

Children in the Courtroom: Essential Strategies for Effective Testimony by Child Victims of Sexual Abuse

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I. Introduction

A seven-year-old girl enters the courtroom clutching a stuffed teddy bear and staring at the floor. She is a victim of sexual abuse and is the government's key witness in the case against her abuser. The military judge looks up from her notes and, staring directly at you, says, "Trial counsel, please proceed." What happens over the next hour depends in large part on how well you prepared yourself and the witness for this moment.

This article reviews essential strategies for preparing and conducting an effective direct examination of a child witness. Most of the recommendations apply only to children under the age of ten, although they are based on general principles applicable to all witnesses who are victims of abuse.¹ Part II of the article explains why a prosecutor should begin preparing for the direct examination at the earliest stage of the investigation by working with a multidisciplinary team. Part III discusses an often overlooked but essential stage of trial preparation: building rapport. Part IV then describes how to reduce uncertainty and fear by familiarizing the child witness with the courtroom and courtroom procedure. A description of remote live testimony and other courtroom accommodations follows in part V; then part VI explores how to conduct the direct examination with emphasis on pretrial preparation, administering the oath, building rapport in court, using practice narratives, accomplishing anatomy identification,

and describing abuse. The article concludes with a guide to preparing children for cross-examination.²

II. Early Involvement and the Multidisciplinary Team: Trial Preparation Begins at the Start, Not the End, of the Investigation

Child abuse prosecutors would do well to heed some advice from the medical profession: first, do no harm.³ Abused children suffer far-reaching psychological trauma from having been abused by someone they loved or trusted.⁴ Their families or communities may be torn apart and adults may pressure them to recant.⁵ Their immature minds are suddenly forced to make decisions and deal with feelings that can overwhelm even the most stoic adult victims of crime. The justice system should be the last place to add to their anxieties.

The multidisciplinary team (MDT) approach to the investigation and prosecution of child abuse is designed to reduce the additional trauma that children can experience in the judicial process. "An MDT is a group of professionals who work together in a coordinated and collaborative manner to ensure an effective response to reports of child abuse and neglect."⁶ It consists of representatives from law enforcement, the prosecution, child welfare agencies, the medical and mental health care community, victim advocate services, and guardians *ad litem* or court-appointed special advocates.⁷ The benefits of an MDT are numerous:

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¹ The term "child" is a broad concept that, in its least precise form, refers to any person under the age of 18. However, given that children develop at different paces and that unique circumstances may put a child ahead of or behind his or peers, it is difficult to draw distinct lines between children of different ages. See Kathleen Coulborn Faller & Sandra K. Hewitt, *Special Considerations for Cases Involving Young Children*, in INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE 142, 144 (Kathleen Coulborn Faller ed., 2007). One of the premises of this paper is that there is not a one-size-fits-all solution for preparing a child of any age for direct examination. The prosecutor must design a trial strategy around each individual child taking into account the child's age, maturity, intelligence, developmental abilities, communication skills, environment, and history of abuse among dozens of other factors.

² This article is not intended to be a comprehensive guide to interviewing children about sexual abuse. Prosecutors working in this field should be trained by competent professionals before attempting to talk to children about abuse or conducting a direct examination. See Victor I. Vieth, *When Cameras Roll: The Danger of Videotaping Child Abuse Victims Before the Legal System is Competent to Assess Children's Statements*, 7 J. OF CHILD SEXUAL ABUSE 113 (1999) (recommending that judges, attorneys, police officers, and social workers be trained in the art of speaking to a child including training on linguistics, child development, memory and suggestibility, and the ways in which children disclose abuse).

³ See FRANCIS ADAMS, THE GENUINE WORKS OF HIPPOCRATES TRANSLATED FROM THE GREEK WITH A PRELIMINARY DISCOURSE AND ANNOTATIONS 300 (1849) ("The physician must be able to tell the antecedents, know the present, and foretell the future—must meditate these things, and have two special objects in view with regard to diseases, namely, to do good or to do no harm.").

⁴ Kathryn Kuehnle & Mary Connell, *Managing Children's Emotional and Clinical Needs*, in CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 179, 185 (Michael E. Lamb et al. eds., 2d ed. 2011).

⁵ AM. PROSECUTORS RES. INST., INVESTIGATION AND PROSECUTION OF CHILD ABUSE 1 (3d ed. 2004) [hereinafter APRI].

⁶ MARK ELLS, FORMING A MULTIDISCIPLINARY TEAM TO INVESTIGATE CHILD ABUSE 2 (2d prtg. 2000).

⁷ APRI, *supra* note 5, at xxxiii–xxxiv.

It can reduce the number of interviews a child undergoes, minimize the number of people involved in the case, enhance the quality of evidence discovered in the investigation, make more efficient use of limited resources, educate each agency concerning the needs and interests of the other agencies involved, and minimize the likelihood of conflicts among those agencies.⁸

At least thirty states and the federal government have mandated or authorized joint investigations of child abuse by MDTs.⁹ With such widespread use of MDTs in the civilian community, military prosecutors should have little difficulty finding and working with one.

The MDT's first contact with a victim of child abuse usually occurs at a Child Advocacy Center (CAC) where a specially trained forensic interviewer interviews the child about the abuse.¹⁰ The prosecutor and a law enforcement agent should attend this interview. Many CACs have rooms with one-way mirrors or other technology that allow other professionals to observe interviews with children.¹¹ Prosecutors and investigators should take this opportunity to suggest additional questions to the interviewer in order to develop investigative leads and, as much as possible, to resolve ambiguity about legal elements such as penetration, the time and location of the offense, and the identity of the perpetrator.¹²

By getting involved at this early stage of the investigation, the prosecutor and the investigator minimize the need for additional interviews, thus reducing the number of times that the victim has to relive the abuse by talking about it. After watching the child's interview, the agent should be able to conduct a better interrogation of the suspect¹³ and begin the search for corroborating evidence,

such as receipts, crime scene photographs, school attendance records, weather reports, etc.¹⁴ Prosecutors also benefit by observing early in the process how well the victim is able to remember and communicate about the details of the abuse.¹⁵ This helps the prosecutor to conduct informed pretrial negotiations with the defense¹⁶ and begin to design a direct examination.¹⁷ Before leaving the CAC, the prosecutor and investigator should introduce themselves to the child and the child's caregiver.¹⁸ This brief interaction begins the long process of building rapport and increasing confidence in the judicial process.

Other members of the MDT provide therapeutic and support services to victims of child abuse and their families.¹⁹ A prosecutor should not ignore this aspect of a victim's experience because it plays a critical role in determining how the victim will testify.²⁰ A therapist, for example, may help a child overcome a fear of talking about the abuse or look for warning signs of destructive behaviors like substance abuse, running away, or attempting suicide.²¹ A victim advocate or social worker can help alleviate a family's fears about loss of income, housing, and other military benefits which, if not addressed, could lead to a recantation.²² The child welfare agency can monitor the child's home environment and alert the prosecutor to any

¹⁴ *Id.* at 77.

