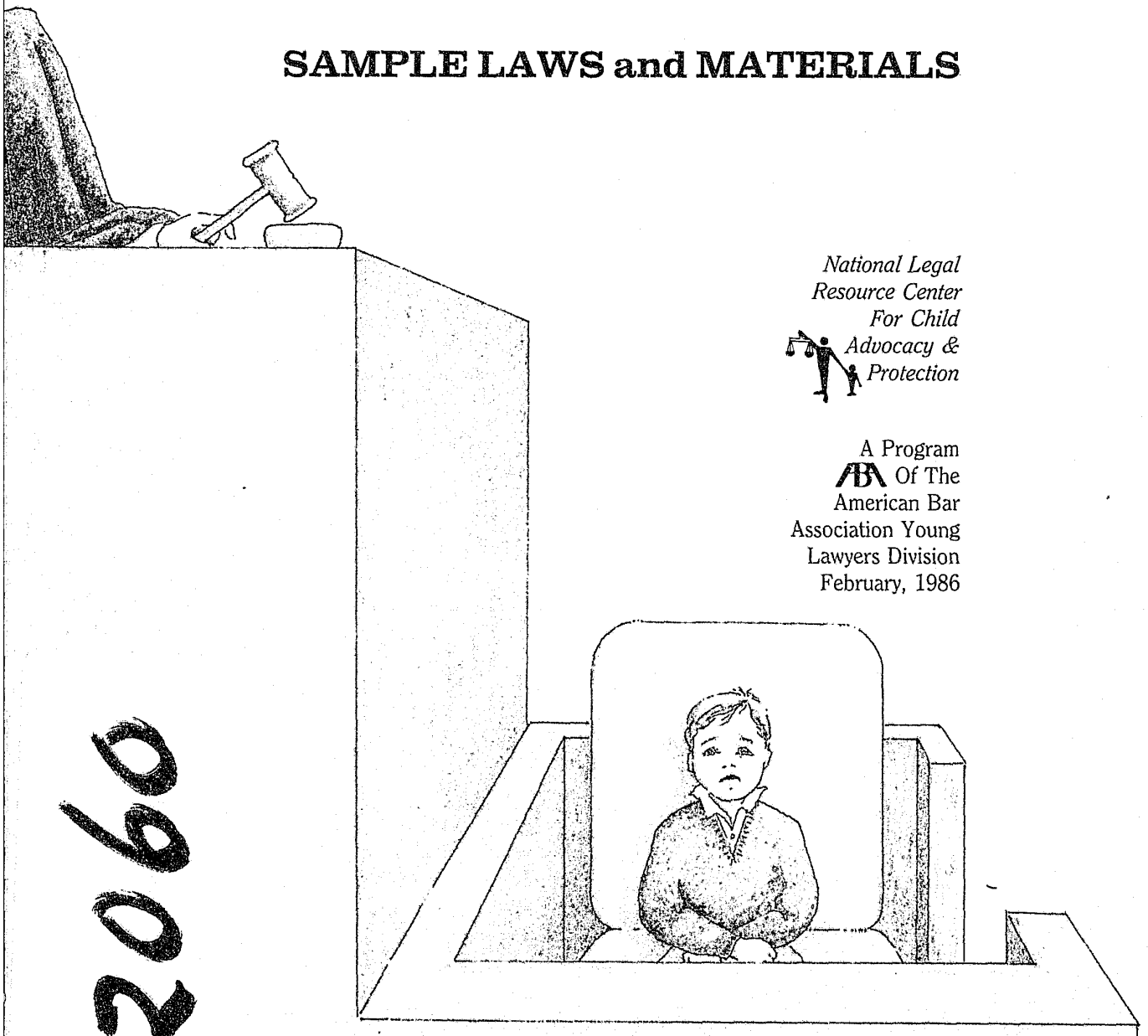
PROTECTING CHILD VICTIM/WITNESSES

SAMPLE LAWS and MATERIALS



National Legal Resource Center For Child Advocacy & Protection

A Program
ABA Of The
American Bar
Association Young
Lawyers Division

February, 1986

NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION

A Project of the ABA Young Lawyers Division

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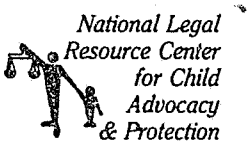

Prepared under a Cooperative Agreement to the National Center for Missing and Exploited Children, Number 86-MC-CX-K003, from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice.

Preface

Over the last several years, there has been a tremendous amount of media and professional attention directed at the special vulnerability of very young children who, as both victims of crime and witnesses in the judicial process, have faced a double ordeal. The trauma induced by their involvement in the legal system, which some have referred to as a "second victimization," has for some time been a concern of this program. Since 1979, the National Legal Resource Center for Child Advocacy and Protection has been focusing on the child who has been criminally victimized within their own family. However, what we have learned through seven years of technical assistance throughout the country is that many of the statutory reforms originally devised to protect the victim of intrafamily abuse are applicable to all young sensitive children who are called upon to function in the courtroom environment.

After we published five books (between 1980 and 1985) which spotlighted some of these issues, and the ABA's Criminal Justice Section began to focus on this area, the American Bar Association's policymaking body, the House of Delegates, approved a resolution setting forth a set of "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged." These guidelines (contained herein) now represent the official policy of the ABA. However, our technical support responsibilities have continued unabated, and to assist those who are trying to craft legislation on some of the most vexing and complex aspects of the child witness issue, we have been commissioned under a contract with the National Center for Missing and Exploited Children to develop this publication.

Let me first be clear about what this publication is <u>not</u>. The sample statutes are not intended to serve as model laws or uniform legislation. Rather, they are offered as approaches states may want to consider in pursuing legislative reform. Nor have we tried to develop statutes that track the specific positions taken in the ABA "Guidelines." In no way are we suggesting that the sample legislative approaches contained herein will not be controversial; indeed, as the limited, cautious positions taken in the "Guidelines" point out, there is clearly disagreement within the ABA about how far these child witness reforms should go. We also recognize that the difference in the states' constitutional provisions and court decisions make any single national approach to these child protective reforms unrealistic.

We therefore encourage people who are working on reforms at the state level to be cautious, to draft laws in these areas as carefully and methodically as possible, and with the broadest range of multidisciplinary input and study. Our seven years of research and consulting tells us that states must be flexible

in both adopting and using these reforms, and that alternative approaches should be available for dealing with the child in the courtroom. Without the utmost care in legal drafting and reform implementation, there is great risk of case reversals and the need for retrials, thus causing the child even more trauma. It is also vital to carefully evaluate the use of any new procedures to protect children by using a case-by-case analysis, rather than a blanket approach, and to only use the reforms when necessary. This is consistent with the U.S. Supreme Court's decision in the Globe Newspaper Co. case which is referred to herein.

The major part of the following material is in some way both a crystalization of the writings previously published by us (see the complete list enclosed), as well as an expansion upon one part of a previous publication of the National Center for Missing and Exploited Children, entitled Selected State Legislation: A Guide for Effective State Laws to Protect Children. Our program was pleased to have assisted in the preparation of that guide.

