CSHB

323

SENATE COMMITTEE REPORT

FURTHER

DATE TURNED INTO OFFICE 5/5/88

4/15/88
Mr. President:

FINANCE Committee considered CSHB 323 (JUD)

testimony of children in certain crinal proceedings; efd

and recommended

[ ] replace with ___ CS_____)[] same title
[ ] or adopt _____ CS_____)[] new title

[ ] attached amendment(s) and

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

[ ] letter of intent adopted _____

Committee [ ] attached or [ ] adopted fiscal note(s)
[ ] new [ ] updated or [✓] previous
[ ] zero [ ] fiscal impact 140.8

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

NO REC

Rick Halford NO REC
Chairman signature and recommendation

[ ] Committee Backup attached

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 323 (JUD)
PUBLISH DATE: HOUSE 3/17/88

FISCAL NOTE

No. 3

REQUEST:

Revision Date: _____
Title: "An Act relating to testimony of children in certain criminal proceedings..."
Sponsor: House Judiciary
Requestor: Representative Swackhammer

Agency Affected: Department of Law
BRU: Prosecution
Components: First, Second, Third, and Fourth Judicial Districts

235

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	82.2	82.2	82.2	82.2	82.2
SUPPLIES						
EQUIPMENT	-0-	58.6	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	140.8	82.2	82.2	82.2	82.2
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	140.8	82.2	82.2	82.2	82.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: March 15, 1988

Richard L. Pegues /FOR/

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Date: March 15, 1988
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

This bill adds new sections to AS 12.45 that provide for alternative methods for taking the testimony of a child in certain criminal proceedings (AS 11.41) in which that child was the victim or is to be a witness. The bill provides that closed circuit television, one-way mirrors or other spatial arrangements may be used in these proceedings so that a child's testimony may be viewed by the defendant, the court, and the finder of fact, but which also provides that the child does not have visual contact with the defendant and jurors.

The Department of Law believes that alternative methods for taking the testimony of a child, in those cases where normal court procedures would result in the child's inability to reasonably communicate, can be accomplished in three ways. One, closed circuit television would be used routinely at Anchorage, Fairbanks, and Juneau, when isolation of the child is required. If necessary, a modified closed circuit televised method would be used only occasionally at other locations. Two, a one-way mirror or perforated one-way screen method could be used routinely at most other locations when isolation of the child witness from the defendant or jurors is required. Three, use of child-size furniture for the child witness would be appropriate at all locations when it becomes necessary to schedule the proceeding in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age.

Use of closed circuit television at Anchorage, Fairbanks and Juneau would be contracted out to private vendors. Video/audio communications from the victim/witness to the defendant, the court and the trier of fact would be required. Private audio communciation between the defendant and the defendant's counsel would also be required. The department estimates that about four hours of testimony will occur at each pretrial or trial proceeding. The department also estimates that a total of two hours of setup/takedown time will also be required for each proceeding, including vendor's chargable travel time. It is estimated that contracted costs for operator(s), audio/visual equipment, and cabeling will be $300 per hour, at these three locations.

Occasional use of a modified audio/visual method at other locations, using video recordings of testimony, and involving rental of a video camcorder and monitors, is estimated to $600 per year at each of the department's other locations. This cost is based upon three days rental, at $200 per day, of one camcorder, defense audio equipment, and monitors at each location. Operation of the equipment would be handled by existing Department of Law paralegals.

Use of one-way mirrors or some other method that provides one-way sight so that the witness may be viewed by the defendant and the jurors, but which prevents the witness from viewing the defendant and

the jurors, will require the manufacture or fabrication of freestanding (or attachable) portable, safe, and easily stored viewing/ screening devices. Thus far, the department has not been able to locate regularly manufactured devices of this nature. However, freestanding partitions providing a 96" x 96" "L" barrier, with two plexiglass 48" x 48" view areas retail for $1,890. Substitution of a one-way mirror, or other device, would probably cost $2,000 at a minimum. Devices of this type are not easily nor safely transported between locations by air carrier. For this reason, the cost for one-way screening devices at each of our district attorney office locations is included in this fiscal note request.

The cost of child furniture, at $150 for a table and chair, is included for each location, except Anchorage costs are for three sets, and Fairbanks costs are for two sets.

During FY 1987, 346 child sexual assault cases were referred to the department. Of this number, 125 cases, or 36% of the total number of cases referred, were declined. It is estimated that about 40% of the declined cases, or 51 complaints, would have been accepted for prosecution had the alternative child testimony methods, contained in this bill, been available to prosecutors. Moreover, due to the obvious trauma experienced by some child witnesses, it would have been appropriate to use the bill's alternate testimony methods on twenty or more occasions in cases that were accepted for prosecution.

A schedule is attached that details the cost of contractual services and equipment that will be necessary for the department to implement this bill.

No. 3
CSHB 323 (JUD)
HOUSE 3/17/88

Fiscal Note Analysis CSHB 323 (Jud.)

Court Room Close Circuit/Screening
Criminal Division

Office	Type	Cases	---One-Time--- Screen Jury	Screen Defendant	Furniture	Rental/ Contractual	Annual cost	73000 Contractual	75000 Equipment
Juneau DAO	CC	6	2000	2000	150	10800	14950		
Ketchikan DAO	SC	2	2000	2000	150	600	4750		
Sitka DAO	SC	2	2000	2000	150	600	4750		
First Judicial:		10	6000	6000	450	12000	24450	12000	12450
Barrow DAO	SC	3	2000	2000	150	600	4750		
Kotzebue DAO	SC	1	2000	2000	150	600	4750		
Nome DAO	SC	2	2000	2000	150	600	4750		
Second Judicial:		6	6000	6000	450	1800	14250	1800	12450
Anchorage DAO	CC	24	2000	2000	450	43200	47650		
Bethel DAO	SC	3	2000	2000	150	600	4750		
Dillingham DAO	SC	2	2000	2000	150	600	4750		
Kenai DAO	SC	4	2000	2000	150	600	4750		
Kodiak DAO	SC	3	2000	2000	150	600	4750		
Palmer DAO	SC	5	2000	2000	150	600	4750		
Valdez DAO	SC	2	2000	2000	150	600	4750		
Third Judicial:		43	14000	14000	1350	46800	76150	46800	29350
Fairbanks DAO/4th	CC	12	2000	2000	300	21600	25900	21600	4300
Grand Total:		71	28000	28000	2550	82200	140750	32200	58550

CC = Closed circuit: 1800 Per case
SC = Screen: 2000 One-Time
Rental $ 200 per day 600 based on three day average
Furniture/set 150 Children size

Offered: 3/14/88
Referred: Finance

5-1233L

Original sponsor: Swackhammer

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 323 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to testimony of children in certain criminal proceedings; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. PURPOSE. It is the purpose of this Act that, in providing alternative methods for taking the testimony of a child in certain criminal proceedings in which that child was the victim or is to be a witness, the legislature is acting

(1) to balance the need for the victim's or witness's testimony against the right of the defendant to confront witnesses;

(2) to mitigate the mental and emotional distress that may arise as the child is required to testify; and

(3) to minimize possible victim harassment by limiting the opportunities for unnecessary examination of the child by the parties' counsel.

* Sec. 2. AS 12.45 is amended by adding a new section to read:

Sec. 12.45.046. TESTIMONY OF CHILDREN IN CRIMINAL PROCEEDINGS. (a) In a criminal proceeding under AS 11.41 involving the prosecution of an offense committed against a child under the age of 13, or witnessed by a child under the age of 13, the court

(1) may appoint a guardian ad litem for the child;

(2) on its own motion or on the motion of the party presenting the witness or the guardian ad litem of the child, may order that the testimony of the child be taken by closed circuit television or

through one-way mirrors if the court determines that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate.

(b) In making a determination under (a)(2) of this section, the court shall consider factors it considers relevant, including

(1) the child's chronological age;

(2) the child's level of development;

(3) the child's general physical health;

(4) any physical, emotional, or psychological injury experienced by the child; and

(5) the mental or emotional strain that will be caused by requiring the child to testify under normal courtroom procedures.

(c) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the defendant, the court, and the finder of fact in the proceeding. If the court authorizes use of closed circuit televised testimony under this subsection,

(1) each of the following may be in the room with the child when the child testifies:

(A) the prosecuting attorney;

(B) the attorney for the defendant; and

(C) operators of the closed circuit television equipment;

(2) the court may, in addition to persons specified in (1) of this subsection, admit a person whose presence, in the opinion of the court, contributes to the well-being of the child.

(d) When a child is to testify under (c) of this section, only the court and counsel may question the child. The persons operating the equipment shall do so in as unobtrusive a manner as possible. If the defendant requests, the court shall excuse the defendant from the courtroom, shall permit the defendant to attend in another location, and shall afford the defendant a means of viewing the child's testimony and of communicating with the defendant's attorney throughout the proceedings. Upon request of the defendant or the defendant's attorney, the court shall permit a recess to allow them to confer. The court shall provide a means of communicating with the attorneys during the questioning of the child. Objections made by the attorneys to questions of a child witness may be resolved in the courtroom if the court finds it necessary.

(e) If the court determines under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures would result in the child's inability to effectively communicate, the court may authorize the use of one-way mirrors in conjunction with the taking of the child's testimony. The attorneys may pose questions to the child and have visual contact with the child during questioning, but the mirrors shall be placed to provide a physical shield so that the child does not have visual contact with the defendant and jurors.

(f) If the court does not find under (a)(2) of this section that the testimony by the child victim or witness under normal court procedures will result in the child's inability to effectively communicate, the court may, after taking into consideration the factors specified in (b) of this section, supervise the spatial arrangements of the courtroom and the location, movement, and deportment of all persons in attendance so as to safeguard the child from emotional harm or stress.

In addition to other procedures it finds appropriate, the court may

(1) allow the child to testify while sitting on the floor or on an appropriately sized chair;

(2) schedule the procedure in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age; and

(3) order a recess when the energy, comfort, or attention span of the child warrants.

* Sec. 3. AS 44.21.410(a) is amended by adding a new paragraph to read:

(6) provide guardian ad litem services in proceedings under AS 12.45.046.

* Sec. 4. AS 12.45.047 and 12.45.048 are repealed.

* Sec. 5. AS 12.45.046, enacted by sec. 2 of this Act, is retroactive and applies in criminal proceedings involving the prosecution of an offense committed before the effective date of this Act.

* Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

No. 2

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: CSHB 323(JUD)
PUBLISH DATE: HOUSE 3/14/88

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to testimony of children in certain...proceedings...
Sponsor: Swackhammer
Requestor: House Judiciary

Agency Affected: Public Safety
BRU: Council on Domestic Violence and Sexual Assault
Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Executive Director
Phone: 465-4356
Division: Council on Domestic Violence and Sexual Assault
Date: 3/9/88

Approved by Commissioner: Dave A. Hoetzki Dep. Comm.
Date: 3-10-88
Agency: Public Safety

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

BILL NO: CS for HB323 DATE: March 10, 1988

TITLE: An Act relating to testimony of children in certain criminal proceedings; and providing for an effective date.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic
Violence and
Sexual Assault

DEPARTMENT OF PUBLIC SAFETY / DIVISION OF STATE TROOPERS

CS for HB323 (Judiciary) has a very important purpose; to provide alternative methods for taking the testimony of child victims or witnesses in certain criminal proceedings. It is recognized that testifying in court can be very traumatic for a child unless modifications are made in current court procedures. While the Council supports the intent of this bill, there are two problems which need to be addressed before the Council could support this bill.

1) In (a) of proposed Section 12.45.046 (page 1,line 26) any party to the case may move to have the child's testimony taken by closed circuit television or through one-way mirrors if the court determines that taking testimony under normal court procedures would result in the child's inability to reasonably communicate. While the section is intended to provide protection for child victims, it has the potential for abuse as it would allow the defendant to move to have the child's testimony taken in private in instances when the child is able to testify and the testimony would have great impact on the jury and the court. This section should be changed to limit the motion to the party who presents the child as a witness or the child's guardian ad litem.

2) In subsection (f) (page 3, lines 18+) the court may allow changes in the spatial arrangements of the courtroom and the location, movement and deportment of all persons in attendance. Three options the court may pursue are presented. The Council recommends adding another subsection stating "and other measures the court determines appropriate." The Council is concerned that the options presented might be viewed as limiting the court's options in tailoring the courtroom setting to fit the circumstances. It is important that this legislation does not close existing avenues or prevent innovations not considered which would reduce trauma to the child.

The Council on DVSA would support CS for HB323 (Judiciary) if the amendments recommended above were made.

Arthur English
Commissioner

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CSHB 323(JUD)
Publish Date: HOUSE 3/14/88

Revision Date: 03/14/88
Title: An act relating to testimony of children in certain criminal cases
Sponsor: Swackhammer
Requestor:

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars) OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						
FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact. See attached analysis.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 03/14/88

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 03/14/88
Agency: Alaska Court System

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management & Budget
- Impacted Agency(ies)
- Senate Secretary

ALASKA COURT SYSTEM

- FISCAL ANALYSIS

Because the video equipment and operators necessary to implement this bill are to be provided by the Department of Law, the court system's fiscal note for this committee substitute is zero.

SECTIONAL ANALYSIS

SECTION 1: States the purpose of the act when providing alternative methods for taking testimony from children in certain criminal proceedings. The main purpose is to minimize a child's trauma or emotional stress when facing the defendant in a criminal proceeding under AS 11.41, particularly sexual abuse cases.

SECTION 2: Adds a new section to Title 12 (AS 12.45.046) regarding the testimony of children in criminal proceedings. In criminal proceedings involving the prosecution of an offense committed under AS 11.41 against a child under the age of 13. or witnessed by a child under the age of 13, the court
(1) may appoint a guardian ad litem for the child;
(2) on its own motion, the motion of the party presenting the witness or the guardian ad litem may order the testimony of the child be taken by closed circuit television or through one way mirrors if the court determines the child's testimony would result in the child's inability to effectively communicate.

When making a determination whether or not to use closed circuit television testimony, the court must consider relevant factors including
(1) the age of the child;
(2) the child's level of development;
(3) the general physical health and any emotional, physical or psychological injury the child may have experienced; and
(5) the mental or emotional strain caused by the child having to testify under normal court proceedings.

If the court decides to use closed circuit television, it may order that testimony be taken in a room other than the courtroom and be televised by closed circuit equipment to be viewed by the defendant, the court and the finder of fact in the proceeding. If the court authorizes the use of closed circuit television testimony, only the prosecuting attorney, the defendant's attorney and operators of the closed circuit equipment may be present when the child testifies. In addition, the court may allow a person whose presence contributes to the well being of the child to be in the room when the child testifies.

Only the court and counsel may question the child if closed circuit testimony is used. The persons operating equipment must do so in as unobtrusive manner as possible. The defendant, upon request, will be excused from the courtroom and have the ability to view the child's testimony in another location and have the means to communicate with the defense attorney throughout the proceedings. A recess will be permitted, upon request of the defendant's attorney or the defendant, to allow them to confer. During the questioning of the child, the court will provide a means of communications with the defendant's attorney. Objections made by the attorneys to questions imposed on the child may be resolved in the courtroom if the court finds it necessary.

The court may also authorize the use of one way mirrors while taking the child's testimony. The attorneys may question the child and have visual contact during the questioning but the mirrors will be placed in such a way that a shield is situated so the child does not have visual contact with the defendant.

In the event the court does not allow the use of closed circuit television or one way mirrors, it may supervise the spatial arrangements of the courtroom and the location, movement and deportment of all persons in attendance to safeguard the child from emotional harm or stress. The court may make other appropriate arrangements it deems necessary during the questioning of the child.

SECTION 3: A technical amendment that cross references in Title 44, the use of a guardian ad litem in proceedings under section 2 of the bill.

SECTION 4: Repeals two statutes, AS 12.45.047 and AS 12.45.048, that provided for videotaping of testimony and the exclusion of the public during testimony of young victims of sexual abuse.

SECTION 5: Makes section two retroactive and applies in criminal proceedings involving the prosecution of an offense committed before the effective date of this bill.

SECTION 6: Provides the bill takes effect immediately.

EVIDENTIARY AND PROCEDURAL TRENDS IN STATE LEGISLATION AND OTHER EMERGING LEGAL ISSUES IN CHILD SEXUAL ABUSE CASES

A paper by the

National Legal Resource Center for Child Advocacy and Protection

Child Sexual Abuse
Law Reform Project

American Bar Association
Young Lawyers Division
Washington, D.C. - April, 1985

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Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases

Josephine A. Bulkley, Esq.
Project Director
Child Sexual Abuse Law Reform Project
National Legal Resource Center
for Child Advocacy and Protection
American Bar Association

General Discussion of Trends

Since the early 1980's, a number of states have undertaken statutory reform efforts to improve the handling of child sexual abuse cases in the legal system. Legislative reform in a few areas had begun earlier, including a trend to abolish the corroboration requirement and to abolish competency tests for children.[1] For example, in 1981, a dozen states had eliminated competency qualifications of child witnesses; by 1985, almost half of the states had made this change, nearly twice the number of states in a four year period. The reasons motivating the recent reform movement seem to be the greater awareness and reports of child sexual abuse, the increasing number of cases being prosecuted and children who must be witnesses in court, and wide circulation of the ABA's Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases with a range of suggestions regarding state legislative action and other innovations in legal intervention. An additional reason for some of the reforms relates to changes in attitudes regarding children and their abilities.

The new legislation is designed to serve three basic purposes - to modify legal procedures to be more sensitive to child victims, to improve prosecution and conviction rates, and to provide treatment in special programs for the offender, child and family. The literature is replete with documentation by mental health clinicians, child welfare professionals, prosecutors, children's attorneys, and other legal experts that children suffer additional psychological harm by insensitive legal procedures.[2] Moreover, until recent years, criminal proceedings often were not initiated (particularly in incest cases) due to a variety of reasons, including lack of eyewitnesses or physical evidence and perceptions that children were not credible witnesses.[3] Finally, since the 1970's a number of specialized incest treatment programs have developed around the country, some of which were funded for several years

by the National Center on Child Abuse and Neglect to provide training to professionals in other jurisdictions. These programs vary in terms of treatment philosophy and their involvement with the legal system. Although the effectiveness of programs that provide alternative dispositions for offenders and their families should be explored, this paper only deals with reforms to minimize trauma and improve prosecutions.

This paper will deal with two areas that have generated a significant amount of legislative activity -- special hearsay exceptions for complaints of sexual abuse by child victims and videotaping or closed-circuit television procedures for taking a child's testimony outside the courtroom. Legislative efforts in other areas, such as videotaped interviews, competency, expert testimony, civil protective orders or many other ideas outlined in the ABA's Recommendations are not examined here. These and other areas will be analyzed at the ABA's March, 1985 National Policy Conference on Legal Reforms in Child Sexual Abuse Cases and in the Conference report. Appendix A, however, contains a list of states that have adopted statutes in the following areas: videotaped testimony, closed-circuit television testimony, videotaped interviews, special hearsay exceptions, and abolishment of competency requirements.

As some researchers suggest, new research relating to children in the legal system would be helpful in a number of areas.[4] These include the effects of pretrial investigation and the trial itself on the child's performance as a witness; determining what factors may make some children more vulnerable, e.g., age, type of abuse, relationship of child to perpetrator, threats, young age, sex; determining what aspects of the legal process (such as repeated pretrial questioning, delays, testifying in open court, or in front of the defendant) cause greatest trauma, inhibit reporting, or contribute to a child's retraction or refusal to testify; and what if any are the long term effects of legal intervention on children. Nevertheless, the experience of numerous professionals throughout the country who have frequent contact with children is sufficient to justify the recent legislative reform movement.

In 1981, the National Center on Child Abuse and Neglect (NCCAN) reported that the average age of a child victim of sexual abuse was between 11 and 14 years of age; however, it also was noted that more recent program information showed a higher percentage of children under age 12, and one program showed that 1/3 of the victims were under age six.[5] Recent revelations about sexual abuse of pre-school age children in child care forces us to accept the fact that very young children are at risk. Further, it must now be acknowledged that in addition to parental sexual abuse, a significant amount of sexual abuse is committed by adults outside of the home.

These new problems also raise new legal concerns. In cases involving offenders who are not parents, such as teachers, day care providers, or babysitters, the criminal justice system is more likely to be involved than when the offender is a parent. Although more incest cases also are being prosecuted in many jurisdictions, a juvenile court child protection proceeding sometimes is the only legal intervention in an incest case. Even if criminal prosecution occurs in an incest case, a special program may exist for offenders who plead guilty, where they may obtain specialized treatment along with the child and family under a sentence of work-release or probation.[6] The child in a non-incest case therefore probably has a greater chance of having to testify in a criminal proceeding, since more prosecutions and fewer guilty pleas are likely. Further, in cases with young victims, there may be greater problems in proving the abuse and greater trauma to the child.

