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Protecting Child Witnesses on the Witness Stand: The Law and the Role of the Forensic Social Worker in Criminal Proceedings

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Forensic social workers are frequently called upon to testify regarding the use of protective measures for children who must testify about child abuse. The basic legal requirements for the use of witness protections were established 20 years ago, but recent years have seen important developments in this body of law. This article reviews the legal requirements for the use of child witness protections, including those recent developments, and provides guidance to forensic social workers in engaging in this work.

Courtrooms are adult spaces designed to reflect the hierarchy and power structure in the relationship between the players in a trial (Edelman, 1995; Supreme Court of Texas, n.d.). They are intended to be intimidating, to impress upon those entering them that serious business in transacted in these spaces (Mulcahy, 2011). For children, courtrooms are especially difficult environments. The American legal system, and in particular the American system of adjudicating criminal charges, is formalistic, adversarial, and confrontational (Vandervort, Pott-Gonzalez, & Faller, 2008; van Wormer, 1992; *Gideon v. Wainwright*, 1963). The questioning of witnesses reflects this adversarial posture and formalism and can take a particular toll on the well-being of children who must testify in cases of child abuse (Troxel, Ogle, Cordon, Lawler, & Goodman, 2009). Forensic social workers (FSWs) may play an important role in helping to prepare children to participate as witnesses in criminal proceedings, in supporting them throughout the legal proceedings and after their ordeal.

During the 1970s and 1980s, the prosecution of child maltreatment increased substantially (Myers, 1994). More specifically, prosecutions for

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sexual abuse rose dramatically in that time period, and in recent years it has been the primary reason that children appear as witnesses in criminal proceedings (Troxel, Ogle, Cordon, Lalwer, & Goodman, 2009). A quarter century ago the United States Supreme Court recognized that "Child abuse is one of the most difficult crimes to detect and prosecute, in large part, because there often are no witnesses except the victim" (*Pennsylvania v. Ritchie*, 1987, p. 60). Indeed, in most cases of sexual abuse, the primary, if not the exclusive, evidence is the statements of the child-victim. This fact presents a real challenge to child-victims and to the legal system because the general rule is that in a criminal proceeding a child must testify just as an adult witness would be expected to do (*Crawford v. Washington*, 2004; *Maryland v. Craig*, 1990): in a courtroom open to the public and to the media (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982); confronting face-to-face the defendant who is alleged to have harmed the child (*Maryland v. Craig*, 1990; *Coy v. Iowa*, 1988); and being subjected to cross-examination, a form of questioning that may be hostile but is intended to ensure the accuracy and completeness of the witness's testimony.

Recognizing that testifying is sometimes traumatic for children, not long after the incidence of child abuse prosecutions rose, courts and legislatures began to experiment with ways to alter procedures, both in and outside the courtroom, to accommodate child witnesses who were appearing more frequently in court (Vandervort, 2006; Ordway, 1981). For instance, numerous states enacted statutes aimed at reducing the traumatic impact of testifying on victims of child maltreatment. By 1990, thirty-seven states allowed the use of videotaped testimony in cases involving child sexual abuse, twenty-four states' statutes permitted a trial court to use one-way closed circuit television (CCTV) to facilitate the taking of a child's testimony in cases involving allegations of child abuse, and eight other states permitted two-way CCTV to be used in presenting a child's testimony (*Maryland v. Craig*, 1990).

In a series of cases beginning in the early-1980s and extending into the 1990s, the United States Supreme Court delineated the basic rules for taking children's testimony during criminal prosecutions (e.g., *Coy v. Iowa*, 1988; *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982; *Kentucky v. Stincer*, 1987; *Maryland v.Craig*, 1990; *Pennsylvania v. Ritchie*, 1987; *White v. Illinois*, 1992). Although the basic parameters for taking children's testimony in criminal cases were set 20 years ago, the specific contours of the application of those rules in individual cases continue to be the subject of litigation across the country, in trial courts, in state appellate courts and in the United States Supreme Court (e.g., *McLaughlin v. State*, 2012; *Overholt v. State*, 2013; *People v. Rodriguez*, 2008; *People v. Rose*, 2010; *State v. Parker*, 2008). Because this body of law regularly impacts the work of FSWs (e.g., *People v. Rose*, 2010; *People v. Rodriguez*, 2008), it is important that they have a basic working knowledge of the legal principles and their application in order to best serve children. (For a list of significant child witness protection cases discussed in the article, please see Table 1.)

TABLE 1 Significant Child Witness Protection Cases Discussed

Citation	Child witness protection	Holding
Public and Press Access		
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)	Closing the courtroom during child's testimony regarding sexual abuse	Trial courts may not assume that testifying in a courtroom open to the press and the public is harmful to a child; court must hold a hearing and make a case-specific determination that the child-witness would be harmed by testifying in open court.
Hearsay		
White v. Illinois, 502 U.S. 346 (1992)	Use of hearsay in lieu of child-victim's testimony in criminal proceeding	Court held that admission of various hearsay statements made by the child-victim did not violate the Sixth Amendment's Confrontation Clause. This holding was explicitly called into question by the court in *Crawford v. Washington* and is likely no longer good law.
Crawford v. Washington, 541 U.S. 36 (2004)	Hearsay—when evidence is of a testimonial nature, a criminal defendant has the right to confront and cross-examine the witness	Distinguished hearsay statements that are testimonial from those which are nontestimonial. If a statement is testimonial the defendant must have an opportunity to confront and to cross-examine the person making the statement.
Giles v. California, 554 U.S. 353 (2008)	Use of hearsay where the defendant's wrongful act caused the witness to be unavailable	Where the defendant's wrongful actions causes the witness's unavailability, the court may admit that witness's hearsay against him without violating his right to confront witnesses against him. Established the forfeiture by wrongdoing doctrine after *Crawford v. Washington*.
People v. Burns, Michigan Supreme Court, June 18, 2013, No. 145604, 2013 Mich. LEXIS 910	Use of hearsay asserting the forfeiture by wrong doing doctrine	Where the defendant threatened the child not to tell "anyone" about sexual abuse, this threat was insufficient to trigger the forfeiture by wrongdoing doctrine because the defendant did not specifically intend the child not to testify in court; where threat was made during abuse and before charges were brought against defendant, the timing did not suggest intent to keep the child-victim from testifying.

