 470.
- 9 See e.g. FED. R. EVID. 611 (a). See generally APRI, *supra* note 3 at 441-442, 469-472.
- 10 See e.g., John E.B. Meyers, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES, sec. 6.2 (3rd ed. 2004).
- 11 See APRI, *supra* note 3 at 320-321.
- 12 See e.g. *id.* at 325-327.
- 13 See John E.B. Meyers, *supra* note 10 at Volume 2, pp. 6 n.21-25.
- 14 541 U.S. 36 (2004). See also Allie Phillips, *A Flurry of Court Interpretations: Weathering the Storm after Crawford v. Washington*, THE PROSECUTOR, vol. 38, No. 6, 37-44 (2004).
So far, courts have not been applying *Crawford's* requirements of confrontation to child protection cases on grounds the Sixth Amendment only applies to criminal cases. See, e.g., *In the Matter of the Children of L.D.*, 2005 Minn. App. Lexis 222 (unpublished opinion) (2005).
- 15 See e.g., Julie A. Lipovsky, *The Impact of Court on Children: Research Findings and Practical Recommendations*, 9 JOURNAL OF INTERPERSONAL VIOLENCE 238-57, 245-246 (1994) ("many (but not all) children find the court process distressing. Effects do not appear to be long lasting").
- 16 For a review of such studies see John E.B. Meyers, *supra* note 10 at sec. 6.2.
- 17 For judges and prosecutors the immediate issue is whether calling the child as a witness will result in trauma rendering the child unable to communicate, and thus, unavailable.
- 18 Relevant studies are ones on the impact of face-to-face confrontation or comparing the effects of testifying in court versus testifying in less intimidating surroundings. Some children are so affected by the defendant's presence in the courtroom the child's ability to speak is compromised. See John E.B. Meyers, *supra* note 10 at sec. 6.2, 9-12.
- 19 See *id.* at sec. 6.4.
- 20 One study found thirty four percent of abused children met criteria for PTSD, cited in Tom Harbinson, *Using the Crawford v. Washington "Forfeiture by Wrongdoing" Confrontation Clause Exception in Child Abuse Cases*, REASONABLE EFFORTS, vol. 1, no. 3, note 32 (2004). Re-traumatization occurs in court because the child with PTSD is trying to avoid stimuli associated with persons or thoughts involved with the trauma. See DSM-IV-TR 309.81. See generally Reginald D.V. Nixon, Richard A Bryant, Michelle L. Moulds, Kim I. Felmingham, and Julie A. Mastrodomenico, *Physiological Arousal and Dissociation in Acute Trauma Victims During Trauma Narratives*, 18 JRNL. OF TRAUMATIC STRESS No. 2, 107 (2005).
- 21 497 U.S. 836 (1990).
- 22 Dissociation involves "particular alterations in phenomenal experience that are related to a disconnection or disengagement regarding the self and/or the environment." Stephen J. Lyn and Judith W. Rhue, eds. DISSOCIATION: CLINICAL AND THEORETICAL PERSPECTIVES, 23 (1994). Dissociation would be evidence, to put on the record, to justify a motion for special courtroom procedures.

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