The sample laws which follow take a comprehensive approach to the issues addressed, and each area has been carefully analyzed by our staff, and is fully discussed in the commentary which accompanies the statutory language. In certain places we have bracketed certain words (such as the suggested ages of children) to indicate that these are places where the legal drafters may especially want to consider alternatives.

Of course, drafting, enacting, and even using new legal protections for child victim/witnesses will not be enough. There must be a concomitant effort to educate county and local professionals in the need for these reforms and where they can most appropriately be used. Our program will continue to be available to assist in these efforts.

Howard A. Davidson, Esquire
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Acknowledgment

We want to express our gratitude to Bernadette Higgins, who typed the many drafts of this manuscript.

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Introduction

This publication offers sample statutes and accompanying commentaries for four legislative reforms: a special hearsay exception for a child victim's out-of-court statement of abuse; videotaped depositions of a child victim's testimony; closed-circuit televising of a child victim's trial testimony; and revision of the testimonial competency standard for children. These reforms all have a common objective -- to facilitate or allow the admission into evidence at trial of a child victim's account of abuse. Although the concern for a child abuse victim's welfare is no less significant in civil proceedings, the commentary may place a greater emphasis on criminal trial issues than on civil issues. This emphasis reflects the more stringent constitutional requirements in criminal proceedings. For example, the defendant's sixth amendment right of confrontation and the public's and press' rights of access to certain judicial proceedings may be more strictly applied in criminal cases.

The reforms selected for this publication are among many that have been adopted by state legislatures and local jurisdictions throughout the country since the early 1980's. As state child protection agencies received more reports of sexual abuse of children and as more cases were prosecuted in the criminal justice system, it became evident that child sexual abuse cases were extremely difficult to prove, that the legal system often further traumatized the victim, and that treatment was rarely available. A sweeping law reform movement developed to respond to these problems with numerous proposals for improving the legal response in child sexual abuse cases. Sources of these reform proposals include the ABA's Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged (included in this publication), the Recommendations of the ABA National Legal Resource Center for Child Advocacy and Protection (also included in this publication), the NIJ study report When the Victim is a Child and many law journal and social science articles. By 1986, 22 states had adopted a special hearsay exception, 27 states had enacted videotaped deposition statutes, 20 states had passed closed-circuit television statutes, and 32 states had accorded children presumptive competency.

A comprehensive interdisciplinary response to child abuse involves a wide range of reforms, some of which require state legislation, others of which do not. Many reforms implemented without legislation (some trial reforms do not require legislation) can significantly reduce a child victim/witness' trauma and result in more successful prosecution or disposition of child abuse cases, and innovative prosecution programs have recognized that these non-legislative reforms are indispensable. Legislative authority is not needed to convene interdisciplinary child abuse teams, to coordinate court proceedings, to appoint special advocates for child victims, or

to reduce interviews with children through joint interviews or videotaping of interviews. Training and education of law enforcement personnel in interviewing and investigative techniques can also be accomplished at a local level. Some progressive local prosecutorial programs have instituted vertical prosecution policies, allowing the same prosecutor to handle all stages of a child abuse case, and some jurisdictions have formed special prosecution units to handle all abuse cases. Finally, treatment programs for child victims, families, and (where appropriate) offenders also have been created without legislative authorization.

However, reforms that involve the revision of evidentiary and procedural rules at trials generally require legislative authorization. Further, courts may be reluctant to permit innovative procedures to protect the child victim/witness in the absence of legislative authority, especially when important constitutional rights of the defendant are at stake. Thus, the California court of appeals, in Hochheiser v. Superior Court, 161 Cal. App. 3d 777, 208 Cal. Rptr. 273 (1984), held that a trial court had exceeded its authority in allowing the use of closed-circuit television equipment to transmit a child victim's trial testimony from another room into the courtroom. On the other hand, a New Jersey trial court validated the same procedure despite the absence of statutory authority, but set forth elaborate conditions for its implementation. Legislation therefore may be appropriate and sometimes necessary when a desired reform involves a significant departure from traditional court procedures or judicial doctrine, or when detailed procedures will be required for its implementation. Finally, legislation encourages the use of reforms, whether or not it is necessary to achieve them.

Some of the legislative reforms -- such as the admission into evidence at trial of a child victim's videotaped deposition, closed-circuit testimony, or out-of-court statement about abuse-- offer child victim/witnesses special protections to accommodate their unique needs. Statutory revision of the testimonial competency standard, on the other hand, is intended to treat children as other witnesses are treated, and is needed to supplant a practice which has traditionally worked to the special disadvantage of child witnesses.

States have already addressed through legislation a number of ameliorative reforms for the benefit of child victim/witnesses. Most states provide for the exclusion of spectators from the courtroom during the testimony of a minor victim of specified offenses if it can be shown that the victim would be traumatized (see Summary of Other Legislative Reforms). Since 1983, eleven states have passed statutes which authorize the admission into evidence at trial of a child victim's videotaped statement or interview about abuse (see Summary of Other Legislative Reforms). These statutes should not be confused with the videotaped deposition laws (discussed

in Videotaped Deposition and Closed-Circuit Television Testimony) that contemplate full cross-examination of the child victim/witness. The videotaping of a child victim's statement may serve useful purposes apart from its evidentiary value, since, for example, an effective and persuasive statement may reduce the number of interviews or induce a guilty plea. Use of a vidotaped statement as evidence in a criminal trial in lieu of the child's trial testimony, however, may violate the defendant's sixth amendment right of confrontation, as appellate courts in Texas have held.

A number of states have enacted statutory provisions which direct courts to expedite proceedings, give docket priority, or ensure a speedy trial in cases involving child victim/witnesses (see Summary of Other Legislative Reforms). It is generally believed that protracted proceedings may exacerbate the child's trauma, and these special provisions are designed to limit the child's unnecessary exposure to the legal system. Several states have also extended the statute of limitations for certain criminal offenses against children, recognizing that the circumstances of child abuse, especially in an intrafamily context, may delay discovery or disclosure of the abuse. Various state statutes now permit a guardian or support person to remain with a child victim during different stages of legal proceedings, while other statutory provisions require courts to protect a child victim's privacy in court proceedings.

At least three states--Rhode Island, Washington, and Wisconsin-- have enacted into law a "bill of rights" for child victims and witnesses during their involvement with the legal system. These statutory schemes contain broad language stating that efforts should be made to ensure that law enforcement personnel, prosecutors, or judges explain the nature of various proceedings to the children and that input of a child's guardian or support person be considered during the proceedings. All three states also require that child victims and their families be provided information or referrals to social service agencies to help them cope with the emotional impact of the crime, investigation, and subsequent judicial proceedings.

Many of the issues raised by these new reforms have not yet been carefully addressed by courts and commentators. The reforms contained in the sample statutes have received more scholarly attention, however, and though issues remain unresolved, sample statutes can be offered with greater assurance.