Screens		
Coy v. Iowa, 487 U.S. 1012 (1988)	Use of screen to shield child while testifying	Criminal defendant has a right to face-to-face confrontation with accuser; exceptions to this requirement, if one exists, must address important governmental interest and must be based on case-specific finding of need.
State v. Vogelsberg, 724 N.W.2d 649 (Wis. App. 2006); appeal denied 731 N.W.2d 636 (2007); cert denied 127 S.Ct. 2265 (2007).	Use of screen to shield child while testifying	Upheld the use of a screen to shield child from a face-to-face confrontation with the defendant; held that *Crawford v. Washington* does not overrule *Maryland v. Craig* and that these two cases addressed different Confrontation Clause concerns.
State v. Parker, 757 N.W.2d 7 (Neb. Sup. Ct. 2008)	Use of screen to shield child while testifying.	Use of screen to block defendant's view of child while testifying violates the defendant's right to due process of law.
People v. Rose, 808 N.W.2d 301 (Mich. Ct. App. 2010); leave to appeal denied 490 Mich. 929 (Mich. Sup. Ct. 2011); cert den sub nom Rose v. Michigan, 132 S.Ct. 2773 (2012).	Use of scree to shield child witness while testifying.	Use of screen to block the defendant's view of child-witness did not violate either the Sixth Amendment right to confront witnesses or the right to due process of law; noted that the size of the screen and the manner of its use may impact whether due process is violated.
McLaughlin v. State, 79 So.3d 226 (Fla. App. 2012)	Use of screen to shield child witness when testifying.	Use of screen to shield child from seeing the defendant violated defendant's right to due process of law.
Overholt v. State, 110 So.3d (Fla. App. 2013)	Use of screen to shield child witness while testifying	Use of screen to block the defendant's view of child-witness violated his right to due process of law.
Closed circuit television (CCTV)		
Maryland v. Craig, 497 U.S. 836 (1990)	CCTV; all witness protections	Criminal defendant's right to face-to-face confrontation is not absolute; may use alternative procedures if a case-specific finding that child would be traumatized or unable to testify fully in face-to-face confrontation with defendant
People v. Rodriguez, 209 P.3d 1151 (Ct. App. Colo. 2008), affirmed 238 P.3d 1283 (2010).	CCTV	Where social worker testified that child would be traumatized by testifying, and that 70–80% of that trauma would result from a direct, face-to-face confrontation with the defendant, the use of CCTV was upheld.

This article will provide a summary of the rules established by the United States Supreme Court to deviate from the normal procedures for taking a child witness's testimony—the closing of the courtroom to the public and the press, the use of hearsay, the use of CCTV, the use of screens in the courtroom to shield the child witness—in criminal proceedings. It will address more recent litigation focused on the taking of children's testimony. The article will consider the role and responsibilities of the FSWs in the process of using child witness protections, and will provide guidance to FSWs working with children who may be required to testify.

BASIC CONSTITUTIONAL CONSIDERATIONS

In general, the presentation of child-witness testimony implicates two distinct constitutional concerns. The first of these is the Sixth Amendment right of the criminal defendant to confront those who bear witness against him during a trial that is open to the public and the press. The second is the Fourteenth Amendment right to due process of law, which guarantees that legal proceeding will be characterized by "fundamental fairness" (*Lassiter v. Department of Social Services of Durham County, N.C.*).

The Sixth Amendment

Unlike civil proceedings (e.g., child protective proceedings or divorce cases), when a child testifies in a criminal child abuse proceeding the constitutional rights of the accused as protected by the Sixth Amendment to the United States Constitution are implicated (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982; *Coy v. Iowa*, 1988; *Maryland v. Craig*, 1990). As is relevant to the current discussion, the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a … public trial … [and] to be confronted with the witnesses against him" (U.S. Const., amend. VI). The Sixth Amendment was ratified as part of the original Bill of Rights, the first 10 amendments to the Constitution, on December 15, 1791.

In commenting on the age of Amendment, and the rights it guarantees, the Supreme Court has observed that "The language 'comes to us on faded parchment'" (*Coy v. Iowa*, 1988, p. 1015). Although now more than 220 years old, the rights that the Sixth Amendment seeks to protect have their roots much further back in Western legal history than the establishment of the United States as a country. In *Coy v. Iowa* (1988), the court traced the roots of the Confrontation Clause to ancient Roman law. The right to confront witnesses includes the right to question the witness by way of cross-examination.

Similarly, in ruling that criminal trial must generally be open to the public and the press, the court reasoned that this had been the case throughout our history as a nation (*Globe Newspaper Co. v. Superior Court for the County of*

Norfolk, 1982). Access to criminal trials by the press and public trial is thought to help ensure that the trial process is fair and that it is endowed with integrity that results from governmental functions taking place in an atmosphere of openness (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982). Open trials permit individual citizens to participate in our democratic form of self-government (*Richmond Newspapers, Inc. v. Virginia*, 1980).

As these cases illustrate, the rights that the Sixth Amendment seeks to protect are long-standing and thought to be of critical importance in ensuring that criminal trials lead to fair and accurate results. Courts, which are conservative institutions that apply a form of analysis that looks backward to consider how things have been done historically, will not take lightly such a lengthy dedication to a principle. They will tend, that is, to move away from historical precedent only reluctantly and slowly (Stein, 1998). Thus, the burden will always rest with those who would alter the traditional procedures to demonstrate compelling reasons for those alterations. That burden will be a heavy one.

Due Process

Unlike the Sixth Amendment, which contains specific requirements for conducting criminal trials, the Fourteenth Amendment's Due Process Clause imposes a more general requirement of fundamental fairness. In relevant part, the Amendment requires that no State may "deprive any person of life, liberty, or property, without due process of law" (U.S. Const., amend. IV). The right to due process is implicated when courts take special protective measures to ensure that children are not traumatized when testifying in criminal proceedings (*Coy v. Iowa*, 1988; *State v. Parker*, 2008).

As is clear from the language of the Fourteenth Amendment, the rights implicated by the phrase "due process of law" are somewhat amorphous, incapable of easy definition. The United States Supreme Court has recognized this difficulty. In 1981, a majority of the justices on the court wrote:

> For all its consequence, "due process" has never been, and perhaps never can be, precisely defined … due process is not a technical conception with a fixed content unrelated to time, place, and circumstances. Rather, the phrase expresses the requirement for "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation. (*Lassiter v. Department of Social Services of Durham County, N.C.*, 1981, pp. 24–25).

Although difficult to define precisely, the principle embodied in the concept of "due process of law" is of overarching importance. The Supreme Court has noted the centrality of the concept to the operation of the law when one's

physical liberty is at issue: "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise" (*In re Gault*, 1967, pp. 20–21).

Because the Due Process Clause is concerned with the requirement of basically fair procedures, it has been interpreted to require that a criminal defendant be provided, among other rights, written notice of the specific facts that state authorities allege constitute a violation of the law as well as a citation to a specific provision of the statutory law the governmental officials assert the defendant has violated, the opportunity to present a defense, and that the judge presiding in the case be impartial. As it relates to child witness protections, courts have been concerned about the appearance of fairness and the messages conveyed, even if subtly, by the way in which a child's testimony is taken (e.g., *People v. Rose*, 2010; *State v. Parker*, 2008; *State v. Vogelsberg*, 2006).