Although one may accept the need to reform laws and legal procedures, the assumptions and purposes underlying proposals need to be examined, and the legal and practical consequences should be analyzed thoroughly before states adopt innovative approaches. It is wise to proceed with caution in order to protect against reversals of convictions by appeals courts based on a statute's unconstitutionality, to prevent backlash and failure of legislatures to enact reforms for fear they will be found unconstitutional by the judiciary, and to ensure that reforms are narrowly drawn to apply only in cases where it has been shown that a particular child would be injured by a particular legal procedure.

Generally speaking, therefore, a state may want to consider adopting a range of legislative alternatives that permit a court to decide "on a case-by-case basis whether the state's legitimate concern for the well-being of the minor victim necessitates"[7] the use of a particular approach. As the U.S. Supreme Court stated in Globe Newspaper Co. v. Superior Court, a case-by-case determination "ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest."[8] In addition to avoiding constitutional challenges, whether they involve the first amendment or the rights of a defendant in criminal trials, a statute that provides "a narrowly tailored means of accommodating the state's asserted interest"[9] also assures that an approach is used only when clearly necessary. In Globe Newspaper, mandatory closure of the courtroom during the testimony of child sexual abuse victims in a criminal trial was held to be overly broad, since it would apply whether or not the victim sought to have closure and even if the victim would not suffer injury if the proceeding was open to the press or public.

Indeed, research and clinical evidence suggests that children, like adults, react differently to being victimized and react differently to the aftermath and the judicial process.[10] In addition, mandating an approach for all children could be interpreted as degrading. Although efforts should be made to protect children, efforts also should be directed to treating them equally as adults, where appropriate. For example, reform laws abolishing competency requirements for children reflect such an attitude.

Another issue relating to the development of reforms for child sexual abuse victims is whether it might be wiser to enact them as part of a broader package of special procedures for any victim of crime who is shown to have specific vulnerabilities or who is likely to be psychologically harmed by particular legal procedures. On the one hand, concern for safeguarding the well-being of young victims may justify special treatment; on the other hand, many other potentially vulnerable populations, such as elderly persons, adult persons who have a history of psychiatric problems, or adult persons who were victimized in an extremely traumatic crime also may deserve special procedures to reduce the trauma they experience in the criminal justice system.

Although it might be better for states to develop a comprehensive legislative scheme for all vulnerable crime victims, this approach seems unlikely to happen. First, legislatures tend to deal with single issues and to consider laws that address a specific current problem. Second, it seems improbable that the reforms proposed in child sexual abuse cases could be justified for a much larger category of all vulnerable crime victims. Still, the idea of developing special procedures by statute only for young victims may lead other groups to lobby for similar reforms.

Moreover, perhaps a more significant issue for research involves the need to study and compare the effects of victimization and legal intervention on a variety of crime victims. One risk with establishing special approaches for child witnesses without procedures available for other witnesses is that a social policy of special treatment for a particular group necessarily excludes other potentially eligible groups in society. If children do not suffer greater harm than certain other crime victims, or if other criminal cases are equally difficult to prove, it seems unwise to develop approaches solely for children. Thus, for example, in the area of special hearsay exceptions, it may be questioned whether initial statements of young victims should receive special evidentiary status more than statements of other victims in cases which are difficult to prove.

A final suggestion for future development of innovations is to consider limiting their use to young victims, such as children under ten years of age. Many statutes that provide for testimony by videotape or television cover children up to 16, 17 or 18 years of age.[11] This would eliminate a lot of children who may be traumatized, but it may be one method of ensuring that special approaches are used only in the most serious cases or extraordinary circumstances.

State Legislation Creating a Special Hearsay Exception for a Child's Complaint of Sexual Abuse

One evidentiary reform attracting attention by state legislatures is the creation of a special exception to the hearsay rule to permit a child victim's complaint of sexual abuse to be admitted into evidence. Traditionally, such a statement is hearsay and may not be admitted to prove the truth of the assertion unless it falls within an existing hearsay exception. State codes include a variety of exceptions for admitting these statements, including the following: (1) excited utterances or res gestae; (2) statements to physicians; (3) statements of present bodily feelings or symptoms or present sense impressions; (4) necessity exception; (5) prior consistent statements (if the child is available to testify); and (6) residual exception.[12] A child's prompt complaint also may be admitted not as proof of the truth of the statements but to corroborate the child's in-court testimony to rebut an inference of silence inconsistent with the abusive act.[13] Nevertheless, some states have not adopted all the above exceptions[14], and even with a range of traditional exceptions, a child's statement may not meet the strict requirements of a particular exception.

Because of the need for such statements as evidence, since direct evidence or other circumstantial evidence may be minimal, and because a statement may not fit within an existing exception, ten states have adopted by statute a special hearsay exception. (See Appendix A for list of States). Although the language and organization of the provisions vary, most statutes allow a child victim's statement to be admitted if: (1) either the child testifies or is found to be unavailable; and (2) the court finds the statement to be reliable. Illinois only allows such statements to corroborate the child's in-court testimony. Iowa allows statements to be admitted only in juvenile court child abuse adjudication proceedings and does not require unavailability or reliability.

Four statutes (Indiana, Minnesota, South Dakota, and Washington) require corroboration or other evidence of the act, in addition to requiring unavailability of the child and reliability of the

statement before the statement may be admitted. The purpose of requiring other evidence in addition to the statement when the child victim's testimony is not available is to prevent a conviction based upon evidence of the child's statement's alone. The appropriate statutory language should be that after a court finds both unavailability and reliability, and admits the statement into evidence, there may not be a conviction unless other evidence exists in addition to the child's statement. As discussed below, this may not be necessary, since a prosecution is unlikely to be commenced with only the child's statement. On the other hand, a state may want to include this requirement to ensure that defendants receive a fair trial.

Under the new exceptions, if the child testifies at trial, the prior statement can be admitted as substantive evidence; however, the child's testimony is sufficient to convict without the statement, and the statement merely serves to corroborate the in-court testimony. In cases where the child cannot testify, the necessity for these statements is much greater. Situations where the child may not be able to testify include cases involving extremely young victims (such as two or three-year olds) who may not be able to communicate or remember what happened to them, or other children who would be highly traumatized emotionally from testifying or intimidated by the defendant into not testifying.[15] As noted above, the problem with these cases, is that if the child does not testify and the sole evidence is the victim's out-of-court statement, it is unlikely that the state would bring a case. But where circumstantial evidence in addition to the statement is available, a prosecutor could decide that there is sufficient evidence to convict the defendant beyond a reasonable doubt.

Despite the hope that these new exceptions bring toward increasing the number of prosecutions and convictions, in cases where the child does not testify and is not subject to cross-examination, admissibility of statements under the new exceptions may be jeopardized under the confrontation clause of the sixth amendment. The confrontation clause has been interpreted as a rule of preference for "face-to-face confrontation at trial," requiring the "personal presence of the witness at trial, enabling the trier to observe his demeanor as an aid in evaluating his credibility and making false accusation more unlikely because of the presence of the accused and the solemnity of the occasion."[16] If, however, the declarant's live testimony in court cannot be obtained, principles of necessity and public policy have been invoked to admit some hearsay statements.[17]

It would be not enough, however, for the prosecutor simply not to call or produce the child victim to testify at trial. Indeed, the U.S. Supreme Court in the 1980 decision of Ohio v. Roberts held that to satisfy the confrontation clause, the "prosecution must

either produce, or demonstrate the unavailability, of the declarant whose statement it wishes to use against the defendant."[18] Thus as noted earlier, if the child is available and testifies at trial, the statement may be admitted under a special exception as a prior consistent statement with no further inquiry. When the child is not produced as a witness, however, two requirements must be met under Ohio v. Roberts. In addition to unavailability the statement must possess indicia of reliability, which is discussed in greater detail later.

Most of the new hearsay exceptions require a showing of the declarant's unavailability before the statement may be admitted. Traditional categories of unavailability include death, absence, physical disability, mental infirmity or insanity, failure of memory, refusal to testify, privilege, or supervening disqualification.[19] Unavailability of the witness at trial also is a requirement for admitting hearsay under certain traditional exceptions, including dying declarations, statements against interest, and former testimony. (Most exceptions allow hearsay to be admitted even if the declarant does not testify at trial).

There is, however, a higher standard of unavailability for constitutional purposes. The Supreme Court has addressed the issue only in the context of a declarant's absence from the jurisdiction, holding that the prosecution must make a "good faith effort" to obtain the presence of the witness at trial.[20] The Court also has indicated that the "lengths to which the prosecution must go to produce the witness is a question of reasonableness."[21] Until the Supreme Court decides the issue, this is the only guide for courts in deciding what is a sufficient showing of unavailability to satisfy the confrontation clause.

In child sexual abuse cases, a child is likely to be unavailable under the categories of mental infirmity (psychological harm),[22] failure of memory[23], refusal to testify (based on threats of harm to the child by the defendant)[24], and incompetency.[25] Courts also sometimes have established a special type of unavailability for very young child sexual abuse victims who cannot be meaningfully cross-examined although they are present at trial and take the witness stand.[26] Thus, prosecutors may be able to obtain admission of statements both in cases where the child does not take the witness stand at all, or where the child "freezes up" on the stand, and becomes unavailable because of failure of memory, inability to continue testifying, or inability to communicate. Showing unavailability, however, may not always be easy. One court held that the evidence established that the witnesses' mental, emotional, and physical condition rendered her ability to testify merely inconvenient and not relatively impossible.[27]

One special exception statute in Indiana specifically defines unavailability of a child sexual abuse victim, providing that a child is unavailable if:

(i) A psychiatrist has certified that the child's participation in the trial would be a traumatic experience; (ii) a physician has certified that the child cannot participate in the trial for medical reasons; or (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

States that have adopted or are considering special exceptions should include definitions or refer to other sections of their code regarding unavailability.[28] How unavailability should be shown also should be specified, including the requirement of a hearing on the issue and the making of trial record. A hearing should be held, for example, on a child's incompetency if that is the basis of unavailability alleged by the prosector. Holding a hearing ensures factual support for the trial court's finding and for an appeals court to uphold the trial court's determination.