Hearsay Exception for Child Victim's Out-of-Court Statement of Abuse

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense[s] of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.

(B) An out-of-court statement may be admitted as provided in section A if:

(1) the child testifies at the proceeding, or testifies by means of videotaped deposition (in accordance with [_____]) or closed-circuit television (in accordance with [_____]), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or

(2) (a) the child is found by the court to be unavailable to testify on any of these grounds:

i) the child's death;

ii) the child's absence from the jurisdiction;

iii) the child's total failure of memory;

iv) the child's persistent refusal to testify despite judicial requests to do so;

v) the child's physical or mental disability;

vi) the existence of a privilege involving the child;

vii) the child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or

viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television;

and

(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) A finding of unavailability under section B(2)(a)(viii) must be supported by expert testimony.

(D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(E) In determining whether a statement possesses particularized guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;
(2) the age and maturity of the child;
(3) certainty that the statement was made, including the credibility of the person testifying about the statement;
(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
(5) the timing of the child's statement;
(6) whether more than one person heard the statement;
(7) whether the child was suffering pain or distress when making the statement;
(8) the nature and duration of any alleged abuse;
(9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
(10) whether the statement has a "ring of verity," has internal consistency or coherence, and uses terminology appropriate to the child's age;
(11) whether the statement is spontaneous or directly responsive to questions;
(12) whether the statement is suggestive due to improperly leading questions;
(13) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(F) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

Commentary

This sample statute creates a special exception to the hearsay rule to allow a child victim's out-of-court statement about abuse [or other offense] to be admitted at a judicial proceeding as substantive evidence that the abuse [offense] occurred. A special exception to the hearsay rule for a child's out-of-court statements is necessitated both by practical and legal considerations. In child sexual abuse cases, especially, these statements often provide crucial evidence, since physical evidence is often lacking and there are seldom other witnesses to the abuse. A child's out-of-court statement also may contain details and spontaneity absent in the child's later testimony about the events. Further, the child victim may be unavailable to testify at trial, in which case the out-of-court statement may provide the victim's only account of the incident. Finally, more cases may proceed without a live witness if a child's statement is available to supplement other evidence.

The hearsay rule generally excludes from evidence any out-of-court statement offered to prove the truth of the matter contained in the statement. The value of such statements rests on the credibility of the out-of-court declarant, and the hearsay rule is designed to ensure that statements be made under oath, by a witness who is present at trial and subject to cross-examination. However, numerous exceptions to the rule have been established because certain statements, while lacking these elements, have nevertheless been deemed to be inherently trustworthy or reliable. The hearsay exceptions most commonly utilized to admit a child's out-of-court statement are: (1) excited utterances, spontaneous exclamations, or res gestae; (2) statements made to physicians in the course of treatment; (3) prior consistent statements (if the child testifies); (4) statements of present bodily symptoms or present sense impressions; and (5) the residual hearsay exception.

However, states have not uniformly adopted all of these exceptions, and a child victim's out-of-court statement often does not fall within the strict requirements of traditional hearsay exceptions. As a result, twenty-two states have now passed statutes which, like the proposed sample statute, create a special hearsay exception as a vehicle for the admission of a child victim's out-of-court statements.

In a criminal trial, a child victim's out-of-court statement must also satisfy a defendant's sixth amendment "right to be confronted with the witnesses against him." Decisions of the United States Supreme Court have indicated that the confrontation clause poses no obstacles to the admission of an out-of-court statement when the person who made the statement testifies at trial, since the witness is under oath, the defendant has the opportunity to cross-examine the witness about the out-of-court statement, and the jury can

assess the demeanor of the witness. Section B(1) incorporates by reference sample provisions pertaining to videotaped depositions and closed-circuit broadcasts of a child victim's testimony. The proper use of these alternative means for obtaining a child victim's testimony should also satisfy the confrontation clause prerequisites for the admission of the child's out-of-court statement.

Under the Supreme Court decision Ohio v. Roberts, the confrontation clause imposes additional conditions on the admission of a hearsay statement if the person who made the statement does not testify at a criminal trial. First, the proponent of the statement must show that the person who made the statement is unavailable as a witness. Section B(2)(a) lists the various grounds of unavailability, most of which are recognized by the Federal Rules of Evidence and state statutes, decisions, or court rules. Two grounds of unavailability deserve special comment. Section B(2)(a)(vii) allows into evidence the statement of a child victim who is adjudged an incompetent witness at the time of trial. A child's testimonial incompetence does not preclude the admission of the child's hearsay statement since the statement of an incompetent witness might still satisfy the elements of a hearsay exception. Decisions have held, however, that there must be a hearing and a trial court finding that the child is incompetent before admitting such hearsay testimony. That a competency hearing may be required under this section should not be read to contradict the view, expressed elsewhere in these sample statutes, that competency hearings should be avoided. In this context, it is the prosecutor who asserts the child's incompetence, and the procedure is intended to facilitate, rather than preclude, the child's testimony.

Expert testimony is required to establish the child victim's unavailability only when the prospective psychological trauma from testifying is asserted as the grounds of unavailability under section B(2)(a)(viii). Some courts have required expert testimony on psychological unavailability, and have held that a parent's testimony alone cannot establish the child's unavailability. Warren v. United States, 436 A. 2d 821 (D.C. App. 1981), discussed in the commentary accompanying the sample videotaped deposition and closed-circuit testimony statutes, suggests useful criteria for assessing a witness' psychological unavailability.

When the hearsay declarant does not testify at trial, the proponent must also show that the out-of-court statement bears "indicia of reliability." A statement which falls under a firmly rooted hearsay exception may be presumed reliable; any other statement, however, must be excluded unless it possesses "particularized guarantees of trustworthiness." Since the special hearsay exception applies only when a statement is not admissible under an established exception, section B(2)(b) requires that the the statement of an unavailable witness possess "particularized guarantees of trustworthiness."

The first two special hearsay exception statutes, in Washington and Kansas, recently were challenged as unconstitutional violations of the confrontation clause. These statutes, which incorporate the Ohio v. Roberts requirements, were upheld by the highest courts of both states.

Section E provides a court with criteria for assessing the trustworthiness of out-of-court statements for confrontation clause purposes. This list of trustworthiness factors, drawn from judicial decisions, is intended to provide guidance for a trial court and should not be construed as exhaustive of all indicia of trustworthiness. Under section F, however, a court should support its ruling on the admissibility of the statement with findings on the record as to the child's unavailability and the trustworthiness of the statement.

Of the twenty-two states that have created special statutory hearsay exceptions for child victims' out-of-court statements, nine require that there be corroborative evidence (either of the alleged act or of the statement itself) before the statement of an unavailable child witness can be admitted. The corroboration requirement reflects a legislative judgment that a criminal conviction should not rest solely on evidence consisting of the out-of-court statement of an unavailable witness. The accused's due process right to a fair trial requires that a conviction rest upon evidence sufficient to support the conviction. Although some courts have referred to "corroboration" of a hearsay statement as an indication of the statement's reliability, corroboration is not required under the confrontation clause. This sample statutory exception does not include a corroboration requirement, since corroboration should not be a prerequisite to the admissibility of the statement. It is, in fact, unusual for cases of child abuse to proceed with no witness and no other evidence besides the statement.