SPECIFIC CONSTITUTIONAL CONCERNS

With these basic legal principles in mind, this article will now turn to consider more specific issues—the use of a child's hearsay testimony, the legal authority of a trial court to close the courtroom to the press and to the public during a child's testimony, and the use of child witness protections that might run afoul of the defendant's rights to confront witnesses and to due process of law. This article next turns to a discussion of hearsay.

HEARSAY

Hearsay is an out-of-court statement offered in court to prove the facts asserted in the statement (*Federal Rule of Evidence 801*). So, for instance, if a child's statement that she was touched inappropriately is admitted though the testimony of her physician—without the child having testified—for the purpose of proving that the inappropriate touching in fact took place, that statement is considered hearsay (e.g., *White v. Illinois*, 1992). The foundational rule is that hearsay is not admissible unless it falls within one of a number of exceptions to the rule against hearsay (*Federal Rule of Evidence 802*). Several exceptions to the rule against hearsay are particularly relevant for consideration regarding the statements of children describing sexual abuse. These include the excited utterance rule, the rule permitting statements made for the purpose of medical diagnosis and treatment, and the rule regarding the use of prior consistent statements (Myers, 2002).

The admission of hearsay in a criminal trial implicates both the Sixth Amendment right to confront and cross-examine witnesses and the applicable

rules of evidence, which are intended to ensure that only reliable (and nontestimonial) statements are admitted in evidence against a defendant. These two sources of law implicate related yet distinct legal concerns. If a child's hearsay statement is admitted without the child being on the witness stand (e.g., through a FSW), than the defendant cannot question the child directly about the statement—that is, he cannot confront the child. Even if the child's statement may be deemed reliable for hearsay purposes and would otherwise be admissible, admission of the statement deprives the defendant of the chance to directly question the child about that statement.

Following the increase in prosecutions of cases of child abuse discussed earlier, using the child's hearsay statements was one of the methods advocates used to protect children from having to take the witness stand and to testify in a direct, face-to-face confrontation with the alleged perpetrator. Courts approved the use of such hearsay if it fell into a preestablished exception to the rule against hearsay in lieu of the child's in person testimony. *White v. Illinois* (1992) involved a child sexual abuse prosecution. The prosecution alleged that defendant, White, who was acquainted with the child's mother, broke into the child's home in the night and sexually assaulted her. During the assault, the child screamed out, awakening a babysitter. The child made statements to the babysitter describing the abuse. The child's mother returned home a short time later and the child made statements to her, too. A police officer then interviewed the child. About 45 min after the child screamed, she was taken to the hospital where she made statements to both a nurse and a doctor implicating the defendant. At trial, the child did not testify. Rather, the child's babysitter and mother, the nurse and physician were called to testify as to the statements the girl made describing the sexual assault. The defendant was convicted and appealed, arguing that his Sixth Amendment right to confront witnesses against him was violated by the trial court's admission of the child's hearsay statements. At that time, the law permitted a trial court to admit hearsay statements against a defendant if the judge was satisfied that the statement was reliable (Fishman, 2010). The Supreme Court applied this reliability rule, which was established in *Ohio v. Roberts* (1980) and upheld the defendant's conviction.

A dozen year after the *Roberts* case was decided, the Supreme Court dramatically altered this approach to the admission of statements made outside the courtroom. In *Crawford v. Washington* (2004) it ruled that, in general, a testimonial statement could not be admitted by way of an exception to the rule against hearsay, even if the statement was reliable, because to do so would violate the defendant's rights under the Confrontation Clause. After *Crawford*, the question was no longer whether the child's statement was reliable, but, rather, whether it was testimonial. The justices distinguished testimonial statements from those deemed nontestimonial for Confrontation Clause purposes. The court did not initially define testimonial statements for

all purposes, but held that when, as in *Crawford*, the witness makes a formal statement to a law enforcement officer (the witness in *Crawford* had completed an affidavit regarding domestic violence perpetrated upon her by the defendant in the case), that statement is testimonial and cannot be admitted unless the defendant has the opportunity to cross-examine the witness. In doing so, the Supreme Court specifically called into question the use of a child's hearsay testimony that it permitted in *White v. Illinois* (1992).

Applying the rules established by *Crawford* and the cases that followed it to cases involving child sexual abuse, state appellate courts analyzing statements made by children in the context of a formal interviews at child advocacy centers, in which interviews are typically conducted by forensically trained social workers, have found them to be testimonial and therefore inadmissible through the testimony of the FSW (Lyons, & Dente, 2012). By contrast, where a child made a spontaneous statement to the Executive Director of a Children's Advocacy Center (CAC) regarding sexual assault, the statement was deemed nontestimonial (*People v. Geno*, 2004). In that case, the child was taken to the CAC after concerns about her having been sexually abuse surfaced. At the CAC, the child asked the staff member to accompany her to the bathroom. The staff member noticed blood in the child's "pull-up underpants" and asked her if she "had an owie," to which the child made statements indicating that the defendant had sexually abused her. At trial, the staff member was called as a witness and allowed to testify after the trial court ruled that the child's statement to the CAC staff member was nontestimonial. This decision satisfied the Confrontation Clause concern. But the appellate court had to then go on and analyze whether the child's statement was sufficiently reliable to address the hearsay concern. The appellate court agreed with the trial judge's assessment that the statement was nontestimonial and that they were sufficiently reliable to be admissible under the hearsay rule. Because the statement met both of these tests, it was properly admitted, and the state's highest court affirmed the defendant's conviction. In doing so, the state supreme court noted that the CAC's Executive Director was not a governmental employee and that the child's statement was not the functional equivalent of an in court statement.

Two years after *Crawford*, in *Davis v. Washington* (2006), the Court clarified the testimonial–nontestimonial dichotomy, at least when a statement is given to a police officer. It said that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Davis v. Washington*, 2006, p. 822)

In 2011, the Court further clarified what it means by testimonial statements. These include statements "in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial" (*Michigan v. Bryant*, 2011, p. 1155).

Davis, like *Crawford*, involved an incident of domestic violence. Unlike *Crawford*, however, where the witness gave a formal, written affidavit about what had previously transpired, the testimony at issue in *Davis* were statements made to a 911 operator in the course of reporting an ongoing emergency (a then-occurring incident of domestic violence). Thus, the statement admitted in *Davis* was nontestimonial and did not implicate Confrontation Clause concerns. Applying the principle established in *Davis*, a state appellate court ruled that a child's statements made to a Sexual Assault Nurse Examiner (SANE) in a hospital setting may or may not be testimonial, the key being whether all the facts and circumstances under which the statement was taken suggested that it would be used later at trial or was taken for the purpose of establishing past events to be used in a future prosecution (*People v. Spangler*, 2009). If so, then the statement will be deemed testimonial and cannot be admitted without the child who made the statement taking the witness stand at trial.