In one state, California, courts also have held that unavailability due to psychological harm can be established only by an expert, not a lay witness.[29] Thus, when seeking to admit statements when the child is alleged to be unavailable due to severe psychological harm from testifying, a mental health professional who has had direct experience with the child should testify to emotional problems of the child and that such problems would be seriously exacerbated by testifying in court. Indiana's statute is a good example of specifying a requirement for expert testimony, although California has added a category of unavailability that defines an expert as "a physician, surgeon, psychiatrist, licensed psychologist, licensed clinical social worker, or licensed marriage family or child counselor."[30]

As noted previously, in order to protect an accused's constitutional right to confront witnesses, a second requirement also must be met before a child's statement may be admitted under the new exceptions. In Ohio v. Roberts, the U.S. Supreme Court indicated that after a witness is shown to be unavailable, a statement may be admitted only if it has "sufficient indicia of reliability"; such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."[31] (emphasis added). This requirement means that a court may not admit a statement under a special exception unless the statement is shown to possess particularized guarantees of trustworthiness, since the statement would not fall within a "firmly rooted exception."

As with the showing of unavailability, factors showing trustworthiness may not be easy to establish. Indeed, it is preferable for prosecutors to seek admissibility of hearsay statements of child sexual abuse victims under one or more of the long-standing or accepted exceptions, as well as the new exception. A court would be likely to admit a statement under a traditional exception in order to avoid making particularized findings of trustworthiness. South Dakota's statute makes a statement admissibile under the new exception only if it is not admissible under any other statute.

In seeking admissibility under the new exception, a prosecutor first should attempt to show that the statement satisfies one or more criteria cited in the U.S. Supreme Court's decision in Dutton v. Evans.[32] The Dutton criteria are: (1) The statement contains no express assertion of past fact; (2) Cross-examination could not show the declarant's lack of knowledge; (3) The possibility of declarant's faulty recollection is remote; and (4) The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

Courts have held that all four Dutton factors need not be shown in order to admit a statement over confrontation objections, and in fact, if other factors indicate reliability, a statement may not be required to satisfy any of the elements.[33] Prosecutors also should marshall facts to satisfy criteria cited by other courts as indicating a statement's trustworthiness, including the following:

(1) whether there is an apparent motive to lie;
(2) the general character of the declarant;
(3) whether more than one person heard the statements;
(4) whether the statements were spontaneous or directly responsive to questions;
(5) the timing of the declaration;
(6) the relationship of speaker and declarant;
(7) the child's young age makes it unlikely the child fabricated where the statement represents a graphic account beyond the child's experience;
(8) the nature and duration of abuse;
(9) the relationship of declarant and defendant;
(10) the statement has a "ring of verity" and terminology appropriate to the child's age;
(11) the child was suffering pain or distress when making statement; and
(12) extrinsic evidence exists to show defendant's opportunity to commit the act complained of in child's statement.[34]

Alternative Approaches for Avoiding the Child Victim's Testimony in Open Court Where Necessary to Prevent Severe Emotional Trauma or When the Child is Otherwise Not Available as a Witness

The ABA Recommendations state the following regarding the testimony of child sexual abuse victims:

> 1.4.4. Child's Testimony
>
> In criminal cases, a child sexual abuse victim should testify at preliminary hearings or grand jury proceedings only if needed. Where necessary to prevent trauma to the child, procedures should be developed to avoid the need for the child's testimony in open court in criminal and civil trials, taking into account any constitutional limitations.

Testifying in a formal courtroom at a criminal trial in front of the defendant, jury, judge and an audience of spectators, and being subjected to direct and cross-examination often is cited as one of the most intimidating and stressful aspects of the legal process for children.[35] Although such an experience also may be anxiety-producing for adults, adults generally have developed coping mechanisms to deal with such situations. Further, adults also have a general understanding of the purpose and operation of our legal system and should be better able to withstand and deal with a defense attorney's efforts to discredit their testimony.

The choice of alternatives for taking a child's testimony should depend upon the needs and problems of a particular child. For some children, testifying in front of the defendant may not be as traumatic as sitting on the witness stand in a formal courtroom with an audience full of strangers and the press or with the jury present. A videotaped deposition with the defendant present may be the proper mechanism for such a child. In juvenile court child protection cases, children may be interviewed in the judge's chambers (generally with the parent alleged to have committed the abuse present), providing a less formal setting in which the child may be examined and cross-examined. Other children may not be disturbed by testifying in the presence of the public or the jury, but terrified of facing the defendant. Still other children may only require an advocate, close friend or relative in order to feel less traumatized. Finally, some children may find testifying a helpful experience in dealing with the abuse and may not be traumatized at all.

For the above reasons, legislatures adopting innovative approaches should not mandate a particular approach for all child victims, such as excusing all children from testifying, closing the courtroom in all cases when a child testifies, or preventing the child from seeing the defendant in all cases during the child's testimony. Indeed, the U.S. Supreme Court in Globe Newspaper Co. v. Superior Court held that mandatory exclusion of the press during the testimony of a child sexual abuse victim was violative of the first amendment.

A number of states have enacted or are considering legislation allowing alternatives for taking the testimony of a child sexual abuse victim in order to prevent the child from having to testify in open court at trial, including testimony by videotape or closed-circuit television. Indeed, it is advisable for states to adopt legislation allowing the use of such alternatives. A California appeals court skirted the constitutional issues and disallowed the use of closed-circuit television for taking a child's trial testimony because specific authorization for such a procedure had not been granted by state statute, a necessity given the serious constitutional issues raised by the procedures.[36]

Other courts, however, have allowed such alternatives without legislative authority, or at least have addressed the constitutional issue despite the absence of legislation.[37] For example, where no legislative authority existed, some courts have allowed a child sexual abuse victim to testify in court with the defendant hidden from the child's view, although others have held such a procedure to be violative of the defendant's right of confrontation.[38] Thus, although states should enact legislation authorizing various methods, prosecutors still should request a court to allow the use of videotaping, closed-circuit television, or other means where necessary to lessen the trauma of testifying even if their state has no statute.

Videotaped Testimony or Deposition

States seem to be most interested in statutes to allow videotaping of a child's testimony. In 1982, the ABA's Child Sexual Abuse Project found that four (4) states allowed videotaped testimony. By 1985, fourteen (14) states had statutes permitting videotaped trial or preliminary hearing testimony. (See Appendix A for states) Six (6) of the 14 statutes permit the videotape to be made or admitted into evidence at trial only if the court finds that the child's testimony in open court would cause severe emotional trauma.[39] Three (3) of these statutes allow either the videotape to be made or to be admitted at trial if the court

finds the child to be "medically unavailable" because testimony would cause emotional trauma, or otherwise "unavailable" as defined in a state's evidence code sections relating to the admissibility of hearsay or prior testimony.[40] The remaining statutes simply give the court discretion to order the making of the videotape. Thirteen (13) specifically allow cross-examination or questioning of the child by the defendant or his lawyer.

Twelve (12) statutes require the physical presence of the defendant in the room where the videotaping takes place; the statutes in Kentucky and Texas mandate that the defendant be hidden from the child's view, although the defendant must be able to see and hear the child. The age of the child varies by statute, although all provisions allow videotaping of children under 12 years of age.

Live Testimony of the Child by Closed-Circuit Television

Three (3) states, Kentucky, Louisiana, and Texas, have statutes permitting closed-circuit television of a child's testimony. (See Appendix A) During the trial, the child is questioned by the prosecutor and defense attorney (with a support person allowed to be present) in a room outside the courtroom, which is televised to the judge, jury and public in the courtroom. The defendant must be able to "observe and hear the testimony of the child in person," but the child may not see or hear the defendant. Only Louisiana conditions the use of this procedure "when justice so requires."

A bill in California, which has passed the state senate, proposes two-way television of the child's testimony, which may be utilized if psychological harm to the child from testimony in open court is shown. Under this bill, the child would be in a room outside the courtroom, and the judge, jury, defendant, and both attorneys would be in the courtroom. The child would be able to see the courtroom by television, and the people in the courtroom can see the child by television. The attorneys would question the child from the courtroom, and only a support person would be permitted with the child. This proposal thus differs from the other laws by allowing the child to see the courtroom and the jury, judge, public and defendant, but permits the questioning to occur by television rather than in the child's presence.

Potential Constitutional And Other Problems With Alternative Procedures for Taking a Child's Testimony

The above statutory alternatives may raise a number of constitutional violations, many of which are to be examined for the first time at the American Bar Association's National

or have been analyzed by various law journal articles.[41] As noted earlier, careful consideration of these issues is advised in order to avoid reversals of convictions and to prevent retrials. Once a significant number of states have passed legislation dealing with an area of great concern to the public such as child sexual abuse, tremendous interest in following the trend should be tempered by evaluating the issue in terms of both its constitutionality as well as its practicality.

The constitutional issues raised by the new videotaping and closed-circuit television statutes include the defendant's right to a fair trial under the due process clause of the fourteenth amendment, the defendant's sixth amendment right to a public trial and to a trial by jury, the defendant's sixth amendment right to confront witnesses, and the public's (and press') first amendment right to attend criminal trials. Commentators have suggested that the defendant's jury trial right may be infringed, even if the videotaping is shown to the jury later, because it interferes with the jury's decisionmaking function by distorting or not fully conveying evidence, especially a witness' demeanor; it denies the jury's power at common law to question witnesses; and "it compromises the integrity of the court."[42]

The defendant's right to a fair trial under the 14th amendment due process clause "traditionally has required judge and jury to be unbiased and evidence to be trustworthy."[43] The use of videotaping may prevent the jury from making an accurate and unbiased decision if the videotaping medium prejudicially alters or does not convey evidence. Moreover, the truth-eliciting aspects of the jury trial are removed when videotaping is used, enhancing the possibility of unfairness or perjury.[44]

As with the jury trial right, the defendant's right to a public trial and the right of the press and public to attend criminal trials may be infringed even if the videotape is shown later to the public. Commentators have cited a number of reasons to support this contention, such as the fact that witnesses "may speak more truthfully if placed before the scrutiny of their peers," and that confidence in judicial remedies may lead to public skepticism of judicial processes if the videotaping is done privately.[45]

The first amendment right of access to criminal trials by the press and public has been analyzed in depth elsewhere.[46] The issue has reached the U.S. Supreme Court, which held in Globe Newspaper that mandatory closure of the courtroom during the victim's testimony violated the first amendment. Statutes

in many states allow closure within the discretion of the court, which should pass constitutional muster. Videotaped testimony shown later to the press and public also should not be violative of the first amendment as long as they are not mandated by statute.