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Admissibility of Child Victim's Out-of-Court Statements

The following states have passed legislation permitting a child's out-of-court statement to be admitted as substantive evidence in either criminal or civil proceedings. The specific provisions should be consulted to determine whether they apply in particular proceedings. The parenthetical information following the statutory citations pertains to: 1) the age of the child covered by the provision; 2) statutory references to the child's availability to testify at trial; and 3) whether the legislation specifically requires that the statement be reliable as a prerequisite to its admission. The statutes approach the availability issue in a variety of ways. Some allow the out-of-court statement into evidence only if the child testifies at trial (indicated by "child must testify"). Others also allow into evidence the statement of an unavailable witness if there is corroborative evidence of the abuse (indicated by "corroboration required only if child unavailable"), while some allow into evidence the statement of an unavailable child witness without specifically imposing further conditions to admissibility (indicated by "provides for unavailability"). A note is included for the states that make no reference to the child's availability at trial and to the few whose language departs from the approaches already described.

Alaska:	ALASKA STAT. §12.40.110 (1985); (under 10; child must testify; reliability).
Arizona:	ARIZ. REV. STAT. ANN. §13-1416 (1985); (under 10; corroboration required only if child unavailable; reliability).
Arkansas:	ARK. R. EVID. 803(25)(A) (1985); (under 10; "hearsay statement can be used even though child available"; reliability).
California:	CAL. EVID. CODE §1228 (West 1985); (under 12; requires unavailability; no reference to reliability).
Colorado:	COLO. REV. STAT. §13-25-129 (1983); (age varies with offense; corroboration required only if child unavailable; reliability). See also §18-3-411(3) (1984).
Florida:	FLA. STAT. §90.803 (1985); (11 or under; corroboration required only if child unavailable; reliability).
Illinois: (civil)	ILL. ANN. STAT. ch. 37, §704-6(4)(c) (Smith-Hurd 1983); (under 18; no reference to other issues; but note, uncorroborated

	hearsay statement alone is not sufficient to support finding of abuse and neglect).
Illinois: (criminal)	ILL. ANN. STAT. ch. 38, §115-10 (Smith-Hurd 1984); (under 13; no reference to other issues).
Indiana:	IND. CODE ANN. §35-37-4-6 (Burns 1985); (under 10; corroboration required only if child unavailable; reliability).
Iowa:	IOWA CODE §232.96(6) (1985); (no reference to other issues).
Kansas:	KAN. STAT. ANN. §60-460(dd) (1983); (no reference to age; requires unavailability; reliability).
Maine:	REV. STAT. ANN. tit. 15, §1205 (1985); (under 14; no reference to other issues).
Minnesota: (civil)	MINN. STAT. ANN. §260.156 (West 1984); (under 10; no reference to availability; reliability).
Minnesota: (criminal)	MINN. STAT. ANN. §595.02(3) (West 1984); (under 10; corroboration required only if child unavailable; reliability).
Missouri:	MO. REV. STAT. §491.075 (1985); (under 12; provides for unavailability; reliability).
Nevada:	Act of June 12, 1985, Ch. 653, 1985 Nev. Stat. 2132; (under 10; provides for unavailability; reliability).
New York: (civil)	N.Y. JUD. LAW - FAM. CT. ACT §1046(a)(vi) (McKinney 1985); (no reference to age; child not required to testify (but uncorroborated hearsay alone is not sufficient to make a finding of abuse and neglect); no reference to reliability, except that such evidence constitutes corroboration).
New York: (criminal)	N.Y. CRIM. PROC. LAW §§65.00 to 65.30 (McKinney 1985); (12 or under; no reference to other issues; special provision for use of hearsay statements at hearing to establish need for use of closed-circuit television testimony).
Oklahoma:	OKLA. STAT. ANN. tit. 12, §2803.1 (West 1985); (under 10; corroboration required only if child unavailable; reliability).

Rhode Island: R.I. GEN. LAWS §14-1-68 (1985); (under 13; no reference to other issues).

South Dakota: S.D. CODIFIED LAWS ANN. §19-16-38 (1985); (under 10; corroboration required only if child unavailable; reliability).

Texas: TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 1985), TEX. FAM. CODE ANN. §54.031 (Vernon 1985); (12 or under; "child must testify or be available to testify"; reliability).

Utah: UTAH CODE ANN. §76-5-411 (1985); (no reference to age; corroboration required only if child unavailable; reliability).

Vermont: VT. R. EVID. 804(a) (1985); (10 or under; child must testify; reliability).

Washington: WASH. REV. CODE ANN. §9A.44.120 (1985); (under 10; corroboration required only if child unavailable; reliability).

NOTE: In 1985, the Montana legislature passed a resolution (House Joint Resolution No. 37) to examine the need for a new child victim hearsay rule.

Videotaped Depositions of Child Victims

(1) Application

In any civil or criminal proceeding involving an alleged offense against a child under the age of [thirteen] the state's attorney, the child's attorney, or the child's guardian ad litem may apply for an order from the court that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on videotape.

(2) Procedure

(a) Upon timely receipt of an application as provided in section 1, the court shall make a preliminary finding regarding whether at the time of trial the child victim is likely to be unavailable to testify in open court in the physical presence of the defendant, public, jury, and judge for any of the following reasons:

(i) the child's persistent refusal to testify despite judicial requests to do so;

(ii) the child's inability to communicate about the offense because of extreme fear, total failure of memory, or other similar reason; or

(iii) the substantial likelihood that the child will suffer severe emotional trauma from so testifying.

(b) A finding of unavailability under section 2(a)(iii) must be supported by expert testimony. If the court finds that the child is unavailable for any of the reasons in 2(a), it shall order that the deposition be taken and preserved by videotape.

(c) The trial judge shall preside at the videotaping proceeding and shall rule on all questions as if at trial. Subject to the provisions of section 2(d), the only other persons who may be present at the proceeding are the operator(s) of the recording equipment, the attorney for the state, the defendant, the defendant's attorney, the attorney or guardian ad litem for the child, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child during his or her testimony. The defendant shall be afforded the rights applicable to defendants during trial, including the right to an attorney, the right to be

confronted with the witness against him, and the right to cross-examine the child.

(d) If the preliminary finding of unavailability under section 2(a) is based upon evidence that the child is unable to testify in the physical presence of the defendant, the court may order that the defendant be excluded from the room in which the deposition is being conducted. If the court orders that the defendant be excluded from the deposition room, it shall order that two-way closed circuit television equipment relay the defendant's image into the room in which the child is testifying, and the child's testimony into the room in which the defendant is viewing the proceeding. The defendant shall also be provided with a means of private, contemporaneous communication with his attorney during the deposition.