In *Giles v. California* (2008), the Supreme Court ruled that where wrongdoing on the part of the alleged perpetrator of a crime is intended to and does in fact cause the person making the statement to be unavailable to testify at the time of trial, that act of wrongdoing works as a forfeiture of the right to confront the witness. In *Giles*, the defendant was charged with murdering his girlfriend. At trial, the prosecutor sought to introduce certain statements made by the girlfriend to the police about three weeks before she was killed. Those statements described an incident of domestic violence perpetrated by defendant-Giles upon her. Mr. Giles objected, asserting that the statement was hearsay and admitting it without the opportunity to cross-examine the girlfriend would deprive him of his Sixth Amendment right to confrontation. The trial judge admitted the statements, ruling that the forfeiture by wrongdoing doctrine permitted the court to do so. The defendant was convicted and appealed. The Supreme Court ultimately ruled that where a defendant's actions are intended to prevent a witness from testifying and actually result in the victim not testifying, the defendant's wrongdoing acts to forfeit his right to cross-examine the witness.

Legal commentators have argued that the forfeiture by wrongdoing doctrine should be applied to cases of child abuse and that when children cannot testify, in part because they have been threatened by the defendant, their out of court statements should be admitted into evidence (Lyon & Dente, 2012; Fishman, 2010). To date, however, this possibility seems to have been thwarted by courts' application of the doctrine in the context of child sexual abuse. Although forfeiture by wrongdoing has been raised a number of times in the context of child abuse prosecutions, courts have generally

been unwilling to apply the doctrine to permit the admission of the child's out of court statements (e.g., *People v. Burns*, 2013; *People v. Stechly*, 2007; *State v. Waddell*, 2006). Most recently, for example, the Michigan Supreme Court reversed a conviction for child sexual abuse where the defendant threatened the child that if she told "anyone" about the abuse she would be in trouble (*People v. Burns*, 2013, p. 3–4, 11). In *Burns*, the prosecutor attempted four times to have the 4-year-old child testify. "All four attempts were unsuccessful. CB [the child] left the witness chair, hid under the podium, refused to answer questions asked by the prosecutor, indicated that she would not tell the truth, stated that she was fearful of the jury, and expressed a desire to leave the courtroom" (p. 3). At the prosecutor's request, the trial court then held a hearing and determined that the child was unavailable to testify. Because the girl was deemed unavailable to testify, the judge admitted the child's hearsay statements to a social worker and to a SANE nurse in lieu of her live, in-court testimony. Relying on *Giles*, the state appellate court found this threat made by the defendant was not made specifically to keep the child from taking the witness stand to testify against him. In addition, the court was concerned about the timing of the threat the defendant made against the child. The court reasoned that because the defendant had had no contact with the child after the allegations of sexual abuse surfaced, and the threat was made contemporaneous with the alleged sexual assault on the child, the threat did not demonstrate the defendant's intent to keep the child from testifying against him at trial. Consequently, the court reversed the defendant's conviction.

Implications for FSWs

In applying the rules established in *Crawford*, *Davis*, *Giles* and the related state court decisions, several matters become important. First, FSWs will want to carefully document very concrete matters about their interaction with the child. Why is the child being seen? What is the "presenting problem"? What is the context of the meeting—did it take place in a hospital emergency room, a child advocacy center, or a school? Is the social worker investigating alleged abuse or neglect? Or is she seeing the child for some concern unrelated to maltreatment. The social worker should also be certain to record other basic information such as the date and time of the meeting.

Next, it will be important that the FSW pay careful attention to each statement made by a child and the context in which that statement is made. Is the social worker seeing the child in response to a concern that the child may have been abused? Or is the social worker seeing the child for some unrelated reason? If the child is being seen because of concerns that the child may have been harmed, the social worker should assume that statements made by the child are likely to be held testimonial in nature and will necessitate the child testifying in court. But the context in

which any statement is made is crucial, and the FSW must carefully document that context. If the FSW is an interviewer at a CAC and the statement is given in the course of a forensic interview, it is almost certain that the child's statement will be considered testimonial for hearsay purposes (Lyons & Dente, 2012).

The FSW should document very carefully how the child's statement was made. Was the statement more spontaneous, such as the statement given to the staff member in *Geno*? Or was it given in a more formal setting such as the statement given to the SANE nurse in *Spangler*? Because all of the circumstances surrounding the child's statement are important in the analysis of whether a particular statement is testimonial, it will be important that every detail of the interaction be documented as clearly as possible.

Any statement that is made while the FSW is working in conjunction with law enforcement to conduct a joint interview—as is generally the case with CACs—are likely to be deemed testimonial (Lyon & Dente, 2012). As such, the only means for admitting such statements is by application of the forfeiture by wrongdoing doctrine. In considering this doctrine, it will be important that FSWs pay particularly close attention to the child's statements regarding any threats that may have been made by the alleged perpetrator of abuse. What precisely was said and the child's understanding of the intent of what was said are important details that may permit these statements to be used in the event that the child is unavailable to testify. In addition, did the perpetrator say anything to the child specifically about not speaking to the police or other authority figure or did the perpetrator make more general threats against the child? Any such statement could be crucial in demonstrating that the defendant intended to dissuade the child from testifying, and thereby provide the opportunity to argue that the forfeiture by wrong doing rule should be applied and the child's hearsay statements admitted. Finally, if a threat was made, when was it conveyed to the child? Was it made contemporaneously with the assault? Was it made after the alleged abuse came to light? If more than one threat was communicated, the content and timing of each statement will be important.

THE RIGHT TO A PUBLIC TRIAL

The Sixth Amendment guarantees a criminal defendant a public trial (U.S. Const. amend. IV). In addition, the First Amendment's guarantees of freedom of the press and of speech require that members of the general public and the media must typically have access to criminal trials (U.S. Const., amend. I; *Richmond Newspapers, Inc. v. Virginia*, 1980). In *Richmond Newspapers, Inc. v. Virginia*, a criminal defendant requested that the courtroom be closed to the public and to the media during his murder trial, and the judge presiding over his trial granted his request, excluding two newspaper

reporters from the courtroom. The newspaper sued, claiming that the trial judge's ruling violated the First Amendment, which provides, in relevant part, that: "Congress shall make no law … abridging the freedom of speech, or of the press" (U.S. Const., Amend. I). The case ultimately made its way to the Supreme Court, which held, in part based upon the long history of open trials, which the court traced to the 1200s, that the First Amendment generally guarantees the public and the press the right to have access to criminal trials.