The defendant's sixth amendment right to confront witnesses in a criminal trial also may be violated unless certain requirements are met before using videotaped testimony or closed circuit television. Generally, closed circuit television or videotaping of the child's testimony is sought where it is believed that if the child testifies, she will suffer serious emotional harm or will be so terrified that she will refuse to talk or will freeze up because of the courtroom setting or personal threats by the defendant. Therefore, although the child is in fact available to testify, she would be unavailable to testify in a formal courtroom setting. Depositions frequently have been used in situations where it is impossible to obtain the witness' personal presence at trial. One commentator notes three types of unavailability: the witness is not available for legal process (e.g. death, absence); available for process, but not available for actual attendance (e.g., illness); or available for process and attendance but not available for testifying. It is the third category that justifies videotaping or television for taking the child's testimony.[47]

Necessity is the basic principle for the use of depositions and former testimony at trial, and for the use of closed circuit television. If the witness's testimony in court cannot be had, "it will be lost entirely for the purpose of doing justice if it is not received in the form in which it survives and can be had. The only inquiry then, need be: Is his testimony in court unavailable?"[48] Thus, in order to admit videotaped testimony in lieu of the child's testimony in court, the requirement of unavailability first must be met. As with special hearsay exceptions, unavailability categories include death, absence, physical or mental disability, incompetency at trial, failure of memory, and refusal to testify. As some statutes provide, severe psychological trauma to the child from testifying also may be a proper ground, although the three statutes that allow a videotaped deposition to be admitted based on any ground of unavailability are preferable.

In addition to unavailability, Ohio v. Roberts also requires statments to possess indicia of reliability, either by falling within an existing hearsay exception or having particularized guarantees of trustworthiness. In analyzing the videotaping legislation, both requirements of Ohio v. Roberts must be considered. First, the eight (8) videotaping statutes that do not require unavailability to be demonstrated probably violate the confrontation clause. Those statutes that require a finding of the child's unavailability, and require

the testimony to be taken in accordance with the state's hearsay exception for former testimony should be constitutional. Or, statutes requiring an unavailability showing and cross-examination in the defendant's presence also should satisfy confrontation requirements. Cross-examination and the defendant's presence clearly fulfill the trustworthiness requirement, and courts have allowed videotaped depositions in other cases where a witness was unable to attend the trial where these elements were present.[49] As discussed later, however, statutes that attempt to hide the defendant from the child's view may not be constitutional under the confrontation clause of the U.S. Constitution or under state constitutions if the defendant's right to be confronted with the witnesses against him is considered a right to physical, face-to-face confrontation with the witness.

The closed-circuit television laws in Kentucky and Texas also do not require a showing similar to unavailability. Louisiana allows the procedure "when justice so requires." Since testimony by television should not be considered hearsay, unavailability may not be the test. Nevertheless, courts may require a showing of necessity or "extraordinary" or other circumstances similar to unavailability to justify restriction of a constitutional right[50]. The California Supreme Court recently upheld the Hochheiser decision which borrowed language from the Globe case and stated that "a compelling state interest" must be shown to permit two-way television.

The videotaping and closed-circuit television statutes in Kentucky, Louisiana, and Texas also do not permit the child to see the defendant, although the defendant must be in the room and be able to see the child. As noted before, the second requirement of Ohio v. Roberts is that a statement must fall within a traditional hearsay exception or possess particularized guarantees of trustworthiness. The issue is whether cross-examination without physical confrontation of the child is sufficient to satisfy the trustworthiness requirement. If confrontation is interpreted to mean that the witness and defendant must face each other physically, as some courts have held,[51] these statutes would be unconstitutional.

The purpose underlying the face-to-face requirement is that the witness is less likely to make a false accusation while looking at the accused. This purpose clearly is not met if the child cannot see the defendant, even though the defendant can see the child. Moreover, almost half the state constitutions give the defendant a right to meet witnesses against him "face-to-face," which may be literally interpreted by courts; indeed, a trial court in Kentucky recently struck down the state's videotaping statute because it does not permit face-to-face confrontation of the child witness and the defendant as required by the Kentucky constitution.[52]

The above closed circuit television or videotaping provisions may have guarantees of trustworthiness by providing an opportunity for cross-examination, permitting the defendant to see the child, and showing the videotape or televising the testimony to the jury and public, despite the fact that the child cannot see the accused. A trial court in New Jersey upheld an approach where the defendant was in the courtroom with the judge, jury and public, who could view the child by a television monitor, although the child had no view into the courtroom.[53] Further, in a child sexual abuse prosecution, the Iowa Supreme Court allowed the defendant to be hidden from the view of the child witness during the child's testimony and rejected a confrontation challenge because there was cross-examination and the jury could observe the demeanor of the witness while testifying.[54] With the above videotaping and television laws, however, the child is not testifying in open court in the presence of the judge and jury. The jury does not have the opportunity to observe the child's demeanor during the videotaped deposition or preliminary hearing, although they may view it later. Although the jury may see the child testifying on television with the closed-circuit television approach, the problems cited earlier with distorted or excluded evidence are still present. As the Hochheiser decision noted, " . . . use of closed circuit television may affect the jurors' impressions of the witness demeanor and credibility".

It is possible that a court may hold that cross-examination alone fulfills the trustworthiness requirement, and satisfies the confrontation clause without the defendant's physical presence. One commentator notes:

> If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation.[55]

Professor Wigmore further states that requiring the witness' personal appearance enables the jury and judge to observe the demeanor of the witness while testifying; it does not mean the opponent and witness must be confronted, but that the witness must be present before the tribunal.

If however, a court considers face-to-face confrontation indispensable, two-way closed-circuit television may be valid as long as confrontation is interpreted to mean that the defendant and witness only must see each other. The Supreme Court of Missouri allowed two-way closed circuit television for an expert's testimony, holding that while the witness was not physically present in the courtroom, "his image and voice were there ... for the defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the

witness."[56] In a 1979 case, moreover, a videotaped deposition was held to be unconstitutional where physical face-to-face confrontation was absent, although the court noted: "Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. ... [W]here the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming."[57] The court went on to say, "It is possible that face-to-face confrontation through two-way closed circuit television might be adequate," although concern was expressed that no showing of "extraordinary circumstances" was made in the Missouri decision.[58] Although at least one Florida trial court is known to have allowed two-way television in a child sexual abuse proceeding,[59] the recent Hochheiser California Supreme Court decision noted serious constitutional problems with two-way television, including violations of the defendant's right to a jury trial and a fair trial, as well as of the right of confrontation.

Another potential problem is that some statutes do not require a finding of unavailability at the time of trial when the videotape is sought to be admitted in lieu of the personal appearance of the child, but only require a finding of unavailability to make the videotape. To satisfy the confrontation clause, it may be that unavailability must be established not just at the time of the taking of the videotape, but at trial, particularly if the witness' condition may have changed.[60] Colorado requires a showing both to make and to admit the videotape. Many state criminal procedure rules require two showings.[61]

Finally, most statutes that allow pre-trial depositions or videotaping of preliminary hearing testimony do not permit an additional deposition if new evidence is discovered between the original videotape and the trial. (South Dakota allows a second tape). Unless the videotaping occurs during the trial, an additional deposition frequently may be necessary, which would result in one more time a child must be questioned. Thus, states may want to consider requiring the videotaping after the trial has begun, as is required in Florida's statute.

Conclusion and Emerging Issues

A number of areas relating to child victims in the legal system remain to be explored. This paper addresses a few issues designed to help improve prosecutions of child sexual abuse and to prevent psychological trauma to a child from testifying. Additionally, this paper initially raised issues about how the legal system will handle the increasing number of cases, particularly those involving very young children, as well as cases of abuse committed by adults outside the home. Another category of cases entering the criminal

justice system that also should create new challenges are those involving multiple perpetrators and multiple victims.

Cases of child sexual abuse are being litigated in other judicial forums as well. In addition to civil child protection actions which may be filed in cases involving a parent, other possible legal actions include civil protective order proceedings, custody and divorce actions, and civil tort suits seeking money damages against perpetrators or against institutions, such as school systems, for negligence in hiring or maintaining an employee for sexually abusing multiple children. These suits are becoming more prevalent, and many of them have resulted in settlements of hundreds of thousands of dollars for the victims.[62] Several attorneys have developed law practices or reputations in handling these cases.[63]

When child sexual abuse is an issue in a custody case, significant problems are presented. Conflicts between the parents must be considered when examining an allegation of sexual abuse. In some cases, it has been alleged that courts believe that the mother is vindictive by alleging sexual abuse, and award custody or generous visitation privileges to the father, who in fact may have sexually abused the child. On the other hand, cases now are coming to light in which it is believed that some parents have manipulated their child into claiming sexual abuse to prevent the other parent from having contact with or custody of the child. Moreover, when an allegation is made, how it is handled in the family court in a custody proceeding may be problematic, since judges may not be as knowledgeable about sexual abuse of children as their counterparts in juvenile or criminal court. In many custody cases, whether the parent sexually abused the child often is not separately proven or determined. Thus, in Maryland, a bill was enacted into law in 1984 requiring the court in a divorce or custody case to make a finding by a preponderance of the evidence regarding a sexual abuse allegation before it makes a custody award to either parent.[64] A survey of practices as well as legal research and analysis in this area would be helpful to domestic relations lawyers and family court judges.

Although much has been learned and many changes made during the last five to ten years, reforms are still needed. New methods to protect children nevertheless must be considered in the context of our constitutional system that values liberty and assumes an individual innocent until proven guilty by the state. Another important idea to keep in mind is that the current media attention focusing on the problems involving child witnesses eventually will die down. Hopefully, at that time, there may be greater objectivity and recognition that the current reform movement contributed to more effective handling of cases, more guilty persons prosecuted and convicted and, hopefully fewer children traumatized. It also must be expected

that greater awareness and prosecutions mean that statistically more children may retract their stories (although actually may be false retractions). This should result in more careful and thorough investigations before cases are filed. Further, as with any other crime, there will be some false reports or child witnesses who lie. However, as one commentator noted in discussing the corroboration requirement for child sex offense prosecutions (now abolished in all but one jurisdiction, Nebraska):

> ... It is estimated that most sexual offenses are never reported to the authorities. Those authorities who support the assumption cite only isolated examples of false complaints, many of which were by persons suffering from severe psychiatric disturbances. Existing statistics indicate that the frequency of "false" reports for sex offenses approximates the frequency of false reports for other crimes.[65]

Another researcher also notes that "there is little correlation between age and honesty," and that "children are no more prone to lying than adults."[66]

Footnotes

[1]J. Bulkley, Recommendations for Improving Legal Intervention in Child Sexual Abuse Cases, Recommendations 4.1 and 4.2 and Commentary, American Bar Association, Washington, D.C. (1982).