¹⁵ *Id.* at xli.

¹⁶ *Id.* at 219.

¹⁷ Colin H. Murray, *Nuts and Bolts: Child-Witness Examination*, 31 LITIG. 16, 17 (2005).

¹⁸ APRI, *supra* note 5, at 64.

¹⁹ *Id.* at xxxiii–xxxv.

²⁰ See Gail S. Goodman et al., *Testifying in Criminal Court*, in 57 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 1, 116 (1992) (noting that “when mothers react to the disclosure of abuse with hostility, distance, or preoccupation with others’ needs (i.e., not the child’s needs), their children have more difficulty dealing with the additional stress of legal involvement”).

²¹ U.S. DEP’T OF HEALTH & HUM. SERVICES, TRAUMA-FOCUSED COGNITIVE BEHAVIORAL THERAPY FOR CHILDREN AFFECTED BY SEXUAL ABUSE OR TRAUMA 5–8 (2012), available at <https://www.childwelfare.gov/pubs/trauma/trauma.pdf>; see also MARILYN STRACHAN PETERSON & ANTHONY J. URQUIZA, THE ROLE OF MENTAL HEALTH PROFESSIONALS IN THE PREVENTION AND TREATMENT OF CHILD ABUSE AND NEGLECT (1993), available at <https://www.childwelfare.gov/pubs/usermanuals/menthlth/menthlth.pdf>.

²² U.S. DEP’T OF JUSTICE, BREAKING THE CYCLE OF VIOLENCE: RECOMMENDATIONS TO IMPROVE THE CRIMINAL JUSTICE RESPONSE TO CHILD VICTIMS AND WITNESSES 14 (June 1999) [hereinafter BREAKING THE CYCLE OF VIOLENCE], available at <http://www.ojp.usdoj.gov/ovc/publications/factsheets/pdf/monograph.pdf>; see also Tamara E. Hurst, *Prevention of Recantations of Child Sexual Abuse Allegations*, CENTER PIECE (Nat’l Child Prot. Training Ctr., Winona, Minn.), 2010, at 3, available at <http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7BEDA13E5A-2350-408C-B673-34CAEB3FD7E7%7D.PDF>.

⁸ *Id.* at xxix; see also Felicia Kitzmiller, *Report Calls for Training, Coordination in Prosecuting Child Sex Abuse Cases*, May 28, 2013, available at <http://www.goupstate.com/article/20130528/articles/130529685?p=all&tc=pgall&tc=ar>.

⁹ APRI, *supra* note 5, at xxx; see also 18 U.S.C. § 3509(g) (2009); KY. REV. STAT. ANN. § 431.600 (West 2013); MO. ANN. STAT. § 660.520 (West 2013); GA. CODE ANN. § 19-15-2 (2013); N.Y. SOC. SERV. LAW § 423.6 (McKinney 2013); MD. CODE ANN., FAM. LAW § 5-706(g) (West 2013); TEX. FAM. CODE ANN. §§ 264.403, .406 (West 2012); VA. CODE ANN. § 63.2-1503K (West 2013).

¹⁰ APRI, *supra* note 5, at 237; see also United States v. Paaluhi, 54 M.J. 181, 183 (C.A.A.F. 2000); see generally Kathleen Coulborn Faller, *Forensic and Clinical Interviewer Roles in Child Sexual Abuse, in INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE, supra* note 1, at 3, 3–9.

¹¹ APRI, *supra* note 5, at xli; see also Paaluhi, 54 M.J. at 183 (describing a forensic interview observed by law enforcement agents).

¹² APRI, *supra* note 5, at 41.

¹³ *Id.* at 126, 131–32.

sign that the offender has tried to contact the child or that a non-offending parent or a sibling is pressuring the child to recant.²³ Even chaplains can contribute to the work of the MDT by acting a consultant to a mental health professional, acting as a support person for the child, marshaling resources from faith-based organizations, and advising on cultural issues that are important to the child and her family.²⁴ A prosecutor who works closely with these members of the MDT will be in a better position to eliminate obstacles to the child's participation at trial, explain the dynamics of child abuse to the panel, and present a compelling sentencing case.

The MDT works together at all stages of the investigation and prosecution to achieve two overarching goals: to provide care and support for the victim and to bring the offender to justice. While some members of the team will focus almost exclusively on only one of these goals, neither goal can be achieved without the coordinated response of the entire team. A judge advocate who attempts to prosecute a child abuse case without the help of an MDT risks both a miscarriage of justice and harm to the welfare of the victim.

III. Building Rapport

In ordinary context, "rapport" is defined as "a close and harmonious relationship in which the people or groups concerned understand each other's feelings or ideas and communicate well."²⁵ This definition also applies to the investigation and prosecution of child abuse, but it connotes much more. Rapport is the first step in a widely used forensic interview protocol, RATAC®, developed by CornerHouse, a nonprofit child abuse evaluation and training center in Minneapolis, Minnesota.²⁶ CornerHouse describes rapport this way:

First, an interviewer should establish a child's *comfort* by being aware of and, more importantly, responsive to a child's

²³ N.Y. CITY ADMIN. FOR CHILDREN'S SERVICES, POST-DISCLOSURE/CHILD SEXUAL ABUSE DIVISION OF CHILD PROTECTION GUIDELINES FOR UNDERSTANDING AND ADDRESSING RECANTATION 11-14 (Nov. 10, 2010), available at http://www.nyc.gov/html/acs/downloads/pdf/pub_child_sexual_abuse.pdf.

²⁴ See Victor I. Vieth et al., *Chaplains for Children: Twelve Potential Roles for a Theologian on the MDT*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), 2013, available at <http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/CenterPiece.NL.Vol3.Iss6.pdf>.

²⁵ *Rapport Definition*, OXFORDDICTIONARIES.COM, <http://oxforddictionaries.com/definition/english/rapport> (last visited June 17, 2013).

²⁶ Jennifer Anderson et al., *The CornerHouse Forensic Interview Protocol: RATAC®*, T.M. COOLEY J. PRACT. & CLINICAL L. 193, 258 (2010). For updated information regarding the CornerHouse Forensic Interview Protocol, please visit <http://www.cornerhousemn.org/protocolupdates.html>.

individual needs within the interview setting. Second, an interviewer should become acquainted with a child's unique mode of *communication*, including language skills, emotions, and individual idiosyncrasies. Finally, an interviewer needs to assess the *competence* of each child being interviewed.²⁷

For the forensic interviewer who may have only one encounter with the child, rapport begins and ends with the forensic interview. For the prosecutor, who has numerous encounters with the child, rapport should be incorporated into every meeting from pretrial preparation to direct examination.²⁸ Prosecutors should take advantage of delays in the investigative and judicial processes to meet regularly with the child and the child's caregiver to build a solid rapport. If at all possible, these meetings should take place at the child's home or some other neutral place where the child feels safe and comfortable.²⁹ These meetings build trust and confidence between the child and the prosecutor, which will pay dividends in the crucible of the courtroom.