(3) Admissibility at Trial

If at the time of trial the court finds that the child is unavailable to testify as provided in section 2(a), the court may admit into evidence the child's videotaped deposition in lieu of the child's testifying at trial. The court shall support any ruling under this section with findings on the record as to the child's unavailability at the time of trial.

(4) Newly Discovered Evidence

Upon timely receipt of a notice that new evidence has been discovered after the original videotaping and before or during trial, the court, for good cause shown, may order an additional proceeding to videotape the child's testimony. The testimony of the child shall be restricted to the matters specified by the court as the basis for granting such order.

(5) Protective Order

Any videotape which is taken pursuant to this statute is subject to a protective order of the court for the purpose of protecting the privacy of the child.

Child Victim's Live Testimony By Two-Way Closed-Circuit Television

(1) In any civil or criminal proceeding involving an alleged offense against a child under the age of [thirteen], the state's attorney, the child's attorney, or the child's guardian ad litem may apply for an order from the court that the child's testimony be taken in a room outside the courtroom and be televised by two-way closed-circuit television. The person seeking such order shall apply for such an order at least [five] days before the trial date.

(2) The court may order that the testimony of the child be taken by closed-circuit television as provided in section 1 if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

(a) the child's persistent refusal to testify despite judicial requests to do so;

(b) the child's total inability to communicate about the offense because of extreme fear, total failure of memory, or other similar reason; or

(c) the substantial likelihood that the child will suffer severe emotional trauma from so testifying.

(3) The court shall support any ruling on the child's unavailability under section 2 with findings on the record. Expert testimony is required to support a finding of unavailability under section 2(c).

(4) The state's attorney and the defendant's attorney shall be present in the room with the child and the child shall be subject to direct and cross-examination. The only other persons allowed to be present in the room with the child during his or her testimony are the child's attorney or guardian ad litem, those persons necessary to operate the closed-circuit equipment, and any other person whose presence is determined by the court to be necessary to the welfare and well-being of the child.

(5) The child's testimony shall be transmitted by closed-circuit television into the courtroom for the defendant, jury, judge and public to view. The defendant shall be provided with a means of private, contemporaneous communication with his attorney during the testimony. The courtroom setting shall simultaneously be transmitted by closed-circuit television into the room where the child is testifying, to permit the child to view the courtroom participants, including the defendant, jury, judge, and public.

Commentary

It is commonly believed that a child victim may be intimidated or traumatized by having to testify in open court before the defendant, judge, jury, public, press and court personnel. The formal and unfamiliar courtroom setting may compound the stress upon a child who must endure the rigors of direct and cross-examination. For these reasons, many states have adopted reforms which allow a child victim's testimony to be taken outside of the courtroom setting.

The sample statutes outline two alternative methods for taking a child victim's trial testimony. One method contemplates the videotaping of a child victim's deposition testimony for later admission at trial; closed-circuit television may be used during the deposition if the child is traumatized by facing the defendant. The second method allows the child victim's testimony to be taken outside of the courtroom during the trial while closed-circuit facilities transmit the child's live testimony into the courtroom. Although court decisions have not resolved all of the constitutional issues pertaining to the use of videotaped and closed-circuit testimony at a criminal trial, the sample statutes have been drafted with particular attention to a defendant's rights.

The alternative method chosen will depend on the needs of a particular child, and a prosecutor seeking to utilize one of them should carefully assess the alternatives before proceeding. A pretrial deposition can provide a useful means of recording and preserving a young child's testimony closer in time to the event than the trial. Even if the defendant is present, a videotaped deposition also affords the prosecution the opportunity to elicit the child's testimony in a less formal setting than the courtroom, outside of the presence of the press, public, and jury.

It has been suggested, however, that a child victim may have more trouble testifying at a deposition in closer proximity to the defendant than while in open court in the defendant's presence. Thus, section 2(d) allows the court to physically isolate the defendant from the room in which the child's testimony is taken, and provides for two-way monitors that televise both the defendant's image into the testimony room, and the child's testimony into the room in which the defendant views the proceeding. The closed-circuit deposition procedure has the added benefit of reducing any anxiety the child may suffer from testifying in physical proximity to the defendant.

Two-way closed-circuit television equipment to facilitate a child victim's live trial testimony may provide the best alternative method for taking a child's testimony. Since the testimony is live and not pre-recorded, it represents less of a

departure from traditional trial practice than a deposition. Whereas the use of pre-recorded testimony might raise denial of fair trial or jury trial concerns because the jury is not present at the time the testimony is taken, there is less concern when the victim's testimony is broadcast live over closed-circuit television. Further, the closed-circuit procedure also permits the exclusion of spectators during a minor victim's testimony, but still makes it possible for the public to view the live testimony.

The use of videotaped or closed-circuit testimony in a criminal trial raises a variety of constitutional issues. Commentators have suggested that various rights of the defendant might be abridged by the use of videotaped evidence at trial, including: the sixth amendment rights to a public trial and jury trial; the sixth amendment right to compulsory process of witnesses; the fourteenth amendment due process right to a fair trial; and the sixth amendment right to confront the witnesses against him. The use of video technologies may distort or fail to convey certain evidence, affecting the jury's perception of demeanor and credibility, thus having an impact on the defendant's right to a fair trial and trial by jury. The defendant's right to a public trial, which is thought to restrain abuse of judicial authority and encourage public confidence in the judicial process, may be implicated in the public's exclusion from the deposition procedure. The press' and public's first amendment rights of access to criminal trials may be adversely affected by the use of either a videotaped deposition or closed-circuit procedure. These objections, however, can be minimized by careful and responsible use of videotape or closed-circuit technology and selection of the least restrictive alternative justified in a particular case.

The right of confrontation poses the most substantial obstacle to the use of alternatives for taking a child witness' testimony. Before a videotaped deposition or closed-circuit television can be used as a substitute for the child victim's in-court testimony, the prosecution must satisfy certain conditions designed to protect the defendant's confrontation right. The prosecution must demonstrate both that the the child is unavailable to testify in a traditional trial setting and that the proffered testimony bears sufficient indicia of reliability to justify its admission. Under section 2(a), a showing must be made prior to the taking of the deposition that the child is likely to be unavailable to testify in open court at the trial. The child also must be shown to be unavailable to testify in open court at the time of trial under section 3.

The prosecution has a heavy burden if it seeks to establish the child's unavailability under section 2(a)(iii) of the sample deposition statute or the parallel provision in the closed-circuit testimony statute. In Warren v. United States, the District of Columbia Court of Appeals suggested the

following criteria for courts to consider in determining psychological unavailability:

> [W]e think that the following matters are relevant to the question of psychological unavailability: (1) the probability of psychological injury as a result of testifying; (2) the degree of anticipated injury; (3) the expected duration of the injury; and (4) whether the expected psychological injury is substantially greater than the reaction of the average victim of a rape, kidnapping or terrorist act. Just as in the case of physical infirmity, it is difficult to state the precise quantum of evidence required to meet the standard of unavailability. The factors should be weighed in the context of the nature of the crime and the pre-existing psychological history of the witness.

Warren v. United States, 436 A.2d 821, 830 (D.C. App. 1981).