[2]L. Berliner & D. Stevens, Advocating for Sexually Abused Children in the Criminal Justice System, in Sexual Abuse of Children: Selected Readings, National Center on Child Abuse and Neglect (1980); V. De Francis, Protecting the Child Victim of Sex Crimes, American Humane Association (1969); S. Sgroi, Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault, in Sexual Assault of Children and Adolescents xv (A. Burgess et al. eds. 1978); K. MacFarlane, Sexual Abuse of Children, in The Victimization of Women 81 (J. Chapman and M. Gates eds. 1978); Child Sexual Abuse and the Law, American Bar Association (J. Bulkley ed. 1981).

[3]K. MacFarlane & J. Bulkley, Treating Child Sexual Abuse: An Overview of Current Program Models, in Social Work and Child Sexual Abuse 69, Jo. of Soc. Work & Hum. Sexuality, Vol. 1 No. 2 (1982).

[4]See G. Melton, Child Witnesses And the First Amendment: A Psychological Dilemma, in The Child Witness 109, J. Social Issues Vol. 40 No. 2 (G. Goodman ed. 1984); G. Melton, Testimony on the Subject of Child Sexual Abuse Victims in the Courtroom before the U.S. Senate Subcommittee on Juvenile Justice, Committee on the Judiciary, May 22, 1984.

[5]Child Sexual Abuse: Incest, Assault and Sexual Exploitation, at 3, National Center on Child Abuse and Neglect (Rev. Apr. 1981).

[6]See Innovations in the Prosecution of Child Sexual Abuse Cases, American Bar Association (J. Bulkley ed. 1981); K. MacFarlane & J. Bulkley, supra note 3.

[7]Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2621 (1982).

[8]Id.

[9]Id.

[10]G. Melton, Child Witnesses and the First Amendment, supra note 4; Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1015 (1969); L. Berliner & M. K. Barbieri, The Testimony of the Child Victim of Sexual Assault, in the Child Witness 125, 135, supra note 3.

[11]Alaska, Arkansas, California, Montana, New Mexico, South Dakota, Wisconsin.

[12]J. Bulkley, Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in Child Sexual Abuse and the Law 153 (ed. J. Bulkley, 1981).

[13]Id. For more in-depth discussion of the new special exceptions, see Skoler, New Hearsay Exceptions for a Child's Statement of Sexual Abuse, 18 John Marshall L. Rev. 1 (1984); Sexual Abuse of Children - Washington's New Hearsay Exception, 58 Wash. L. Rev. 813 (1983); A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum. L. Rev. 1745 (1983); J. Pierron, The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements, J. Kan. Bar Assn. 88 (Summer, 1983). See also Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, American Bar Association (forthcoming Summer 1985).

[14]See, e.g., Kan. Stat. Ann. § 60-460 (1982) with an exhaustive array of statutory hearsay exceptions.

[15]See L. Berliner & M.K. Barbieri, supra note 10; U.S. v. Carlson, 547 F.2d 1346 (8th Cir. 1976); State v. Sheppard, #I 0822-12-83 (N.J. Super. Ct. Sept. 27, 1984).

[16]McCormick, Evidence § 252, at 606 (1972).

[17]Mattox v. U.S., 156 U.S. 237 (1895).

[18]Ohio v. Roberts, 448 U.S. 55, 65 (1979).

[19]McCormick, Evidence § 253, at 608 (1972).

[20]Barber v. Page, 390 U.S. 719 (1968).

[21]Ohio v. Roberts, 448 U.S. at 74.

[22]See People v. Gomez, 103 Cal. Rptr. 80 (Cal. Ct. App. 1972); People v. Stritzinger, 668 P.2d 738 (Cal. 1983); Hochheiser v. Superior Court, No. 5005940 (Cal. Ct. App. Nov. 9, 1984) (affirmed during week of Feb. 11, 1985 by California Supreme Court); Warren v. U.S., 436 A.2d 821, 826-30 (D.C. Ct. App. 1981).

[23]See U.S. v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); State v. McCafferty, #14350 (S.D. S. Ct. Oct. 3, 1984); State v. Slider, No. 12888-4-I (Wash. Ct. App. Sept. 24, 1984).

[24]See, e.g., Rice v. Marshall, 709 F.2d 1100 (6th Cir. 1983); U.S. v. Carlson, 547 F.2d 1346 (8th Cir. 1976); State v. Sheppard, #0822-12-83 (N.J. Super. Ct. Sept. 27, 1984).

[25]See Indiana statute; State v. Ryan, No. 50216-1 (Wash. S. Ct. Nov. 26, 1984).

[26]State v. McCafferty, #14350; U.S. v. Nick, 604 F.2d 1199 (9th Cir. 1979); U.S. v. Iron Shell, 633 F.2d 77.

[27]People v. Williams, 155 Cal. Rptr. 414 (1979).

[28]Warren v. U.S., 436 A.2d 821. This case notes that 19 states have statutes with mental infirmity as a category of unavailability and includes an excellent discussion on psychological harm from testifying as an unavailability basis for admitting prior testimony.

[29]See, e.g., People v. Stritzinger, 668 P.2d 738 .

[30]Cal. Evid. Code § 240 (amended and effective Jan., 1985, Assem. Bill No. 3840, Stats. 1984, ch. 401).

[31]Ohio v. Roberts, 448 U.S. at 66.

[32]Dutton v. Evans, 400 U.S. 74 (1970).

[33]U.S. v. Perez, 658 F.2d 654 (8th Cir. 1981).

[34]See U.S. v. Nick, 604 F.2d 1199; U.S. v. Iron Shell, 633 F.2d at 87; State v. Ryan, No. 50216-1; State v. McCafferty, #14350; Bertrang v. State, 184 N.W.2d 867 (Wis. 1971); U.S. v. Perez, 658 F.2d at 661 n. 6.

[35]See supra note 2.

[36]Hochheiser v. Superior Court, No. 5005940.

[37]See State v. Sheppard #I0822-12-83 (closed-circuit television); State v. Hutchins, 286 So. 2d 244 (Fla. 1973) (videotaped deposition); U.S. v. Benfield, 593 F.2d 815 (8th Cir. 1979) (videotaped deposition with defendant in a different room and not seen by witness). See also Washington Post, Nov. 14, 1984 "Judge Says Girl, 4 Must Face Father in Sex Abuse Trial" disallowing closed circuit television as a violation of the defendant's right to confront witnesses.

[38]See State v. Strable, 313 N.W. 2d 497 (Iowa 1981) (upheld); Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. Ct. App. 1981) (struck down).

[39]California, Colorado, Florida, Maine, South Dakota, and Wisconsin (Florida and Wisconsin only require a finding by the court when the videotape is made).

[40]California, Colorado and South Dakota.

[41]Comments, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Ore. L. Rev. 567 (1976); S. Brakel, Videotape in Trial Proceedings: A Technological Obsession, 61 ABA J. 956 (Aug. 1975); An Evaluation of Video-Tape Trials, 26 Stan. L. Rev. 619 (1974); Doret, Trial by Videotape - Can Justice Be Seen to be Done?, 47 Temp. L.Q. 228 (1973-74); Comment, Libai's Child Courtroom: Is It Constitutional?, 7 J. Juv. Law 31 (1983).

[42]55 Ore. L. Rev. at 578.

[43]Id. at 582.

[44]Id. at 583.

[45]Id. at 573.

[46]See Parker, The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court, 47 Alb. L. Rev. 408 (1983); G. Melton, supra note 4.

[47]5 Wigmore, Evidence § 1402, at 204 (1974).

[48]Id. at 203.

[49]State v. Hewett, 545 P. 2d 1201, 1204 (Wa. 1976); State v. Hutchins, 286 So. 2d at 246; U.S. v. Singleton, 460 F. 2d 1148, 1153 (2d Cir. 1972). See 5 Wigmore, Evidence § 1387 (1974) for a list of state statutes regarding depositions.

[50]U.S. v. Benfield, 593 F.2d at 822; Hochheiser v. Superior Court, No. B005940, at 28.

[51]Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. Ct. App. 1981); U.S. v. Benfield, 593 F.2d at 822.

[52]Commonwealth v. Willis, No. 84CR346 (Ky. Cir. Ct. Feb. 20, 1985); See 5 Wigmore, Evidence § 1397, at 155 for a list of state constitution confrontation clauses.

[53]State v. Sheppard, #I0822-12-83.

[54]State v. Strable, 313 N.W. 2d 497.

[55]5 Wigmore, Evidence § 1396, at 154.

[56]Kansas City v. McCoy, 525 S.W. 2d 336 (Mo. 1975).

[57]U.S. v. Benfield, 593 F.2d at 821-22.

[58]Id. at 822 n. 11.

[59]See Papers from A National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, supra note 13.

[60]McCormick, Evidence § 253, at 612-13 (1972). Indeed, U.S. v. Benfield noted its concern that only a marginal showing of unavailability was made at trial and no new evidence was presented. The court said "an additional showing of the witness' mental condition and availability on the trial date would have been a much better practice." 593 F.2d at 817 n. 4.

[61]See, e.g., McCormick, Evidence § 253, at 612 n. 55, § 613 n. 56; 5 Wigmore, Evidence § 411.

[62]The ABA's Child Sexual Abuse Law Reform Project has a file with pleadings from a substantial lawsuit in Louisiana, as well as newspaper articles of a major lawsuit settled in Virginia and several others around the U.S.

[63]L. A. Times, May 21, 1982, "Incest: The Victim Fights Back, Some File Suits for Damages."

[64]Md. Code Ann. § 9-101 Family Law Article (Oct. 1, 1984).

[65]D. Lloyd, The Corroboration of Sexual Victimization of Children, in Child Sexual Abuse and the Law 103, American Bar Association (J. Bulkley ed. 1981).

[66]G. Melton, J. Bulkley & D. Wulkan, Competency of Children as Witnesses, id. at 125, 136-38.