Only 2 years after deciding the *Richmond Newspapers* case, the Supreme Court again confronted questions regarding public and media access to criminal trials in *Globe Newspaper Co. v. Superior Court for the County of Norfolk* (1982). Believing a law requiring the closing of the courtroom to the public during the testimony of a child victim of sexual assault would be beneficial to the victim and the administration of justice, the Massachusetts legislature enacted a statute that mandated that trial judges exclude anyone except "persons as may have a direct interest in the case" (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 598). According to the Supreme Judicial Court of Massachusetts Court, that state's highest court, the statute "was designed … to encourage young victims of sexual offenses to come forward; once they have come forward, the stature is designed to preserve their ability to testify by protecting them from undue psychological harm" (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 600).

After the statute was enacted, the prosecution brought a case alleging that two 16-year-olds and one 17-year-old had been sexually assaulted. The trial judge, as was required by the statute, excluded all members of the public, including members of the media, from the courtroom for the duration of the trial. The newspaper attempted to gain access to the proceedings, but its efforts were denied. Relying, in part, on the *Richmond Newspapers* case, the United States Supreme Court held that the statute's mandatory requirement that the courtroom be closed to the public during the entire trial violated the First Amendment. The rationale for the general rule that provides for public and media access to criminal trials was twofold. First, historically, criminal trials had been open to the public. Secondly, public access to and scrutiny of criminal proceedings "enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole" (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 606). Thus, even in the context of a criminal proceeding in which it was alleged that several minors were sexually assaulted, and in which those minors would need to testify, the Supreme Court reaffirmed the general rule that criminal trials must be open to the public and to the press.

Although criminal trials must typically be open to the public and to the press, this rule is not absolute. Where a party to the case can demonstrate a

compelling interest in closing the courtroom, the court may do so, although the reasons for doing so must be "weighty," the Supreme Court warned. Protecting children from undue trauma, the court reasoned, met this standard and was sufficiently compelling that it could, in the proper circumstance, warrant the closing of the courtroom to the press and public. The problem with the Massachusetts statute was that it required (rather than merely permitted) the closure of the courtroom in every case, and throughout the entire trial rather than just during the child's testimony. The Supreme Court majority reasoned that this approach was unnecessarily broad to meet the government's interest in encouraging minor sexual assault victims to come forward and to testify "in a truthful and credible manner" (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 607).

The Supreme Court held that in order to exclude the public or the press from a criminal trial, a trial court judge must make a case-specific determination of the need to do so. Furthermore, it ruled, a trial court may only close the courtroom as is necessary to meet the compelling governmental interest. So, for example, a trial court judge, after making the appropriate, case-specific findings, could close the courtroom during the child's testimony but permit the press and public to attend during the testimony of other witnesses. The Supreme Court suggested a nonexclusive list of factors that trial court judges should consider in determining whether to close the courtroom: (a) the child-victim-witness's age; (b) the child's psychological maturity and understanding; (c) the nature of the crime; (d) the desires of the child-victim; and (e) the interests of the child's parents and relatives (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 608). Although the court did not specifically mention the psychological impact upon the child of testifying in a public venue in which members of the media may be present to report to the public what transpires during the child's testimony, it did note that "the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public" (*Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 1982, p. 607).

Implications for FSWs

The rules regarding the closure of the courtroom as outlined suggest several factors with which FSWs should be familiar. Most fundamentally, a FSW may be called to testify as to the impact of testifying generally, the impact of providing public testimony that may be reported in the media, and the impact of testifying in public upon the particular child at issue in the case. Because one rationale for the closure of the courtroom during the testimony of the child-victim-witness is the child's psychological wellbeing, the FSW should be familiar with the literature addressing the impact of testifying on children (e.g., Faller, & Vandervort, 2012; Troxel, et al., 2009). This author has not been

able to find any research which specifically assesses the impact upon a child of testifying in an open versus a closed courtroom. The FSW may be asked to opine about the impact of public testimony upon children generally. Next, and more specifically, the FSW should carefully assess the impact of testifying on the particular child and should be prepared to testify in detail about the impact upon that child of testifying in a room that may be filled with strangers. Such an individualized assessment should include consideration of the child's preferences regarding whether she will testify in a courtroom open to the public and in which the media may be present and report the proceedings. Separate and apart from the impact on the child mental wellbeing, the Supreme Court made clear that the child's desires regarding the giving of public testimony are important, and the FSW should be prepared to relate the child's preferences separate from her or his assessment of the psychological impact giving public testimony may have on the child.

The FSW should be prepared to testify as to the particular child's psychological maturity and the likely impact that providing public testimony may have on the child. In conjunction with "maturity" the court said that the minor's "understanding" is a relevant consideration. It did not define what it meant by "understanding," but presumably it deals at least with whether the child understands that any member of the public may be present during the testimony, that members of the media may also be present and that they may report what they hear from the child-witness to the general public. In addition, some cases involving child-witnesses will attract the interest of the television media, and the unique aspects of this on the particular child should be assessed.

The most important consideration impacting whether to close the courtroom to the public and the media during a child's testimony is the incremental stress that comes about from the presence of the public and the press in the courtroom during the child's testimony, as well as the possibility that the child's identity will be disclosed in the media. For this reason, it is important that the FSW seek to separate , to the extent possible, the generalized stress and trauma that may result from the courtroom setting and testifying generally from (including testifying in the presence of the alleged perpetrator) that which may result specifically from the presence of members of the general public and of the news media. The FSW working with a child who may be required to testify should specifically discuss with the child her or his feelings about the presence of the public and press and should carefully document the child's verbal and emotional responses.

THE RIGHT TO CONFRONTATION

As noted earlier, the Sixth Amendment guarantees a criminal defendant the right to confront witnesses who testify against him. The Amendment was intended to prevent a criminal defendant from being tried in such a way that

he would not have the opportunity to question the witnesses in order to ensure the accuracy of their testimony.

The United States Supreme Court has held that, in general, the right to confrontation requires a direct, face-to-face confrontation between the witness and the defendant against whom testimony is given (*Maryland v. Craig*, 1990; *Coy v. Iowa*, 1988). In *Coy v. Iowa* the Court's majority asserted two rationales for the right to confrontation. First, the right to meet an accuser face-to-face is something that is deeply rooted in Western history and tradition. Secondly, the right to confrontation provides the criminal defendant the right, either directly or through legal counsel, to test the accuracy of the memory and the truthfulness of the statements of witnesses whom the state would call to testify against him. This is done by cross-examination, a form of adversarial questioning.