Both the videotaped deposition and closed-circuit statutes require the use of expert testimony to establish a child victim's unavailability due to psychological trauma. A physician, psychiatrist, psychologist, licensed clinical social worker, or licensed marriage, family, or child counselor could provide the requisite expert testimony under section 2(a)(iii) of the videotaped deposition statute and section 2(c) of the closed-circuit statute. Efforts should be made to avoid the child's participation in any hearings on the child's unavailability. Remedial legislation may be necessary if a mental health professional's testimony in an unavailability hearing is construed under state law to abrogate the child's privilege of confidential communication with his or her therapist.

The "indicia of reliability" requirement of the confrontation clause should be satisfied in videotaping or closed-circuit sessions conducted in accordance with the sample statutes. At the deposition, a criminal defendant has the same protections available to him at trial, including the right to an attorney and to cross-examination of the child under oath. The videotape also preserves the demeanor of the testifying witness for the jury's later scrutiny. With closed-circuit television, the jury observes the witness on a television monitor rather than in person, but the testimony is live and not pre-recorded. However, these procedures may be challenged under the right of confrontation and the right to a jury trial if the witness is not required to testify in the jury's presence. The right of confrontation also generally has been interpreted to include physical confrontation between the jury and witness, giving the jury the opportunity to view the witness' demeanor while testifying before the defendant. These concerns, however, should not render the alternative approaches unconstitutional, since the child's unavailability to testify has been established, the child may be cross-examined, and the child's view of the defendant has not been obstructed.

It is still not resolved, however, whether the confrontation clause requires that the defendant have the opportunity to confront a witness "face-to-face" during the witness' testimony. One court suggested that face-to-face confrontation influences the witness' "recollection, veracity, and communication" and hence serves as a further guarantee of trustworthiness. Indeed, many state constitutions explicitly grant to a criminal defendant the right to a face-to-face confrontation, and a literal interpretation of these clauses might entitle the defendant to a physical confrontation even if it is not required under the U.S. Constitution. Other courts and commentators have concluded that once unavailability is proven, cross-examination of the witness is sufficient to satisfy the trustworthiness component even if the child testifies outside the defendant's presence. Some state statutes either require or allow exclusion of the defendant during a videotaped deposition of the victim. In such "one-way" schemes, the defendant typically can observe the victim and hear the victim's testimony, but the victim can neither see nor hear the defendant. However, a federal appeals court and several state courts have held that such a procedure violates the defendant's right of confrontation, even if the witness was cross-examined fully.

These sections provide for a "two-way" television approach, representing a compromise position that permits the victim and the defendant to view one another on closed-circuit television monitors during the victim's testimony. The two-way approach, which has been incorporated in several state reform statutes, seems to satisfy the confrontation objection that has hampered one-way approaches, since the victim testifies with a view of the defendant. Indeed, some courts have noted that this two-way approach may satisfy the confrontation clause, where a one-way approach would not. Even the use of two-way closed-circuit television, however, might be disallowed on confrontation grounds were a court to construe the right of confrontation to require a physical encounter between the witness and the defendant.

It should be noted that the confrontation principles outlined by the U.S. Supreme Court have been elaborated in cases involving the use of hearsay evidence at trial. Closed-circuit testimony may not be considered hearsay and thus the existing confrontation cases may not be strictly applicable. The recent U.S. Supreme Court case of Globe Newspaper Co. v. Superior Court. 457 U.S. 596 (1982), described below, delineates another constitutional standard by which special protections for child victims may be measured. Globe and its progeny weighed a special victim protection (courtroom closure) against the public's and press' rights of access to criminal proceedings and against the defendant's sixth amendment right to a public trial, concluding that a case-by-case determination of necessity is required before these rights can be compromised. Although these cases did not

deal with the defendant's right of confrontation, they shared with the confrontation clause cases a concern that such a showing of necessity be made. A California court of appeals, in Hochheiser v. Superior Court, discussed both the Globe standard and the hearsay/confrontation cases in analyzing the validity of a closed-circuit procedure designed to transmit the testimony of a child victim/witness. A final assessment of the applicable standard for closed-circuit televised testimony will have to await further judicial decisions.

Other sixth amendment rights of the defendant may be affected by use of these alternative procedures. Some commentators have discussed the defendant's right to be present at certain proceedings, his or her right to compulsory process of favorable witnesses, and his right to represent himself. The impact of these rights on the videotaping or closed-circuit transmission of testimony has not been addressed in court decisions. For example, by asserting the right to represent himself, a defendant can seek to prevent the use of closed-circuit procedures which keep the defendant and child in separate rooms during the direct and cross-examination of the child. After making a finding of unavailability, however, the court might require the pro se defendant to question the child from another room by means of closed-circuit equipment. The California two-way closed-circuit television procedure, which situates the child in a room other than the courtroom, permits such an approach by requiring that the attorneys (who are located in the courtroom) question the child over closed-circuit television monitors. In reality, assertion of the right to pro se representation in this context is no different than assertion of the right of confrontation, since in both instances the defendant is seeking the right to physically confront the witness.

Section 4 of the sample videotaped deposition statute provides for an additional proceeding to take further testimony of the child victim when new evidence is discovered after the original deposition. This provision ensures that the defendant has an opportunity to cross-examine the child fully about new evidence. Use of closed-circuit television to transmit a child victim's live trial testimony obviates any concern about newly discovered evidence, since the defense has the same opportunities for cross-examination as at trial.

The use of closed-circuit equipment at trial also may solve a problem that states have addressed through statutes authorizing courtroom closure during a minor victim's testimony. These statutes generally give the judge the authority to exclude spectators or to spare a young victim the embarrassment of testifying about sexual matters in front of the press and public. By the use of closed-circuit television, the child need not testify in the physical presence of the public, yet the public may still see the child's testimony. The United States Supreme Court has held that both the press

and public have constitutionally protected rights of access to criminal trials, and in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), invalidated a Massachusetts statute which mandated the exclusion of the press and public during the testimony of a minor victim of sexual assault. Although recognizing that protection of minor victims from trauma in the legal process is a compelling state interest, the Supreme Court nonetheless held that closure of the courtroom could be justified only with a case-by-case determination of necessity for such a procedure and a further showing that the closure of the proceeding was narrowly tailored to serve the state's interest in protecting the victim. Recently, the Court has interpreted a criminal defendant's sixth amendment right to a public trial to require the same showings before certain criminal proceedings may be closed.

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Videotaped Testimony

The following 27 states have passed legislation authorizing the videotaping of a child victim's testimony and the use of this videotape at later proceedings. Some of the statutes apply only to child victims of sexual assault, and the specific provisions should be consulted to determine whether they apply in particular cases. The videotaped testimony, unless otherwise indicated, is admissible at trial under these statutes. The list does not include statutory provisions which govern the videotaped recording, and subsequent admissibility at trial, of a child victim's interview or statement. A list of the videotaped statement provisions is contained in a later section of this publication on other legislative reforms. The parenthetical information following the statutory citations pertains to: (1) the age of the child; (2) the kind of testimony which is videotaped; (3) whether the defendant is present at the videotaping; and (4) whether the statute requires as a prerequisite to the videotape's admission at trial a showing either that the child will be unavailable or that the child will suffer harm. The phrase "no showing of necessity" indicates that there is no such express prerequisite.