APPENDIX A**

States With Statutes For Videotaping And Closed-Circuit Television Of A Child's Testimony*

(1) Videotaped Testimony — 15 States[3]

State	Citation
Alaska	Alaska Stat. § 12.45.047 (1982)
Arizona	Ariz. Rev. Stat. Ann. § 12-2311 (1978
Arkansas	Ark Stat. Ann. §§ 43-2035 to 2037 (1981, 1983)
California[1/]	Cal. Penal Code § 1346 (1983)
Colorado	Colo. Rev. Stat. § 18-3-413
Florida	Fla. Stat. § 918.17 (1984)
Kentucky	Ky. Rev. Stat. § 421.350 (1984)
Maine	Me. Rev. Stat. Ann. tit. 15, §1205 (1983)
Montana	Mont. Code Ann. §§ 46-15-401 to 403 (1977)
New Mexico	N.M. Stat. Ann. § 30-9-17 and N.M. R. Cr. P.R. 29.1 (1980)
New York[2/]	(Recently enacted - No cite yet)
Oklahoma[3/]	Okla. Stat. Ann. tit. 22, 753.
South Dakota[1/]	S.D. Codified Laws Ann. § 23A-12-9 (1983)
Texas	Tex. Crim. Proc. Code Ann. § 38.071 (1983)
Wisconsin	Wis. Stat. § 967.04(7) (1983)

[1/] Videotaped preliminary hearing testimony for use at trial.

[2/] Videotaped testimony for use at Grand Jury proceeding.

[3/] Oklahoma's statute found after text finalized.

Bills Pending

Delaware
District of Columbia
Kansas
Massachusetts
Michigan
Missouri
Ohio
South Carolina
Utah
Vermont

(2) Closed Circuit T.V. — 3 States

State	Citation
Kentucky	Ky. Rev. Stat. § 421.350(3) (1984)
Louisiana	La. Rev. Stat. 15:260 (1984)
Texas	Tex. Code Crim. Proc. Ann. art. 38.071(3) (1983)

Bills Pending

California (passed State Senate)	
Maryland	House Bill No. 1346, Feb. 1, 1985 (amending § 9-102)

States With A Special Hearsay Exception for a Child's Statements of Sexual Abuse - 11 States

State	Citation
Arizona	Ariz. Rev. Stat. Ann. § 13-1416 (1984-85)
Colorado	Colo. Rev. Stat. § 18-3-411(3)
Illinois	Ill. 83rd Gen. Assem. P.A. 83-1067 Sec. 115-10 and Ill. Stat. Ann. Ch. 37, § 704-6(4)(c)
Indiana	Ind. Code § 35-37-4-6 (1984)
Iowa (Juvenile Court Only)	Iowa Code Ann. § 232.96(6)(1984-85)
Kansas	Kan. Stat. Ann. § 60-460(dd) (1982)
Minnesota	Minn. Stat. § 595.02(3) (1984)
South Dakota	S.D. Codified Laws Ann. § 19-16-38 (1984)
Utah	Utah Code Ann. § 76-5-411 (1983)
Vermont	Vt. R. Evid. 803 (24) (1985)
Washington	Wash. Rev. Code § 9A.44.120 (1982)

Special Exception for Videotaped Interviews of Child Sexual Abuse Victims — 4 States

State	Citation
Iowa (Juvenile Court Only)	Iowa Code 232.96(6) (Supp. 1984)
Kentucky	Ky. Rev. Stat. § 421.350(1)(2) (1984)
Louisiana	La. Rev. Stat. 15:440.1-.6 (1984)
Texas	Tex. Code Crim. Proc. Ann. art. 38.071(1), (2) (1983)

States With Statutes or Rules Eliminating Competency Qualification of Children - 22 States

State	Citation
Arizona	Ariz. Rev. Stat. Ann. § 12-2202
Arkansas	Ark. Stat. Ann. § 28-1001
Colorado[1]	Colo. Rev. Stat. § 13-90-106(1)(b)
Delaware	R. Evid. 601
Florida ppi	Fla. Stat. § 90.601
Maryland [1]	Md. Cts. & Jud. Proc. Code Ann. § 9-101
Michigan	Mich. Stat. Ann. § 27A.2163
Mississippi	Miss. Code Ann. § 13-1-3
Missouri[1]	Mo. Rev. Stat. § 491.060(2)
Nebraska	Neb. Rev. Stat. § 27-601
Nevada	Nev. Rev. Stat. § 50.015
New Jersey	N.J. Rev. Stat. § 2A:81-1
New Mexico	R. Evid. 601
North Dakota	R. Evid. 601
Oklahoma	Okla. Stat. § 12-2601
Oregon	Or. Rev. Stat. § 40.310
Pennsylvania	Pa. Stat. Ann. § 42-5911 (purdon)
South Dakota	S.D. Codified Laws Ann. § 19-14-1
Utah[1]	Utah Code Ann. §§ 78-24-2; 76-5-410
Washington	Wash. Rev. Code § 5.60.050
Wisconsin	Wis. Stat. § 906.01
Wyoming	Wyo. Stat. § 1-138

[1]Child sexual abuse victims only

*Some apply in both criminal and civil cases, and some in all child abuse cases, but most cover criminal child sex offense cases only.

**Information for this chart was obtained through research by the ABA's Child Sexual Abuse Law Reform Project (including the help of the project's law clerk, Carl Jenkins) and from legislative survey prepared for a final report of a recent project on child victim legal reforms by Abt Associates, Inc., Cambridge, Massachusetts (the final report will be available in the spring, 1985).

About...
The ABA Public Services Division

The National Legal Resource Center for Child Advocacy and Protection is one of a dozen American Bar Association units operating within the ABA's Public Services Division. The Public Services Division applies the knowledge and experience of the legal profession to public concerns through programs addressing the rights of the disadvantaged, including minorities, the elderly, mentally disabled, and children; substantive issues of broad national concern such as housing and the environment; and improvement of the judicial process by reducing court costs and delay and offering dispute resolution alternatives. Volunteers, largely lawyers, work with ABA staff in running Division programs. They prepare model legal codes and documents, conduct training sessions and other public education initiatives, sponsor working conferences, and produce subscription and one-time publications. Based in the Washington, DC offices of the Association, the Public Services Division has a staff of over forty persons and an annual budget of more than $3 million.

About...
The ABA Young Lawyers Division

Within the overall structure of the American Bar Association, the Young Lawyers Division [YLD] occupies a unique position. Unlike the other organizational components of the ABA, YLD activities are not limited to any one substantive area of the law. Instead, YLD interests cut across all of the Association's professional and public interest programs. In effect, the YLD functions as a complete bar association with its own national leadership structure for the younger members of the bar [defined as all attorney members of the ABA under the age of 36 or those who have been admitted to the bar for less than three years], while at the same time functioning as a full participant in the work of the Association's overall Section, Division and Committee structure. With more than 155,000 member attorneys drawn from all fields of practice, the YLD is the largest single membership group within the ABA.

Young lawyers have traditionally been the most dedicated volunteers in the public service and pro bono work of the organized bar, and the national leadership of the YLD has sought to harness this idealism and commitment in coordinated efforts to address major issues and problems. The Division sponsors an active Affiliate Activation and Outreach Program which provides technical assistance and on-site consultation to affiliates [Young Lawyers groups at the State or Local Bar level] seeking to undertake local public service action programs. Nearly one hundred new affiliate programs are generated each year.

The Young Lawyers Section of the Philadelphia Bar Association has, since 1971, sponsored a volunteer child representation program in Philadelphia. The efforts of this group inspired the creation of the National Legal Resource Center for Child Advocacy and Protection.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
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May 27, 1987

MEMORANDUM

TO: Representative C.E. Swackhammer

ATTN: Tom Wright

FROM: Penelope Weyhrauch
Legislative Analyst

RE: **Sexual Assault: Television Testimony by Minor Victims of Sexual Assault**
Research Request 87.308

You asked us to address the constitutionality of legislation which allows a child's testimony to be videotaped or shown on closed-circuit television for use in court. You asked us to discuss how videotape or closed-circuit television legislation could avoid constitutional challenges.

Child Sexual Abuse Legislation

A statute which allows the videotaping or closed-circuit televising of a minor in a sexual abuse case may be constitutionally challenged on the ground that it deprives a defendant of the opportunity to confront his accuser face to face. A defendant's right of confrontation is established in the U.S. and Alaska Constitutions. These articles state that "...in all criminal prosecutions...the accused shall enjoy [have] the right...to be confronted with the witnesses against him."[1] The confrontation clause generally requires that witnesses be present at trial and that the defendant be allowed to cross examine them.

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[1]U.S. Constitution, Sixth Amendment; Alaska Constitution Article 1, Section 11. These provisions are attached to this memorandum.

The use of videotaped testimony at trial may face another legal challenge--as hearsay--which is not admissible in court unless the statement falls within a hearsay exception.[2] When faced with a hearsay issue, the U.S. Supreme Court has placed major emphasis on the "reliability" of the statement. Three indicators are considered in regard to reliability: 1) whether or not a statement was made under oath; 2) whether the declarant of the statement was subjected to prior cross-examination; and 3) whether the jury had the opportunity to view the witness's demeanor.[3] A videotaped testimony may or may not meet the requirements of reliability.

Some cases have also required that the declarant of the statement be deemed "unavailable" for trial as a prerequisite to admissibility of the statement.[4] It is unclear how unavailability would apply to the videotaping of a child's testimony to avoid facing the defendant in a courtroom situation.[5]

Videotape Statutes. At least twelve states have enacted videotaping statutes since 1977, six of them since 1983.[6] The statutes treat videotaped testimony as the functional equivalent of testimony at trial. Some statutes explicitly demand that the defendant be present and that cross-examination be allowed at the videotaping session; three states--Kentucky, Texas and Wisconsin--allow, in certain circumstances, the admission of videotapes made without the benefit of cross-examination.

A separate provision of the Texas and Kentucky statutes raises another confrontation clause issue. It provides that a videotape made in the presence of both prosecution and defense attorney and put to the test of cross-examination may be admitted in lieu of a child's testimony. It also states that during the videotaping session the court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. At least one federal court of appeals has held, in a context other than child sexual

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[2]David Wise, "Criminal procedure--child witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," 7 Whittier Law Review 639, 649, 1985.

[3]Ibid., p. 650.

[4]Ibid.