In the *Coy* case, the defendant was charged with sexually assaulting two 13-year-old girls. The girls were camping in the back yard of the house next to the defendant's home. The girls alleged that during the night Mr. Coy entered their tent and assaulted them. During the trial, when it came time for the girls to testify, and acting pursuant to a then recently enacted state law, the trial judge ordered that "a large screen" be placed between the girl and Mr. Coy. With lights placed in a certain fashion, "the screen would enable appellant [the defendant] dimly to perceive the witnesses, but the witnesses to see him not at all" (*Coy v. Iowa*, 1988, p. 1015). From behind the screen, the girls testified and defendant-Coy was convicted of two counts of lascivious acts with a child. On appeal, he made two arguments that his rights were violated by the use of the screen. First, he claimed that the placement of the screen between himself and the minor-witnesses violated his Sixth Amendment right to confront the witnesses against him. The Confrontation Clause, he argued, guaranteed him the right to direct, face-to-face confrontation with each of the girls. His second claim was that the use of the screen violated his right to due process of law because its use during the girls' testimony made him appear guilty and thus eroded the presumption of innocence to which he was entitled. After the Iowa Supreme Court upheld his conviction, he appealed to the United States Supreme Court.

The Supreme Court reversed his conviction, holding that the use of the screen to block the girls' view of the defendant impaired his right to a direct, face-to-face confrontation with the witnesses against him. The court reasoned that the Confrontation Clause had always been understood to guarantee to a criminal defendant the right to meet his accusers directly. "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult" (*Coy v. Iowa*, 1988, p. 1020). Although the majority of the justices asserted that a criminal defendant has an absolute right to a face-to-face confrontation, it ultimately decided *Coy* on narrower grounds. They held only that if something less than a direct,

face-to-face confrontation was ever permissible, it would need to be based, like the closure of the courtroom to the public and the press, on a specific finding of need in the particular case. Because the trial court judge made no such case-specific finding of need to use the screen, the court reversed the defendant's conviction. Because it decided the case on Confrontation Clause grounds, the Supreme Court did not consider defendant-Coy's due process claim, a fact that has become important in recent litigation regarding the use of screens to shield child-witnesses (e.g., *State v. Parker*, 2008; *People v. Rose*, 2010)

In a concurring opinion that would prove prescient 2 years later, Justice Sandra Day O'Connor agreed with the majority that because there was no case-specific finding Mr. Coy's conviction had to be revered. Unlike the majority of the justices, however, she made clear her belief that although the law prefers that a criminal defendant has the opportunity to meet his accusers face-to-face, that right is not absolute, and may be altered by countervailing interests and considerations. She wrote that "a child victim may suffer trauma from exposure to the harsh atmosphere of the typical courtroom" (*Coy v. Iowa*, 1988, p. 1022). Avoiding or minimizing that trauma, she reasoned, might be a sufficiently important governmental interest to permit altering the typical face-to-face confrontation.

Justice O'Connor's view prevailed and became law in *Maryland v. Craig* (1990). In *Craig*, the defendant was charged with several crimes relating to the sexual abuse of a 6-year-old girl who was a student in the defendant's kindergarten and prekindergarten center. Before the trial began, the prosecution moved to have the child's testimony taken via one-way CCTV.[1] This procedure was authorized by state law if, before using it, the trial court judge found that "testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate" (*Maryland v. Craig*, 1990, p. 841). The trial court judge so found, based in part on expert testimony that the child would not be able to testify if a direct, face-to-face confrontation with defendant-Craig in the courtroom was required, and allowed the child to testify in another room and her testimony to be televised in the courtroom. The prosecutor and defense lawyer were in the separate room with the child, and the defense attorney was permitted to fully question the child-witness, while the defendant remained in the courtroom with the judge and jury. During the taking of her testimony, the child-witness could not see the defendant, although the defendant was able to communicate with her attorney via electronic means. In addition to the 6-year-old complaining witness, three other children were allowed to testify using this procedure. Ms. Craig objected to the use of this procedure, asserting that it violated her right to confront

[1]In a one-way system, the defendant can see the child but the child cannot see the defendant. In a two-way closed circuit system the child can see the defendant also.

the witnesses against her. At the conclusion of the trial, she was convicted and she appealed. The highest court in Maryland reversed the conviction. Applying the standards set out in *Coy v. Iowa* (1988), the Maryland appellate court found that the trial judge's findings regarding harm to the children and their inability to communicate were insufficient to obviate the need for an "eyeball-to-eyeball" confrontation between the children and the defendant.

While recognizing that the Confrontation Clause generally requires a fact-to-face confrontation, Justice O'Connor reasoned that "The central concern of the *Confrontation Clause* is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact" (*Maryland v. Craig*, 1990, p. 845, italics in original). In addition to a face-to-face meeting, the Confrontation Clause requires the witness to take an oath, to be subjected to cross-examination, and to allow the jury to observe the witness's demeanor. These elements together with the witness's physical presence in the courthouse serve the purposes of the Confrontation Clause.

A majority of the justices concluded that, although generally preferred, a direct, face-to-face confrontation was not a defendant's absolute right. They, therefore, approved the use of CCTV, but only if three conditions are met. First, the trial court judge must make a case-specific finding based upon the presentation of evidence that the particular child witness would be traumatized and unable to communicate during a face-to-face confrontation with the defendant. Secondly, that trauma and inability to communicate must result not from the stress of testifying generally, but must be the result of a direct, face-to-face confrontation with the defendant. Finally, "the emotional distress suffered by the child must be more than *de minimis*" (i.e., it must be more than trivial or more that an insignificant harm; *Maryland v. Craig*, 1990, p. 856). In permitting the use of CCTV in *Craig*, however, the justices were careful to stress that the other elements of confrontation must be preserved—the physical presence of the child-witness in the court, taking the oath, being subjected to cross-examination, and the ability of the judge or jury to assess the credibility of the child-witness. Without the preservation of these other elements of confrontation, the use of CCTV to protect the child witness will not pass constitutional muster.

In the wake of *Coy* and *Craig*, states adopted the use of CCTV rather than screens as the preferred alternative method of taking children's testimony when a case-specific finding that the child cannot testify in open court is made. Indeed, as of 2012, the federal law, the law of every state and the District of Columbia permitted the use of CCTV to take children's testimony under the appropriate circumstances (National Center for the Prosecution of Child Abuse, 2012). For some years, it appeared, screens of various sorts had fallen out of use. But recently, the use of screens has resurfaced as an issue as several trial courts have permitted them to be used, which has resulted in divided results at the appellate level.