Early in the rapport phase, the prosecutor should avoid talking about the abuse unless the child brings it up. For the first few meetings the prosecutor and the child should talk about things that interest the child like school, friends, and popular culture. This allows the prosecutor to learn about the child's language skills and speech patterns which, in turn, will help the prosecutor develop a direct examination that is appropriate to the child's developmental abilities.³⁰

The prosecutor should also ask the child open-ended questions about past events like birthday parties or family vacations. This is called a practice narrative or practice interview because it helps the child practice retrieving memories and telling stories in a narrative fashion.³¹ Research has shown that interviewers who use practice narratives obtain more relevant information from children:

After participating in a practice interview, children [as young as three] provided a greater average number of details in response to each question than allegations made in interviews without a

²⁷ *Id.*

²⁸ LYNN M. COPEN, PREPARING CHILDREN FOR COURT: A PRACTITIONER'S GUIDE 59-60 (2000); APRI, *supra* note 5, at 334-35.

²⁹ Murray, *supra* note 17, at 16.

³⁰ See Anderson et al., *supra* note 26, at 215-22 (describing which types of questions are appropriate within developmental age ranges); see also *infra* Appendix B. Permission has been granted by CornerHouse for use of this appendix and is on file with the author.

³¹ Kim P. Roberts et al., *Practice Narratives*, in CHILDREN'S TESTIMONY, *supra* note 4, at 129, 135-36.

practice phase. That is, practiced children were willing to talk longer each time a question was posed. Importantly, interviewers who conducted a practice phase also asked fewer questions in the allegations phase, yet their witnesses provided the most detailed reports.³²

For these reasons, prosecutors should use practice narratives not only during the rapport phase in pretrial interviews, but also any time the child is asked to talk about the abuse including during direct examination.

In choosing a topic for the practice narrative, the prosecutor should select an event that happened only once (e.g., a trip to Disney World) or just one episode of a regularly occurring event (e.g., the child's most recent birthday). This encourages the child to provide details about isolated events and to use specific rather than generalized language ("I had pizza at my birthday party," vs. "I usually have pizza when we go out").

The prosecutor should also use open-ended questions in the practice narrative (e.g., "I would like you to tell me everything you can remember about your last birthday from beginning to end," rather than "Who came to your birthday party?"). Open-ended questions encourage narrative responses and prepare the child for the types of non-leading questions that will be asked on direct examination.³³ They also discourage guessing and invite the child to provide a wealth of detailed information even if the child cannot remember other details like who was at the party or when the party began.

IV. Fear of the Unknown: Teaching Children About Court

Courtrooms and courtroom procedures are completely alien to most children. Such an unfamiliar environment can cause fear and anxiety in any witness, particularly a child. Prosecutors must alleviate this fear by removing the mystery about what happens in a courtroom. Some jurisdictions have created court awareness programs or court schools to teach children what to expect and how to act during a trial. One of the longest running court schools in the country is Kid's Court in King County, Washington.³⁴ Kid's Court teaches children in a group setting about courtroom procedure and personnel, basic legal terms, what to expect when testifying, how to dress and behave in court, and even how to deal with

the stress of testifying.³⁵ The program is designed for children in three different age groups and there is a parallel program for parents or guardians.³⁶ If there is a court school near the installation or the child's home, the prosecutor should request that child court-martial witnesses be allowed to participate.

Court schools are not the only resources available to help prepare children for court. The National Children's Advocacy Center has created an interactive DVD called *Home Court Advantage* that gives a virtual tour of a courtroom, teaches children about common legal terms, explains the roles of different court personnel, and answers frequently asked questions.³⁷ Several online court awareness programs are also available in Canada for both teens and younger children.³⁸

In addition to using a court awareness program, the prosecutor should familiarize the child witness with the particular military courtroom where the child will testify.³⁹ Start with an empty courtroom. Encourage the child to explore the courtroom including the judge's bench, the witness stand, the prosecutor's table, the panel box, and the deliberation room. If possible, let the child see and touch some of the physical items in court like the judge's robe, the gavel, and the court reporter's mask. Let the child use some of the courtroom technology like the microphone, the overhead projector, the dry erase board, and the laser pointer. Describe the roles of the courtroom personnel and explain where they will be during the trial. Do not forget to tell the child that the accused will also be there. Let the child know, however, that the accused cannot talk during the trial and must remain in his seat.⁴⁰ If identity is an issue, do not tell the child where the accused will sit. Practice a simple direct examination by asking the child about something interesting like what happened in school that day or her favorite movie. The goal of the tour is to make the courtroom a familiar place where the child feels safe and comfortable testifying.

³² *Id.*

³³ *Id.* at 136–37.

³⁴ KING COUNTY KIDS' COURT, <http://www.kingcounty.gov/prosecutor/kidscourt.aspx> (last visited May 31, 2013).

³⁵ DONNA BELIN & DEBBIE DOANE, KING COUNTY KIDS' COURT: A CHILDREN'S COURT AWARENESS PROGRAM TRAINING MANUAL AND CURRICULUM 1–3 (1996) available at <http://your.kingcounty.gov/prosecutor/trainingmanual.pdf>.

³⁶ *Id.* at 3.

³⁷ *Home Court Advantage DVD*, NAT'L CHILDREN'S ADVOCACY CTR., <http://www.nationalcac.org/ncac-training/hcs-dvd.html> (last visited June 19, 2013).

³⁸ CORY'S COURTHOUSE, <http://www.coryscourthouse.ca/> (last visited Mar. 15, 2013); CHILD WITNESS COURT PREPARATION, <http://www.childcourtprep.com/> (last visited Mar. 15, 2013); and COURTPREP, <http://www.courtprep.ca/> (last visited Mar. 15, 2013).

³⁹ APRI, *supra* note 5, at 321.

⁴⁰ COPEN, *supra* note 28, at 10.

It is also a good practice to let the child see a courtroom in operation.⁴¹ Choose a trial that will not frighten the child. Let the child watch a witness testify and, during recesses, help the child understand what took place during the oath, direct examination, cross examination, and objections. Explain phrases that the child is likely to hear such as “all rise,” “objection,” “overruled,” and “sustained.” During a break, introduce the child to some of the courtroom personnel. Let the child see you in the uniform you will wear for trial. Explain that the accused and most of the other people in court including witnesses and the panel will wear a similar uniform because they are Soldiers, not because they are on one side or the other. If you intend to have a support person in the courtroom while the child is testifying, show the child where the support person will sit and explain what rules the support person will have to follow.