[5]Ibid., p. 654.

[6]Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harvard Law Review 813, (1985). The following three paragraphs are taken in large part from this article. We have limited our discussion to Arizona, Kentucky, Texas, and Oklahoma--the states mentioned in your request.

abuse cases, that the lack of a face-to-face encounter renders the use of videotaped testimony unconstitutional.

In 1982, an **Arizona** appellate court affirmed a conviction obtained with the videotaped statement of a sexually abused six-year-old girl.[7] The defendant and his counsel had been present at the taping, and cross-examined had been allowed. In reaching its decision, the court weighed the state's interest in presenting the videotaped testimony against possible infringements of the defendant's right of confrontation. The determinative factor in admitting the tape was the threat of the child becoming uncommunicative if placed on the witness stand.[8]

Penny Warren, Assistant Attorney General for **Kentucky**, said that a recent (1986) state Supreme Court decision upheld the use of a videotape deposition in a child sexual abuse case.[9] The court rejected the defendant's constitutional challenge in finding that the defendant's right of confrontation was satisfied through the mechanisms used to conduct the videotaping.

The court found that: "The statute requires that the defendant be present in person so that he may see and hear the witness but he shall not be seen by the child. The...procedure permits the testimony to be taken prior to trial and preserved by videotape. The availability of procedures permits the defendant to fully participate in cross-examination and to adequately see and hear the witness. The reproduced testimony must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility. The trial judge paraphrased the issue as to whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face-to-face confrontation. We believe that it is. The legislative authorization of videotape or closed-circuit trial testimony by certain child victims...does not violate a defendant's right to confrontation."[10]

Ms. Warren believes that if a child is required to be administered an oath and if the competency of the child has been established prior to the videotaping, a state statute allowing videotaping may pass constitutional muster.

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[7] State v. Melendez, 661 P.2d 654 (1982).

[8] "Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 639.

[9] Commonwealth v. Willis, 716 S.W.2d 224 (1986).

[10] Willis, p. 228.

State district courts in **Texas** have differed on whether the state's videotape statute meets the constitutional right-to-confront mandate. At least one Texas appellate court has upheld a conviction based on videotaped statements, ruling that the procedure does not violate the confrontation clause since the defendant retains the opportunity to cross-examine the declarant at trial. Several cases involving videotaped testimony in Texas are currently facing a constitutional challenge in the Texas Supreme Court. According to Steve Lamirand, Assistant Attorney General for **Oklahoma**, a constitutional challenge has not been made on the state's videotaping or closed-circuit television statutes.

The **Alaska** videotaping statute--AS 12.45.047--has not been constitutionally challenged, according to Gayle Horetski, Assistant Attorney General. She said this is probably because the procedure established by the statute has not been used by the State because it believes it to be unconstitutional--as a violation of a defendant's right of confrontation. In addition, she believes that the procedure authorized by the statute creates a more frightening situation for a child than a courtroom does. The statute requires that testimony by the child be taken in front of the defendant in a room other than a courtroom. Ms. Horetski said that this may bring the child and the defendant into much closer contact--in a small room--than would occur in a courtroom setting.

Closed-circuit Television Statutes. The states of **Kentucky and Texas** have legislation which allows a child's testimony to be given at trial from a room other than the courtroom by closed-circuit television.[11] Neither of these states have addressed the constitutionality of this legislation. Ms. Warren, with the Attorney General's office in **Kentucky**, believes that because Kentucky's videotape statute has been found to be constitutional, their closed-circuit television statute will also be found to be constitutional. Ms. Horetski said that closed-circuit television statutes have been both upheld and struck down in other states under constitutional challenges. She believes that closed-circuit television statutes are less constitutionally vulnerable than videotape statutes because a child's testimony occurs at trial; providing the defendant and the jury the opportunity to witness testimony that is contemporaneous with the trial.

Other legal scholars are divided on whether a closed-circuit television statute will meet constitutional muster. One constitutional concern expressed about the use of closed-circuit television is that the defendant is deprived of the opportunity of physically confronting his accuser. No case law requires eye contact, but "this procedure could be deemed constitutional only if cross-examination alone is preserved in such a way to fully satisfy the strict constraints of the sixth amendment."[12]

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[11]Other states may also have closed-circuit testimony statutes. I was unable to find a compilation of these statutes for the fifty states. Thus, I limited my search to states in which you were interested.

[12]"Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 659.

Another writer stated that "...The United States Supreme Court has not literally construed the confrontation clause. In the 1980 case of Ohio v. Roberts, the court said that the clause merely states a preference for face-to-face confrontation at trial but that the 'primary interest secured by the provision is the right of cross-examination'.[13] Competing interests when closely examined may justify dispensing with confrontation at trial. Adequate opportunity for cross-examination might meet the requirements of the clause without actual confrontation."[14]

Alaska does not currently have a closed-circuit television statute.

Developing Constitutionally Sound Statutes

In a paper presented at the National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Professor Michael Graham outlined his suggestions for enacting constitutionally sound child sexual abuse legislation:[15]

- provide specifically for unavailability of witness based upon the presence of, or potential for, severe psychological injury to a child witness if forced to face the defendant in open court;

- provide for the use of closed-circuit television or a children's courtroom for eliciting testimony in child sexual abuse prosecutions where the child witness is unavailable for live face to face confrontation, but is available to give testimony in an alternative setting.[16] The statutes should provide for projection to the jury of the demeanor of both child witness and defendant. Statutes should also provide for projection of the image of the defendant before the child witness where the witness is willing and able to testify under such circumstances; and

- provide that testimony of an unavailable child witness taken outside the physical presence of the accused--but subject to cross-examination--is admissible as an exception to the hearsay rule. The child's testimony may be presented to the jury by either

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[13] Ohio v. Roberts, 448 U.S. 56 (1980).

[14] Comment, "Use of Videotaping to Avoid Traumatization of Child Sexual Abuse Victim-Witnesses," 21 Land and Water Law Review 565, 574, 1986.

[15] Michael H. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 University of Miami Law Review 19, 92, 1985.

[16] A children's courtroom is a room set up for the comfort and security of children where a minor's testimony is heard.

> closed-circuit television, use of a children's courtroom, or a videotape of the child's testimony given at a prior trial, hearing, or other proceeding. Admissability should be conditioned upon a showing that the child's testimony possesses a guarantee of trustworthiness equivalent to those required of statements that are admitted under a traditional hearsay exception.

Mr. Graham also stated that "It is...very likely that oath, demeanor, whether live, via closed-circuit television, or videotaped, and cross-examination, if combined with [the] projection of the defendant's image before the child witness, alone create adequate [the]...reliability to be admissible."[17]

Another legal scholar stated that "Videotaping statutes should permit the child to testify on videotape and out of the presence of the defendant if the trial court finds that testimony in open court or a face-to-face confrontation with the defendant would cause the child substantial emotional trauma. The court should defer the taking of videotaped testimony until after the trial has commenced unless substantial delay would thereby result. Once the child has testified on videotape, the court should generally bar both parties from calling the child at trial. Finally, videotaping statutes should prescribe standards regulating taping procedures and the technical quality of the videotaping equipment."[18]

A third opinion rendered by a legal scholar stated that "The interests of the [sexually abused] child are countered by the defendant's sixth amendment rights which guarantee him the opportunity to confront and cross examine...witnesses who testify against him. The Supreme Court has stated, however, 'that competing interests, if closely examined, may warrant

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[17]Ibid., p. 94.

[18]Note, "The testimony of child victims in sex abuse prosecutions: two legislative innovations," 98 Harvard Law Review 806, 826, 827, 1985.

dispensing with confrontation at trial.'"[19] The writer went on to say that if the videotaping procedure includes confrontation by the defendant and cross-examination of the child by the defendant's attorney, the defendant is not denied his constitutional rights.[20]

* * * *

I hope this information is useful to you. The state statutes discussed in this memorandum are attached. If you have any questions or would like additional information, please contact our agency.

Attachments

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[19] Ohio v. Roberts, p. 64.

[20] "Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 660.

BILL NO: CS for HB323 (Judiciary) DATE: March 15, 1988

TITLE: An Act relating to testimony of children in certain criminal proceedings; and providing for an effective date.

CONTACT: Barbara Miklos
Executive Director
Council on Domestic Violence and Sexual Assault

DEPARTMENT OF PUBLIC SAFETY

CS for HB323 (Judiciary) has a very important purpose: to provide alternative methods for taking the testimony of child victims or witnesses in certain criminal proceedings. It is recognized that testifying in court can be very traumatic for a child unless modifications are made to current court procedures.

The 3/11/88 draft of this bill has addressed the concerns the Council on Domestic Violence and Sexual Assault had about earlier versions of this bill. Therefore, The Council on Domestic Violence and Sexual Assualt supports CS for HB323 (Judiciary).

Arthur English
Commissioner

SENATE COMMITTEE REPORT

FURTHER FINANCE

DATE TURNED INTO OFFICE _____

4/5/88
Mr. President:

JUDICIARY Committee considered CSHB 323 (JUD)

testimony of children in certain criminal proceedings; efd

and recommended

[ ] replace with ___ CS_____)[] same title
[ ] or adopt _____ CS_____)[] new title

[ ] attached amendment(s) and

[X] do pass

[ ] do not pass

[ ] no recommendation

[X] individual recommendations

[ ] further referral to _____

[ ] letter of intent adopted _____

Committee [X] attached or [ ] adopted fiscal note(s)
[ ] new [ ] updated or [X] previous
[ ] zero [X] fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

_____
Chairman signature and recommendation

[ ] Committee Backup attached

Judiciary Report

SENATE COMMITTEE REPORT

FURTHER JUDICIARY
FINANCE

DATE TURNED INTO OFFICE _____

3/23/88

Mr. President:

STATE AFFAIRS Committee considered CSHB 323 (JUD)

testimony of children in certain criminal proceedings; efd

and recommended

[ ] replace with ___ CS_____)[] same title
[ ] or adopt _____ CS_____)[] new title

[ ] attached amendment(s) and

[ ] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] further referral to _____

[ ] letter of intent adopted _____

Committee [ ] attached or [ ] adopted fiscal note(s)
[ ] new [ ] updated or [ ] previous
[ ] zero [ ] fiscal impact

MEMBERS SIGNING DO PASS

OTHER RECOMMENDATIONS

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

_____
Chairman signature and recommendation

[ ] Committee Backup attached

State Affairs (waived)

Waived 4/5