Use of Screens

The specific child witness protection used by the trial court in *Coy v. Iowa* (1988) was "a large screen" that blocked the defendant's view of the victim. Recall, also, that in addition to the Confrontation Clause challenge, the defendant in *Coy* challenged the use of the screen on due process grounds, because, he argued, the use of the screen to block his view of the child witness made him appear guilty, a claim the Supreme Court did not address. Interestingly, although the majority of the justices did not address the issue, in his dissenting opinion in *Coy*, Justice Blackman wrote that the use of the screen to shield the witness was not inherently prejudicial to the rights of the defendant. In recent years state appellate courts have had occasion to revisit the role of screens in protecting child-witnesses and to address both Confrontation Clause concerns and the due process question that *Coy* left unaddressed, resulting in a split of opinion in the states about their constitutionality.

Before addressing the due process issue, however, it is helpful to clarify the relationship between the Supreme Court's holding in *Crawford .v Washington* (2004) and its earlier holding in *Craig*. In 2006, the Wisconsin Court of Appeals decided *State v. Vogelsberg* (2006), in which a screen was used to shield a 4-year-old boy while he testified regarding a sexual assault perpetrated upon him by his grandfather. At a pretrial hearing, consistent with *Maryland v. Craig* (1990), the trial judge took testimony from the child's counselor and his mother before deciding that the child would be traumatized by a face-to-face confrontation with the defendant and permitting the use of a screen. After being convicted, the defendant appealed, arguing in part that the holding in *Crawford* essentially overruled *Craig* and required a direct, face-to-face confrontation between the child-witness and the defendant. The Wisconsin Supreme Court rejected this argument, noted that *Crawford* dealt with a circumstance in which the defendant was entirely unable to cross-examine the witness while in both *Craig* and in *Vogelsberg* the defendant had the opportunity to conduct full cross-examination and affirmed the trial judge's decision to permit the use of the screen.

Returning to the due process issue, in 2008, the Nebraska Supreme Court addressed the use of a screen to shield a child-witness from the defendant in *State v. Parker* (2008). The defendant in Parker was found guilty of sexually assaulting a child. Before his trial, the prosecution moved, pursuant to state law, to permit the child to testify from another room by way of CCTV. The trial court held a hearing as required by *Craig* and determined that although some protection of the child witness from a direct confrontation with the defendant was necessary, it would suffice and be a lesser deviation from standard practice to require the child to testify in the courtroom but to place a screen between the child and the defendant while she testified. The appellate court described the screen thusly: "The screen appears … to have been a panel of the kind commonly used as an office partition" (*State v. Parker*, 2008, p.12).

The room and the screen were configured so that the jury could observe both the child-witness and the defendant and that judge could observe the child-witness. But it was clear to the jury that the child could not see the defendant and the defendant could not see the child. After his conviction, Parker appealed. Regarding the use of the screen, he argued that the placement of the screen between himself and the child-witness violated his right to due process of law. The Nebraska Supreme Court agreed. It found that the use of the screen in the courtroom to shield the child-witness violated Mr. Parker's due process rights in that it eroded the presumption that he was innocence. In so holding, the state's high court analogized the use of the screen to other cases in which (a) the defendant was made to appear before the jury in shackles; (b) the defendant was required to appear before the jury shackled and gagged; (c) the defendant was forced to wear identifiable prison garb during his jury trial; and (d) a witness "was allowed to wear a noticeable disguise" (*State v. Parker*, 2008, p. 17). Indeed, the appellate court found that the use of the screen was more prejudicial to Parker than was the case in which the witness was allowed to wear the disguise. This was true because previous witnesses had testified to how afraid of Parker the child-witness was. During the child's testimony, "The screen stood there protecting [the child] as she told the jury how fearful she was of Parker. The screen was, in effect, a judicially sanctioned prop that lent credence to the witness' claims" (*State v. Parker*, 2008, p. 17).

Relying on the United States Supreme Court majority's comment in *Coy* regarding the use of the screen in that case that "it is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter" (*Coy v. Iowa*, 1988, p. 1020), and the holding by the Nebraska Supreme Court in *Parker*, the Court of Appeal of Florida has twice recently held that the use of screens to shield child-witnesses is an unconstitutional violation of a criminal defendant's right to due process of law (*McLaughlin v. State*, 2012; *Overholt v. State*, 2013).

Consistent with *Vogelsberg*, and in contrast to the Nebraska and Florida courts, the Michigan courts have recently approved the use of a screening device for shielding a child-witness (*People v. Rose*, 2010). That case involved several allegations regarding the sexual abuse of two children, an 8-year-old girl and a 10-year-old boy. During a pre-trial hearing in which the prosecution sought the court's authorization to use the screen to shield the girl but not the boy from the defendant while testifying, the child's therapist, a social worker, testified that the child "'was very fearful'" of the defendant, that girl did not believe she could testify in the presence of the defendant, and the therapist believed that testifying in a face-to-face confrontation with the defendant "might trigger some traumatic experiences and cause 'numbing, shutting down, and not being able to speak" (*People v. Rose*, 2010, pp. 308–309). In reliance on the social worker's testimony, the court authorized the use of a Universal Vulnerable Witness Screen (2013). This screen, unlike the

makeshift screens used in *Coy*, *Parker* or *McLaughlin*, is specifically designed for the purpose of shielding vulnerable witnesses. It is relatively small, affixes to the witness stand and allows the defendant to see the child-witness in shadow. This screen is somewhat similar in appearance to a flat screen television. The Michigan Court of Appeals disagreed with the Nebraska Supreme Court's decision in *Parker* and found that the use of the screen was not inherently prejudicial. Rather, it agreed with Justice Blackman's dissenting opinion in *Coy* that other inferences than the defendant's guilt could be drawn from the use of the screening device. These include that the child is being untruthful and needs the screen for this purpose, that the screen is being used to calm the witness' general anxiety about testifying rather than because the child feared the defendant, or the jury might conclude that any time a child must testify against one who is alleged to have harmed her, the witness will have some fear of the defendant. In addition, the Michigan court noted that "the potential for prejudice will vary depending on the particular screen or screening technique employed" (*People v. Rose*, 2010, pp. 316–317). The defendant appealed to the Michigan Supreme Court, which ultimately dismissed his appeal. The defendant's application to appeal to the U.S. Supreme Court was denied (*People v. Rose*, 2010). So, it appears that for some courts, at least, whether the use of a screen to shield the child-witness is inherently prejudicial to the defendant's right to a fair trial hinges, in part, on the type of screening device that is used.