Court school and the courtroom tour are designed to help the child become familiar with the physical environment in which she will testify and some of the procedures she will see. The prosecutor must be careful, however, not to overwhelm the child with jargon or try to make her an expert in criminal procedure. The prosecutor should also avoid talking about the abuse during the initial tour of the courtroom if at all possible. The tour should be a positive experience to lay the foundation for the more difficult work of preparing for the direct examination.

V. Remote Live Testimony and Other Courtroom Accommodations

A. Remote Live Testimony

One of a child abuse victim’s greatest fears is testifying in front of his or her abuser.⁴² If that fear becomes so great that it prevents the child from testifying, the child should be allowed to give evidence outside the presence of the accused. Remote live testimony is an option that prosecutors should consider in child abuse and domestic violence cases, but they must carefully weigh the pros and cons. Testifying remotely is easier than ever with technologies like Skype™ and built-in laptop webcams. But the prosecutor should ask what, if anything, is sacrificed by using this technology. For example, does the camera pick up those subtle characteristics that make children so likeable and sympathetic: their vulnerability, their physical size in comparison to adults, their eagerness to please, their shy and reserved nature in front of strangers?⁴³ Is the panel able to

see the child use demonstrative evidence like anatomically correct dolls and drawings? Can the panel hear the child? Do cameras intimidate the child because the accused use them to film the abuse? These potential drawbacks of remote live testimony, however, are all outweighed if the child is unable to testify in the presence of the accused.

A judge must allow a child to testify remotely if the judge finds that the child, defined as a person under the age of 16,⁴⁴ is unable to testify in the presence of the accused for any of the following four reasons:

(A) The child is unable to testify because of fear; (B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying; (C) The child suffers from a mental or other infirmity; or (D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.⁴⁵

Although there are circumstances in which a child is unable to testify because of fear, infirmity, or the conduct of the accused, the most common reason for using remote live testimony is the substantial likelihood that the child will suffer emotional trauma.⁴⁶ Usually, this is established at an evidentiary hearing prior to trial through the testimony of a psychologist, social worker, or counselor who has worked with the victim or is at least familiar with the victim’s psychological condition and treatment. The court must find that remote live testimony is necessary to protect the welfare of the particular child witness; that the trauma is more than *de minimis*; and that trauma would result, at least in part, from the presence of the accused, not solely from the experience of testifying in open court.⁴⁷

Once the judge finds that the child is unable to testify for one of the reasons stated in the rule, the child must be allowed to testify from a remote location unless the accused voluntarily agrees to be absent from the courtroom.⁴⁸ The

assault cases varied widely between modes of presentation of the victim’s testimony including face-to-face, closed circuit television, and pre-recorded statements; and concluding that jurors’ pre-existing attitudes, biases, and expectations were more significant factors in juror perceptions than the mode of presentation of testimony).

⁴¹ APRI, *supra* note 5, at 321.

⁴² COPEN, *supra* note 28, at 10.

⁴³ See NATALIE TAYLOR & JACQUELINE JOUDO, THE IMPACT OF PRE-RECORDED VIDEO AND CLOSED CIRCUIT TELEVISION TESTIMONY BY ADULT SEXUAL ASSAULT COMPLAINANTS ON JURY DECISION-MAKING: AN EXPERIMENTAL STUDY 66 (2005), available at <http://aic.gov.au/documents/5/3/4/%7B53472FA7-7F7B-48E8-B0E6-32D816852F89%7DR-PP68.pdf> (noting that perceptions among Australian jurors in adult sexual

⁴⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 611(d)(2) (2012) [hereinafter MCM].

⁴⁵ *Id.* MIL. R. EVID. 611(d)(3).

⁴⁶ See, e.g., United States v. Pack, 65 M.J. 381, 382 (C.A.A.F. 2007); United States v. McCollum, 58 M.J. 323, 328 (C.A.A.F. 2003).

⁴⁷ *McCollum*, 58 M.J. at 329–30.

⁴⁸ MCM, *supra* note 44, MIL. R. EVID. 611(d)(4); R.C.M. 914A (a)(1) and (c).

court must follow certain safeguards, including limiting attendance at the remote location to the child, counsel for both sides, a support person, and equipment operators; using monitors in the courtroom to allow all parties, the panel, the judge, and the public to see the witness; using equipment that allows the voice of the judge to be heard at the remote location; and using equipment that allows private, contemporaneous communication between the accused and counsel.⁴⁹ Even if there is no finding prior to trial to allow remote live testimony, the prosecutor should be prepared to use it at the last minute if fear, infirmity, or the behavior of the accused or defense counsel prevents the child from continuing her testimony during the trial itself. Therefore, the prosecutor should have the proper equipment on hand and ready to use at a moment's notice in any case involving a child.

B. Other Accommodations

Remote live testimony is only one of several accommodations for children in the courtroom. Other accommodations include the use of child-sized furniture, witness screens, support persons, comfort items, and even service dogs. Prior to using any accommodation, the prosecutor should either obtain the consent of the defense or request factual findings from the military judge and a ruling that the accommodation is necessary to protect the child from the trauma of testifying or to facilitate the truth-seeking function of testimony.⁵⁰

Two of the least controversial accommodations are to use child-sized furniture and to allow the child to testify from somewhere other than a traditional witness stand.⁵¹ “Nothing in the Constitution preordains that courtrooms be configured in a particular way. So long as the defendant’s rights are protected, minor alterations to accommodate children are proper.”⁵² Sitting in front of a microphone in a witness stand and staring out at a room full of strangers while being asked to describe a sexual assault is difficult enough for adult witnesses; for children, it can be debilitating. One solution is to have the child testify while sitting with the prosecutor on child-sized chairs around a short table in the well of the courtroom. This minor change has several advantages. First, it creates an environment that

is more familiar to the child. Child-sized furniture is used at schools, daycares, doctors’ waiting rooms, and Child Advocacy Centers. Second, this arrangement reduces the child’s field of vision and distracts her from the more intimidating aspects of testifying. By sitting close to the prosecutor and nearer to the ground in a more familiar setting, the child can forget that she is in a courtroom and that other people, sitting higher up and on the periphery, like the panel and the accused, are watching her very closely. Third, using a small table and chairs in the well of the courtroom allows the witness to concentrate on the prosecutor and any demonstrative exhibits on the table in front of her.

Other environmental accommodations include using a screen that allows the accused to see the child but that prevents the child from seeing the accused,⁵³ allowing the child to enter the courtroom through a side entrance to avoid seeing the accused; and allowing the child to enter and leave the courtroom during breaks while the accused and the panel are outside the courtroom.