Alabama:	Act of May 29, 1985, Act No. 85-743, 1985 Ala. Acts; (under 16; deposition; in presence of defendant; admissible in lieu of direct testimony at trial unless court determines that this will unfairly prejudice the defendant).
Alaska:	ALASKA STAT. §12.45.047 (1984); (16 or under; deposition; in presence of defendant; no showing of necessity).
Arizona:	ARIZ. REV. STAT. ANN. §13-4253 (1985); (18 or under; deposition; child cannot see or hear defendant; no showing of necessity). See also §§12-2311 to 2312.
Arkansas:	ARK. STAT. ANN. §§43-2035 to 2037 (1985); (under 17; deposition; in presence of defendant; no showing of necessity required, but victim may be called to testify at trial if necessary to serve interests of justice).
California:	CAL. PENAL CODE §1346 (West 1985); (15 or under; preliminary hearing testimony; no reference to presence of defendant; if victim "unavailable" at

	time of trial, testimony may be admitted as former testimony).
Colorado:	COLO. REV. STAT. §18-3-413 (1984); (under 15; deposition; no reference to presence of defendant; if victim "unavailable" at time of trial, testimony may be admitted as former testimony).
Connecticut:	Act of July 8, 1985, Pub. Act No. 85-587, 1985 Conn. Legis. Serv. 463 (West); (12 or under; deposition; child cannot see or hear defendant; no showing of necessity).
Delaware:	DEL. CODE ANN. tit. 11, §3511 (1985); (12 or under; deposition; defendant may be excluded; no showing of necessity).
Florida:	FLA. STAT. §92.53 (1985); (under 16; deposition (cannot be used at trial during which child testifies by closed-circuit television); defendant may be excluded; showing of harm required).
Iowa:	IOWA CODE §910A.3 (1985); (under 14; deposition; defendant may be excluded from child's view; showing that recordings "substantially comport" with state evidentiary rules required). See also IOWA R. CR. PROC. 12(2)(b) (West 1985).
Kansas:	Act of April 9, 1985, Ch. 112, 1985 Kan. Sess. Laws; (under 13; deposition; child cannot see or hear defendant (criminal only, not specified in civil provision); no showing of necessity).
Kentucky:	KY. REV. STAT. §421.350 (1984); (12 or under; deposition; child cannot see or hear defendant; no showing of necessity).
Maine:	ME. REV. STAT. ANN. tit. 22, §1205 (1985); (under 14; "recorded" out-of-court statement subject to cross examination (no explicit mention of videotaped recording of statement); no reference to presence of defendant; showing of harm required).

Massachusetts:	MASS. GEN. LAWS ANN. ch. 278, §16D (West 1985); (under 15; deposition; defendant may be excluded; showing of harm required).
Missouri:	MO. ANN. STAT. §§491.680 to 491.687 (Vernon 1985); (under 17; deposition; defendant may be excluded; harm to be considered).
Montana:	MONT. CODE ANN. §§46-15-401 to 403 (1977); (no reference to age; deposition; in presence of defendant; no showing of necessity).
Nevada:	Act of June 3, 1985, Ch. 462, 1985 Nev. Stat.; (under 14 for child witness, no age specified for child victim; deposition; defendant able to see and hear proceedings; no showing of necessity; also provides for videotaping of grand jury and preliminary hearing testimony of witnesses under 14).
New Hampshire:	N.H. REV. STAT. ANN. §517:13-a (1985); (under 16; deposition; in presence of defendant; showing of harm required).
New Mexico:	N.M. STAT. ANN. §30-9-17 (1984); (under 16; deposition; in presence of defendant; no showing of necessity).
Oklahoma:	OKLA. STAT. ANN. tit 22, §753 (West 1984); (12 or under; deposition; child cannot see or hear defendant; no showing of necessity).
Rhode Island:	R.I. GEN. LAWS §11-37-13.1 (1985); (17 or under; deposition; child cannot see or hear defendant; showing of harm required for children between ages of 14 and 17).
South Dakota:	S.D. CODIFIED LAWS ANN. §23A-12-9 (1985); (under 16; preliminary hearing testimony; no reference to presence of defendant; showing of "unavailability" required to admit videotape at trial in lieu of further testimony).
Tennessee:	TENN. CODE ANN. §24-7-116 (1985); (under 13; deposition; in presence of defendant; no showing of necessity).

Texas:	TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon 1983); (12 or under; deposition; child cannot see or hear defendant; no showing of necessity).
Utah:	UTAH CODE ANN. §77-35-15.5 (1985); (under 12; deposition; defendant may be excluded from child's view; no showing of necessity).
Vermont:	VT. R. EVID. 807 (1985); (12 or under; deposition; in presence of defendant; showing of harm required).
Wisconsin:	WIS. STAT. §967.04(7) (1983); (under 18; deposition; "court may exclude persons whose presence is not necessary"; showing of harm required).

Live Closed-Circuit Televised Testimony

The following 20 states have enacted legislation which permits the live testimony of a child witness to be taken by closed-circuit television. Three basic approaches are presented in the various statutes. In one approach, the defendant is present in the room with the child while the child testifies, and the testimony is broadcast into the courtroom or (if the testimony is taken in the courtroom) into the room where the jury is situated. The two other approaches are utilized in the statutes which permit or require the exclusion of the defendant from the room in which the child is testifying. In the "one-way" statutes, the defendant can observe and hear the child's testimony but the child can neither hear nor see the defendant. Under the "two-way" statutes, a television monitor projects the defendant's image into the room in which the child is testifying. The parenthetical information describes the approach taken in each statute (and significant variations) and the age of the children for whom the procedure is available.

Alabama:	Act of May 29, 1985, Act No. 85-743, 1985 Ala. Acts; (defendant in room with child; under 16).
Arizona:	ARIZ. REV. STAT. ANN. §13-4253 (1985); (one-way; under 15).
California:	CAL. PENAL CODE §1347 (West 1985); (two-way and attorneys question child over monitors; 10 or under).
Connecticut:	Act of July 8, 1985, Pub. Act No. 85-587, 1985 Conn. Legis. Serv. 463 (West); (one-way; 12 or under).
Florida:	FLA. STAT. §92.54 (1985); (defendant present but court may authorize one-way; under 16).
Georgia:	GA. CODE §17-8-55 (1985); (defendant in room with child; 14 or under).
Hawaii:	Act of June 7, 1985, Act No. 279, 1985 Hawaii Sess. Laws 593; (two-way but "defendant's presence is not unduly emphasized to child"; under 16).
Iowa:	IOWA CODE §910A.3 (1985); (defendant present but court may authorize one-way; under 14).
Kansas:	Act of April 9, 1985, Ch. 112, 1985 Kan. Sess. Laws; (one-way; under 13).