Implications for FSWs

As this discussion makes clear, there is considerable variability in opinion as to the use of child-witness protections, with courts seeming to be more comfortable with the use of CCTV than with the use of screening devices inside the courtroom. Whether a child-witness protective measure will be used, and which one and how, is a fact intensive determination made by an individual judge based upon all the facts and circumstances of the individual case as the judge understands those facts. Whether the use of CCTV or a screen is at issue, the key to their use is a factual finding by the trial judge that the child will be traumatized by having to testify in a face-to-face confrontation with the defendant. To address this issue and meet its burden, the prosecution will frequently call upon a social worker to testify to the child's emotional condition and the likely impact of testifying on the child's ability to communicate his or her story in full (McGough, 1994; e.g., *People v. Rose*, 2010; *State v. Rodriguez*, 2008). It will be important for the social worker to carefully consider and attempt to separate the stress and potential trauma of testifying generally and testifying in the presence of the defendant specifically. For example, in *People v. Rodriguez* (2008), a social worker was called as a witness in a pre-trial hearing to provide testimony about the impact of the child-victim testifying in the presence of the defendant, who was the child's

mother. The social worker opined that this would "re-traumatize greatly" the 10-year-old child and that 70–80% of that trauma would be the result of a face-to-face confrontation (p. 1157). Although not as specific in terms of quantification of the likely trauma from a face-to-face confrontation, the social worker who testified in *People v. Rose* (2010) was able to specifically focus on the 8-year-old child's fears about the face-to-face confrontation element of testifying against the defendant, who was her brother-in-law. Consider this interchange between the defense attorney (Q) and the social worker (A):

> Q: Okay. Now, what do you predict for her mental health if she testifies? Or that she won't be able to testify or that she'll be harmed? Can you clarify that?
> A: Sure. The concern is that [JB] specifically because she had indicated to me that she's very fearful of seeing the defendant. If she has to testify in his presence there's concern that that would be a trigger for her which could cause her to exhibit some of these symptoms I had expressed; the numbing out, spacing out and possibly not even being able to speak.
> Q: Is she able to articulate this fear clearly?
> A: Yes.
> Q: Does she exhibit any symptoms of fear?
> A: Yes. She's very fearful, very shaky, talks about being very nervous, stomach aches.
> Q: This is related to testifying?
> A: In front of the defendant.
> Q: Specifically in front of the defendant?
> A: Correct.
>
> ***
>
> Q: Is there any particularly heightened effect on [JB] of testifying versus say any other witness in a traumatic case?
> A: Well I think the difference in this particular case is that [JB] has expressed this fear of being in front of fact to face the defendant. Some, you know, it varies based on the child. However, because she has verbally expresses that this is very scary for her, shows me that this is something we need to try to prevent her from being so fearful. Because if she's too fearful and she becomes—her stress arousal happens, she'd going to have a very difficult time expressing, verbalizing and accessing her memories. (p. 309)

This exchange, which both the trial court judge and the Court of Appeals judges found persuasive, demonstrates that the social worker has considered the child individually, separate from her brother whose testimony was taken without the need for any protective measures. The social worker is clearly able to relate the child's specific fears, and the child's emotional and physical (somatic) reactions to those fears, to testifying in a direct confrontation with the defendant. Finally, she is able to describe how the child's stress and the

trauma of such a confrontation could impair the child's ability to access her memories and communicate those memories fully and effectively.

GENERAL SUGGESTIONS FOR FSWS

In addition to the specific suggests outlined above, there are several general steps FSWs can take to serve children who may need to testify. First, FSWs will often interview children who have witnessed a crime or who are the victim of a crime. It is crucially important that all FSWs be aware of and follow best practice guidelines for interviewing children (Olafson & Kenniston, 2008; Faller, 2007). Following these guidelines can increase the possibility that a child's hearsay statements may be admitted (e.g., *People v. Katt*, 2003). Similarly, adherence to these best practice guidelines may help to diffuse concerns that inappropriate interviewing techniques have "tainted" the child's memory or have unduly influenced the child's testimony (*New Jersey v. Michaels*, 1994).

Next, staying abreast of developments in the field is important. FSWs should be familiar with the social science literature regarding children testifying and the impact that testifying in a direct confrontation with a defendant may have on a child's ability to recall and to relate her experiences. In addition, as the discussion regarding the use of screening devices makes clear, there is considerable variation from jurisdiction-to-jurisdiction regarding the application of the law. Although social workers do not need to know the law in detail, it will be helpful to have a general sense of the law applicable in your jurisdiction. Knowing the basics of the law will help the social work professional to frame interactions with the child-client who is likely to be called upon to testify, to know what topics of inquiry will be important and to know the salient details that must be attended to. It will also assist the social worker in preparing her testimony and in knowing the relevant topics that may be inquired about when called upon to render an opinion about the impact of testifying on the child. As part of this educational process, FSWs should periodically attend training to update themselves regarding the social science of children's testimony, the legal requirements regarding child witness protections, and working with legal professionals across disciplinary lines.

Before appearing in court, it will be important that the FSW carefully review her or his case file regarding the child in order to be prepared to testify in detail about the child and the FSW's work with the child. Careful preparation is essential to performing well in the courtroom. It may be important that, to the extent possible, the FSW be able to situate the individual child's circumstances within the broader context of what research tells us about children's testimony.

In any particular case, it will be essential that the FSW who may be called to testify regarding the use of child witness protections work closely

with the attorney calling the social worker in order to prepare before appearing in court (Gutheil, 2009; Stern, 1997). It will be important that the FSW understand where her testimony fits in with other testimony and evidence. In addition, it will be important for the social worker to understand with as much precision as possible exactly what the goals of her testimony are. What are the specific questions that will be posed to the social worker, and what are the most likely avenues of cross-examination. As part of this preparation, it may be useful for the FSW to actually view the courtroom in which the trial will take place. It may sometimes be the case that the unique features of a courtroom may contribute to a child's stress, trauma and increased difficulty in testifying. If, for instance, the courtroom is small and the child-witness and the defendant would be forced to sit in close proximity, the FSW should be aware of this.

A FSW called to the stand to testify regarding the impact of testifying on a child will necessarily need to be qualified as an expert witness. To assist in the process, the FSW should have an up to date CV or resume, which should outline educational back ground, work experience, professional training beyond formal education, and related matters. It will be helpful to know whether, how many times and by what courts the FSW has been qualified and allowed to testify as an expert witness.

CONCLUSION

Since the early 1980s, children have been appeared more frequently as witnesses in criminal cases in which those children are witnesses or victims. Over the past 30 years, litigation has established the basic rules regarding the use of child-witness protections. Although the basic rules are well established, the application of those rules in individual cases continues to be a source of contentious litigation, and FSWs will sometimes play a crucially important role in litigation addressing the application of child-witness protections. It will serve these FSWs well to be aware of the research in child witness protections as well as have a basic understanding of the applicable law.

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