Another accommodation is to permit children to testify in the presence of a support person. Federal law allows an adult attendant to accompany the child at all stages of a proceeding, including during the child’s testimony.⁵⁴ In federal district court “the child attendant [may] hold the child’s hand or . . . sit on the adult attendant’s lap throughout the course of the proceeding.”⁵⁵ Several state courts and the District of Columbia have also approved the use of support persons.⁵⁶ The support person should be someone who is not on the witness list and should be carefully instructed not to show emotion during the child’s testimony or do anything that could be construed as suggesting the answer to the child. The support person can be a relative or family friend or a victim advocate or social worker who has spent time with the child outside of court.

Another accommodation is to allow children to hold a comfort item like a stuffed animal or doll while testifying.

⁵³ See *People v. Rose*, 808 N.W.2d 301, 308–18 (Mich. Ct. App. 2010), *cert. denied*, 132 S. Ct. 2773 (2012) (mem.). Neither the Court of Appeals for the Armed Forces nor the service courts of appeals have addressed the issue of witness screens.

⁵⁴ 18 U.S.C. § 3509(i) (2010).

⁵⁵ *Id.*

⁵⁶ See, e.g., *Holmes v. United States*, 171 F.2d 1022 (D.C. Cir. 1948) (allowing nine-year-old to sit on mother’s lap); *State v. Johnson*, 528 N.E. 2d 567 (Ohio 1986) (allowing eight-year-old to sit on aunt’s lap); *Baxter v. State*, 522 N.E.2d 362 (Ind. 1988) (allowing nine-year-old to hold hand of support person); *Soap v. State*, 562 P.2d 889 (Okla. Crim. App. 1977) (allowing seven-year-old to hold hands with support person); *United States v. Brown*, 2012 CCA LEXIS 448, at *17–18 (N-M. Ct. Crim. App. Nov. 28, 2012) (unpublished) (allowing a seventeen-year-old to testify while a victim advocate sat in a nearby chair). Neither the Court of Appeals for the Armed Forces nor the Army Court of Criminal Appeals has addressed the issue of support persons.

⁴⁹ *Id.* R.C.M. 914A (a)(2)–(5).

⁵⁰ *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

⁵¹ BREAKING THE CYCLE OF VIOLENCE, *supra* note 22, at 16; see also *United States v. Williams*, 37 M.J. 289 (C.M.A. 1993) (no violation of the right to confrontation where the accused’s ten-year-old daughter testified from a chair in the center of the courtroom with her side turned toward the accused); *United States v. Thompson*, 31 M.J. 168 (C.M.A. 1990) (no violation of the right to confrontation where the accused’s two sons testified with their backs turned toward the accused).

⁵² JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES 218 (5th ed. 2011).

This accommodation depends upon the particular needs of the child and should only be used where the comfort item would truly help the child overcome a fear of testifying.⁵⁷ Comfort items should not be used as props or gimmicks to make the child appear vulnerable or to elicit an emotional response from the panel.⁵⁸

An emerging area of witness accommodations involves the use of service dogs to accompany children and other victims of abuse to court. The program began in King County, Washington, in 2003 and has spread to seventeen states.⁵⁹ In one case, “Ellie,” a facility dog belonging to the King County Prosecutor’s Office, was allowed to sit at the feet of a developmentally disabled adult witness while he testified in order to reduce the witness’s anxiety.⁶⁰ King County is also using service dogs in forensic and pretrial interviews.⁶¹ In one case involving domestic violence against a woman and her five-year-old son, prosecutors were stymied when the boy refused to talk about the abuse to either a caseworker or a therapist.⁶² Running out of options, prosecutors brought in a service dog. The boy immediately opened up and provided a detailed account of the abuse.⁶³ The use of service dogs has also attracted the attention of researchers. One study of preschool children found that the presence of a service dog during a physical examination resulted in lower heart rates, blood pressure, and behavioral distress.⁶⁴

Whether using comfort items or service dogs, the prosecutor should use common sense and take some general precautions to protect the integrity of the process. First, no child accommodation should be used as a reward.

⁵⁷ *Smith v. State*, 119 P.3d 411 (Wyo. 2005) (fifteen-year-old allowed to hold teddy bear); *State v. Cliff*, 782 P.2d 44 (Idaho Ct. App. 1989) (eight-year-old holding doll upheld); *State v. Hakimi*, 98 P.3d 809 (Wash. Ct. App. 2004) (seven-year-old allowed to carry a doll); *State v. Marquez*, 951 P.2d 1070 (N.M. Ct. App. 1997) (twelve-year-old allowed to hold a teddy bear).

⁵⁸ *State v. Gevrez*, 148 P.2d 829 (Ariz. 1944) (daughter of homicide victim not allowed to testify while holding doll belonging to the mother as it was designed to appeal to the sympathy of jurors); *State v. Palabay*, 844 P.2d 1 (Haw. App. 1992) (harmless error to allow a child to testify while holding a doll where there was no evidence of a compelling need for the item).

⁵⁹ Emily L. Foley, *Creature Comfort: A Former Lawyer Brings Calm to the Courtroom*, O: THE OPRAH MAG., Jan. 2013, at 37; see also Arin Gencer, *Court-System Canine Helps Put Kids at Ease; Victims, Witnesses Open Up to Carroll County Prosecutors*, BALTIMORE SUN, June 2, 2008, at 1A.

⁶⁰ *State v. Dye*, 283 P.3d 1130, 1132 (Wash. Ct. App. 2012).

⁶¹ Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLE POST-INTELLIGENCER, Sept. 3, 2007, at B1.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Sunny L. Nagengast et al., *The Effects of the Presence of a Companion Animal on Physiological Arousal and Behavioral Distress in Children During a Physical Exam*, 12 J. OF PEDIATRIC NURSING no. 6, Dec. 1997, at 323–30.

Prosecutors should avoid saying or doing anything that implies that the child witness will be rewarded with a visit to a service dog or the gift of a coloring book or doll if the child testifies against the accused.⁶⁵ Second, accommodations should be used for a particular purpose designed to assist a particular child witness. The prosecutor should be prepared to justify to the court why a particular accommodation is necessary. Third, accommodations should not be used to create sympathy for the child or to suggest that the accused is guilty. The prosecutor should request limiting instructions ordering the panel to disregard any accommodations. With these guidelines in mind, the judicious use of child-friendly accommodations will improve children’s courtroom experiences and promote the ultimate goal of direct examination to present all the relevant facts to the panel.

VI. The Direct Examination

A. Pretrial Preparation

The direct examination is the culmination of months of investigation and preparation. By the time the child testifies in court, the child should be familiar with how the courtroom is set up, how to take the oath or a developmentally appropriate equivalent, and how to tell a narrative story through practice narratives. Proper pretrial preparation of any witness also includes preparing that witness to give relevant testimony while avoiding objectionable or unfairly prejudicial answers; teaching the witness to answer questions thoroughly and succinctly in order to meet all the legal elements; reminding the witness of previous statements and resolving inconsistencies; and making the witness aware of potential questions on cross-examination.⁶⁶ This kind of preparation is not only good trial strategy; it is common courtesy to the witness. How much to prepare and when to do it is a matter of judgment for the prosecutor in consultation with the multidisciplinary team and the child’s caregiver. Each case will be different depending on the child’s age, attention span, intelligence, and maturity. The prosecutor should let the child know why it is necessary to prepare for trial, ask how she feels about it, and address all of her questions or concerns.

B. The Oath

The direct examination itself begins with an oath to testify truthfully.⁶⁷ For most children aged ten and older, the

⁶⁵ James M. Wood & Sena Garven, *How Sexual Abuse Interviews Go Astray: Implications for Prosecutors, Police, and Child Protection Services*, 5 CHILD MALTREATMENT 109, 110 (2000).

⁶⁶ APRI, *supra* note 5, at 323.

⁶⁷ MCM, *supra* note 44, MIL. R. EVID. 603.

prosecutor can use the same oath that adult witnesses take.⁶⁸ For younger children or children with developmental disabilities, the prosecutor should design an oath that will “impress on the particular child the importance of telling the truth.”⁶⁹ There is no formula; the oath can be as simple as a promise to tell the truth and an acknowledgment from the witness that there are negative consequences for lying.⁷⁰ For example, “Do people get in trouble for lying? Do you promise to tell the truth?”

Judges, prosecutors, and investigators sometimes ask children to explain what it means to tell the truth or to distinguish between the truth and a lie.⁷¹ Although this line of questioning is not uncommon, it is not a prerequisite for testifying.⁷² If a child has trouble distinguishing between the truth and a lie or between reality and fantasy, the child’s confusion goes to the weight of the testimony, not its admissibility.⁷³ Scientific evidence supports this result: “Research has demonstrated that eliciting an age-appropriate oath from children (such as ‘Do you promise that you will tell the truth?’) increases children’s honesty even among children who fail truth-lie competency tasks.”⁷⁴

Nevertheless, asking a child to demonstrate that she knows the difference between the truth and a lie can enhance

⁶⁸ See *id.* R.C.M. 807(b)(2) discussion (F). The requirement to take an oath should not be confused with competence. Every person, except the military judge and members of the court-martial, is competent to be a witness as long as that person has personal knowledge of the matter or is testifying as an expert. *Id.* MIL. R. EVID. 601, 602, 605, 606, 702. Age, by itself, is not a sufficient basis for challenging the witness’s competence. *United States v. Lemere*, 16 M.J. 682, 686 (A.C.M.R. 1983); see also FED. R. EVID. 601 advisory committee’s note (“A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence.”); 18 U.S.C. § 3509(c)(4) (2009) (“A child’s age alone is not a compelling reason [to conduct a competency examination in U.S. federal district court].”).

⁶⁹ *United States v. Washington*, 63 M.J. 418, 425 (C.A.A.F. 2006); see also MCM, *supra* note 44, MIL. R. EVID. 603 (the oath should be “in a form calculated to awaken the witness’s conscience and impress the witness’s mind with the duty to do so”); R.C.M. 807(b)(2) (requiring an oath that “appeals” to the witness’s conscience).

⁷⁰ *Lemere*, 16 M.J. at 686; see also *United States v. Morgan*, 31 M.J. 43, 47–48 (C.M.A. 1990) (describing how a prosecutor struggled to administer the oath to a four-year-old witness but nonetheless satisfied Military Rule of Evidence 603).

⁷¹ See, e.g., *Washington*, 63 M.J. at 424; *United States v. Johnson*, 49 M.J. 467, 474 (C.A.A.F. 1998); *United States v. Hollis*, 54 M.J. 809, 814 (N-M. Ct. Crim. App. 2000); *United States v. Marshall*, 52 M.J. 578, 580 (N-M. Ct. Crim. App. 1999).

⁷² See *Morgan*, 31 M.J. at 47 (“We have never suggested that children might be incompetent to testify based on some general inability to understand an oath or affirmation to tell the truth.”).

⁷³ *Lemere*, 16 M.J. at 686.

⁷⁴ Thomas D. Lyon, *Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law*, in CHILDREN’S TESTIMONY, *supra* note 4, at 69, 80 (citations omitted).

her credibility with a panel or judge. With this purpose in mind, Dr. Thomas Lyon has developed a demonstrative aid that consists of a series of truth-lie tasks and morality tasks.⁷⁵ It allows the child to demonstrate not only that she knows the difference between the truth and a lie, but that she knows there are negative consequences for lying. Dr. Lyon’s method has the added benefit of putting child witnesses at ease during their testimony by appealing to their desire to show adults that they can answer the questions correctly.⁷⁶

C. Rapport-Building and the Practice Narrative

After the oath, the prosecutor should use the rapport-building strategies discussed above.⁷⁷ This includes having the child provide basic biographical information like name, age, and family structure. The prosecutor can help the child create visual depictions like “face pictures” and “family circles” to convey biographical information about the child and her family.⁷⁸ These simple drawings help the interviewer and the child communicate more effectively:

Drawings can assist in building rapport with a child because drawing, typically, is an engaging activity and is an appropriate tool of communication with all ages of children. Also, drawings can reduce the intensity of the interview process. Engaging the child in creating a visual work, like a drawing, can remove direct focus from the child; as a result, the child becomes more relaxed and information-gathering is enhanced.⁷⁹

If the abuser is someone who is related to the child or lived with the child, a diagram of the child’s family can later help the panel understand the relationship between the child

⁷⁵ Thomas D. Lyon & Karen J. Saywitz, *Qualifying Children to Take the Oath: Materials for Interviewing Professionals* (May 2000) (unpublished), <http://works.bepress.com/thomaslyon/9/>. A sample of Dr. Lyon’s materials is reproduced in Appendix A. Permission has been granted by Dr. Thomas D. Lyon to use of this appendix and is on file with the author.

⁷⁶ This assertion is based on the author’s recent professional experiences as the Special Victim Prosecutor for Maryland, Virginia, and the Military District of Washington, U.S. Army Legal Services Agency, from 8 August 2010 to 31 July 2012 [hereinafter Professional Experiences]. The author used Dr. Lyon’s demonstrative aid in courts-martial in 2011 and 2012 with three child witnesses, one of whom had a developmental disability. All three children answered the truth-lie tasks and morality tasks correctly. Two of the children spontaneously expressed a desire to answer the questions again. A prosecutor intending to use Dr. Lyon’s demonstrative aid should submit it to the military judge and defense counsel prior to trial to allow the judge to rule on any defense objections.

⁷⁷ See *supra* Part III.

⁷⁸ Anderson et al., *supra* note 26, at 268.

⁷⁹ *Id.*

and the accused. The family circle, however, should not be used during the rapport phase to identify the abuser unless the child brings it up spontaneously.⁸⁰ As with any demonstrative exhibit, drawings by a child or prosecutor should be marked for identification and the prosecutor should state on the record what exhibit the child is using.

After eliciting some biographical information, the prosecutor should use a practice narrative.⁸¹ Practice narratives during the direct examination accomplish the same goals as they do in rapport including putting the child at ease, encouraging narrative responses, and “strengthen[ing] the child’s ability to provide more candid and detailed accounts of abuse later in the interview.”⁸² According to one researcher, using practice narratives during the direct examination can reduce a child’s anxiety while improving the quality of her testimony:

Preliminary questions about innocuous topics in court would allow the child witness to acclimate herself to the courtroom and to relax before the topic of interest is introduced. Through a series of open-ended questions asking the child to elaborate on her narrative (e.g., “You said you hit a piñata. Tell us what happened next” or “You said you played in a bouncy. Tell us about playing in the bouncy”), the attorney could accustom the child to provide a chronological narrative without the need for leading or closed-ended questions.⁸³

D. Anatomy Identification

The next step in the direct examination should be anatomy identification. The purpose of anatomy identification is to demonstrate a young child’s ability to differentiate between genders and to understand the child’s vocabulary for different body parts.⁸⁴ Anatomy identification requires the use of anatomical diagrams depicting unclothed male and female children. The prosecutor should choose diagrams that reflect the age, ethnicity, and physical development of the child. The prosecutor should mark the diagrams as prosecution exhibits for identification and,

working from the head down, ask the child to identify major body parts including the breasts, genitalia, and buttocks. As the child identifies the body parts, the prosecutor should label the body parts on the diagram. The prosecutor should offer the exhibit into evidence only after the prosecutor is finished labeling it.

Children have a variety of different names for body parts, particularly the genitalia, breast, and buttocks. The prosecutor should always use the terms that the child uses and never attempt to correct the child or ask the child to use a clinical term in place of her own. The prosecutor should use the term exactly as the child uses it, even if that means temporarily suspending the rules of anatomy and grammar. The author once was involved in a case in which a five-year-old girl referred to the buttocks as “front butt” and the vulva as “butt.”⁸⁵ Without an anatomical diagram, the child and the attorneys would have been talking about two different types of contact and thus two different offenses.

E. Describing the Abuse

Once the prosecutor and the child have established a common vocabulary for body parts, it is time to ask about the abuse. In the RATAAC® protocol, this portion of the interview is called the Touch Inquiry and Abuse Scenario.⁸⁶ There are as many ways to begin the touch inquiry and abuse scenario as there are ways to disclose abuse. Each child’s disclosure and circumstances are different and the prosecutor should take these differences into account when designing a direct examination about the abuse. The prosecutor should consult the multidisciplinary team, especially the forensic interviewer or social worker, to craft questions that will elicit relevant information without being unnecessarily suggestive or leading.

One method used in forensic interviews is the touch survey in which the child is asked about different touches including “hugging, tickling, spanking, hitting, and private touches.”⁸⁷ Another method is to use anatomical diagrams to ask the child whether she has ever seen or touched, for example, someone else’s penis or buttocks or whether someone else has ever seen or touched hers.⁸⁸

⁸⁰ *Id.*

⁸¹ See *supra* Part III.

⁸² Anderson et al., *supra* note 26, at 272.

⁸³ Lyon, *supra* note 74, at 73.

⁸⁴ Anderson et al., *supra* note 26, at 273. Anatomy identification is generally used with children under the age of ten, although it may be used with older children to clear up any confusion about anatomical terms that arises during the direct examination. *Id.* at 274.

⁸⁵ Professional Experiences, *supra* note 76.

⁸⁶ Anderson et al., *supra* note 26, at 290.

⁸⁷ Julie Kenniston & Erna Olafson, *Feelings Faces and Touch Survey Instructions*, THE CHILDHOOD TRUST FORENSIC INTERVIEW TRAINING 177 (Aug. 2004).

⁸⁸ John C. Yuille et al., *Interviewing Children in Sexual Abuse Cases*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING CHILDREN’S TESTIMONY 95, 107 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

The touch inquiry and abuse scenario must be specific to the child's perception of the abuse. Using a generic question to begin the inquiry can have disastrous results. For example, a child abuse victim may answer "no" when asked if she has ever been given a bad touch. Not all child abuse victims think of sexual contact as a bad touch. The abuser may have convinced the child that the sexual touching was good or for a non-sexual purpose like bathing or playing a game. This does not mean that a prosecutor should never ask about bad touches. If the child told her teacher, for example, that her cousin gives her bad touches, that might be an appropriate way to begin the touch inquiry. In any event, the prosecutor must design the touch inquiry to elicit an appropriate response based on the child's individual circumstances.

The prosecutor should use open-ended questions that invite the child to say as much as possible about the abuse.⁸⁹ For example, "You said that Joe put his private part in your private part. Tell me everything you can remember about the time that Joe put his private part in your private part." "[I]f the child struggles to respond or cannot respond, the questions can then be rephrased into a more specific question or into a multiple-choice question."⁹⁰ Acceptable questions include, for example, "Did Joe ever do anything to your mouth?" or "Did you see Joe that day at school or at the house or somewhere else?"⁹¹ The prosecutor should also use "scaffolding" to help a child retrieve memories of an event and tell a coherent story:

"[S]caffolding" could assist developmentally immature children's retrieval of memory information. By asking a series of detail-oriented questions—"Did you do anything when you were at that house?" "What did you do?" "Was someone there when you did [what the child reported]?" "Who was there?"—the interviewer offers "cues" or "cognitive supports" that allow the child to access his or her memory. This process is perceived to be developmentally appropriate because . . . even very young children are believed to possess the capacity for recognition memory through the use of scaffolding.⁹²

Scaffolding and focused questions can help the child reach the limits of her memory and ability to observe,

⁸⁹ SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 100 (2005).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Anderson et al., *supra* note 26, at 208.

leaving it up to other witnesses and physical or documentary evidence to fill in any gaps. Such evidence is crucial in any child abuse trial because children, particularly those who have been abused repeatedly, often do not have the capacity to understand time, frequency, duration, geographical location, age, and other factors that are necessary to prove jurisdiction and the elements of the offense. Prosecutors should think creatively about linking an element of the child's testimony with other evidence that together can fill a gap. For example, if a child knows that the abuse happened when she was in first grade, the prosecutor can use school records or the mother's testimony to establish when the child was in the first grade.

VII. Cross-Examination

Two common fears that children have about testifying are being subjected to harsh questioning and being accused of lying.⁹³ The prosecutor can help the child witness manage these fears by thoroughly preparing the child for cross-examination. As with other aspects of trial, the first step in confronting fear is reducing uncertainty. "Some young children believe that they will go to jail if they give the 'wrong answer,' or that the defendant will yell at them."⁹⁴ The prosecutor should explain that cross-examination is a normal part of every trial and that it is designed to help the accused by showing that a witness is confused, mistaken, biased, or lying.⁹⁵ The prosecutor should tell the child what questions the defense counsel might ask and encourage the child to answer them during pretrial preparation.⁹⁶ The prosecutor should emphasize to the child that "I don't know" and "I don't understand" are acceptable answers.⁹⁷ The prosecutor should also explain that if a lawyer asks a question more than once, it does not mean that she got the answer wrong or that she should change her answer. The prosecutor should tell the child that the child's job is to always tell the truth and that she should correct the attorneys or the judge if they say something that is untrue while they are asking a question.⁹⁸ Finally, the prosecutor should

⁹³ COPEN, *supra* note 28, at 10; John R. Spencer, *Evidence and Cross-Examination*, in CHILDREN'S TESTIMONY, *supra* note 4, at 285, 301.

⁹⁴ 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 PAC. L.J. 3, 59 (1996).

⁹⁵ See BLACK'S LAW DICTIONARY 433 (9th ed. 2009) ("The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony.").

⁹⁶ APRI, *supra* note 5, at 323–24.

⁹⁷ COPEN, *supra* note 28, at 109.

⁹⁸ *Id.*

explain that lawyers and judges can sometimes be grumpy but that it has nothing to do with the witness.

The prosecutor should use objections and pretrial motions to ensure that cross-examination does not unfairly frighten or confuse the child.⁹⁹ The prosecutor should file pretrial motions as early as possible before trial so that the prosecutor knows what rules will apply and prepare the child accordingly.¹⁰⁰ For example, the prosecutor should ask the court to require counsel to use developmentally-appropriate language when questioning a child.¹⁰¹ The prosecutor should also insist that counsel speak gently in the presence of the child and refrain from using intimidating gestures, facial expressions, or pacing.¹⁰² The prosecutor should also ask for regular breaks during a child's testimony both for the child's comfort and to avoid overwhelming the child's limited attention span.¹⁰³

The prosecutor then designs a space where the child can testify effectively by surrounding the child with accommodations. In the direct examination, the prosecutor uses developmentally appropriate language, diagrams, drawings, practice narratives, scaffolding, and focused questions to help the child tell the panel or judge about the abuse. Finally, the prosecutor prepares the child to withstand cross-examination while asking the court to protect the child from harassment and intimidation. Within this framework, the prosecutor will advance the twin goals of child abuse prosecution: to see that justice is done and to safeguard the welfare of the child.

VIII. Conclusion

An effective direct examination of a child requires preparation, planning, and patience. Preparation begins with a multidisciplinary team of professionals that are dedicated to conducting a thorough investigation while protecting the welfare of the child. The foundation of the direct examination is the rapport between the prosecutor and the child, which includes building trust while learning about each child's unique circumstances and individual needs. The prosecutor builds on this foundation by teaching the child about court and reducing fear and anxiety about testifying.

⁹⁹ The military judge has the authority to limit cross-examination "so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." MCM, *supra* note 44, MIL. R. EVID. 611(a).

¹⁰⁰ Victor I. Vieth, *A Children's Courtroom Bill of Rights: Seven Pre-Trial Motions Prosecutors Should Routinely File in Cases of Child Maltreatment*, CENTER PIECE (Nat'l Child Prot. Training Ctr., Winona, Minn.), 2008, available at <http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7B4D59E999-6CB5-4F95-8302-95FD8BD5823A%7D.PDF>.

¹⁰¹ See *State v. Dwyer*, 149 Wis. 2d 850, 440 N.W.2d 344 (1989) (discussing the need to question children in a language they understand); see generally, ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN (2d ed. 1999); see also Myers et al., *supra* note 94, at 63 ("A simple guideline with children under age eight is to use short sentences, one to two syllable words, simple grammar, and concrete, visualizable words.").

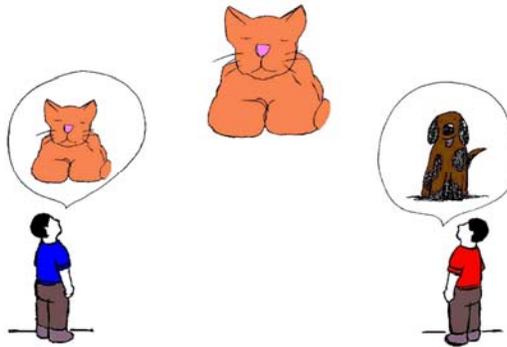
¹⁰² See Myers et al., *supra* note 94, at 73 ("Children can be quite frightened by raised voices and animated argument. . . . [B]ecause young children view the world from an egocentric perspective, they are likely to assume that arguments between attorneys are a sign that they—the child—did something wrong.").

¹⁰³ See *id.* at 70 ("It is not sufficient to tell a child, 'If you want a break, just ask.' Most children cannot take the initiative to request a recess.").

Appendix A

Qualifying Children to Take the Oath: Materials for Interviewing Professionals¹⁰⁴

TRUTH VS. LIE TASK



Here's a picture. Look at this animal--what kind of animal is this?
OK, that's a [child's label].

LISTEN to what these boys say about the [child's label]. One of them will tell a LIE and one will tell the TRUTH, and YOU'LL tell ME which boy tells the TRUTH.

(point to boy on the left) THIS boy looks at the [child's label] and says "IT'S a [child's label]."
(point to boy on the right) THIS boy looks at the [child's label] and says "IT'S a PUPPY."

Which boy told the TRUTH? (correct answer is boy on the left.)

MORALITY TASK



Here's a Judge. She wants to know what happened to these boys.
Well, ONE of these boys is GONNA GET IN TROUBLE for what he says, and YOU'LL tell ME which boy is GONNA GET IN TROUBLE.

LOOK [child's name],

(point to left boy) This boy tells the TRUTH.

(point to right boy) This boy tells a LIE.

Which boy is GONNA GET IN TROUBLE? (correct answer is boy on the right)

¹⁰⁴ Lyon & Saywitz, *supra* note 75.

Appendix B

Guidelines for Age-Appropriate Questions¹⁰⁵

Age of Child	Who	What	Where	When	Structured Report	Contextual Details
3	██████████		██████████			
4-6	██████████			██████████		██████████
7-8	██████████					██████████
9-12	██████████					██████████
11-12	██████████					

¹⁰⁵ Anderson et al., *supra* note 26, at 215-16 (“[T]he black areas denote types of information children in the corresponding age group would typically have the ability to provide. The gray areas denote types of information that children in the corresponding age group might or might not be able to provide.”).