Kentucky:	KY. REV. STAT. §421.350 (1984); (one-way; 12 or under).
Louisiana:	LA. REV. STAT. ANN. §15:283 (West 1984); (defendant in room with child but child cannot see or hear him; under 14).
Maryland:	MD. CTS. & JUD. PROC. CODE ANN. §9-102 (1985); (one-way; under 18).
Massachusetts:	MASS. GEN. LAWS ANN. ch. 278, §16D (West 1985); (in presence of defendant unless child is likely to suffer trauma, then one-way; under 15).
New Jersey:	Act of April 11, 1985, Ch. 126, 1985 N.J. Sess. Law Serv. 6; (presence of defendant depends on findings as to impact of presence on witness; 16 or under).
New York:	N.Y. CRIM. PROC. LAW §§65.00 to 65.30 (McKinney 1985); (two-way; 12 or under).
Oklahoma:	OKLA. STAT. ANN. tit. 22, §753 (West 1984); (one-way; 12 or under).
Rhode Island:	R.I. GEN. LAWS §11-37-13.1 (1985); (one-way; 17 or under).
Texas:	TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon 1983); (one-way; 12 or under).
Utah:	UTAH CODE ANN. §77-35-15.5 (1985); (one-way if defendant consents; under 12).
Vermont:	VT. R. EVID. 807 (1985); (two-way, but if even view of defendant's image will impair child's ability to testify it will not be transmitted to the child; 12 or under).

NOTE: Nevada passed a resolution (Assembly Concurrent Resolution No. 15, 1985 Session) to study the use of closed-circuit television for children's testimony.

Competency

Every person is competent to be a witness [except as otherwise provided in state rules of evidence].

Commentary

Competency challenges are often raised when a child's testimony is offered in court. A finding of incompetency precludes the witness from testifying at all, often preventing prosecution of crimes involving child victims. The child victim's testimony is indispensable if, as is often true, other evidence of abuse is absent. The purpose of this reform is to remove this obstacle to a child victim's testifying in court and to minimize the child's participation in unnecessary competency hearings.

Although at early common law children were excluded as incompetent on the grounds that they were unable to understand the oath, competency rules applicable to children have since adhered to the standards set forth in the 1895 United States Supreme Court case of Wheeler v. United States:

> [T]here is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.

159 U.S. 523,524 (1895).

Still, some state laws deem children above a certain age presumptively competent, requiring that the judge inquire into the competency of children below that age. Under other state laws, a child under a prescribed age is incompetent unless the child is shown to understand the nature and obligation of an oath.

Under traditional standards, a voir dire hearing is conducted in which the child is questioned to determine the child's competency based upon the following factors: understanding of the difference between truth and falsity and appreciation of the obligation to tell the truth; sufficient mental capacity to perceive impressions and to recollect the observations; and ability to narrate or communicate, in words, the memory of these observations. Recent psychological

research indicates that past generalizations and assumptions about children's incapacities are either insupportable or greatly oversimplified. Although empirical research into the comparative performances of children and adults is in its early stages, many researchers believe there is little correlation between age and honesty, and even young children generally possess the basic skills necessary to observe, remember, and communicate information about events they witness.

The sample competency statute liberalizes the traditional approach by presuming that children are competent to testify without a prior showing that they are qualified. The impact of this provision is to allow the jury to hear the child's testimony and to determine the weight and credibility of such testimony. Facts which formerly were considered by the judge as relevant to a threshold determination of the child's competency instead may be considered by the jury in assessing the child's credibility. That such matters should be considered pertinent to credibility, rather than to competency, has been uniformly recognized by commentators, even those accepting traditional assumptions about children's capacities. As long ago as 1940, Professor Wigmore expressed this view:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable.... Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingeniousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth.

2 Wigmore, Evidence §509 (1940).

The sample provision is intended to have the same impact as Rule 601 of the Federal Rules of Evidence, which provides, in relevant part, that "[e]very person is competent to be a witness except as otherwise provided in these rules." Federal Rule 601 was intended to eliminate status-based grounds of incompetency (including age, religious belief, conviction of crime, and mental capacity), and to allow matters pertaining to perception, memory, and narration to be considered in assessing credibility. Although automatic competency hearings are abolished, under other provisions of the Federal Rules (and most state rules of evidence), all witnesses must have personal knowledge of the matters testified about and must declare that they will testify truthfully. These requirements are not eliminated by the sample competency standard. The sample

competency statute simply accords children the same rebuttable presumption of competency granted all other witnesses.

While commentators and courts agree that the Federal Rules approach has liberalized competency rules, they also recognize that a trial judge still has the discretion to exclude witnesses. Thus, although mandatory competency tests are abolished, defense counsel may still object to a child's competency under these rules, and it appears that even in states that have adopted Federal Rule 601, some courts continue to require competency hearings for children. Such hearings should only be allowed, however, after the defense has made a showing of a particular child's incompetency.

The standard by which the child's testimony is to be judged, according to most commentators, is one of "minimum credibility" so that the Federal Rule objective - allowing the jury to weigh the witness' testimony - is not frustrated. In those few cases in which a preliminary examination is permitted, the examination should only address the minimum credibility standard, and an elaborate or contentious proceeding should not occur.

Judges have often instructed juries to subject to special scrutiny a child witness' credibility. This practice may encourage the jury to conclude that a child's testimony is inherently suspect, and may unduly influence the jury's ability to weigh the child's credibility. If a court determines that a special instruction is necessary, it should instruct the jury either that a child witness' testimony is to be weighed according to the same standards applicable to all witnesses, or that the child's testimony should be assessed in light of the child's age, knowledge, and experience. These instructions reflect a neutral view and preserve for the jury its role in determining credibility.

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State v. Ritchey, 107 Ariz. 552, 490 P.2d 558 (1971).

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MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§62 to 71 (1972).

3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE §§601[01] to 601[05] (1985).

D. WHITCOMB, E. SHAPIRO & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD (Government Printing Office 1985).

2 J.H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §509 (1979).

Competency of Child Witnesses

The following states have statutes or rules of evidence which specifically address the competency of child witnesses. These provisions either permit child victims to testify in court proceedings without prior competency qualification or establish a presumption that a child is a competent witness. The applicability of some of these provisions is limited to the testimony of victims of sexual assault in criminal proceedings. The specific provisions should be consulted to determine whether they apply to particular cases.

Alabama:	Act of May 29, 1985, Act No. 85-743, 1985 Ala. Acts; (competent without prior qualification).
Colorado:	COLO. REV. STAT. §13-90-106(1)(b) (1973); (children under 10 competent if they can relate or describe the facts in language appropriate for children of their age).
Connecticut:	Act of July 8, 1985, Pub. Act No. 85-587, 1985 Conn. Legis. Serv. 463 (West); (competent without prior qualification).
Illinois:	ILL. ANN. STAT. ch. 37 §704-6 (Smith-Hurd 1982); (rebuttable presumption that child is competent to testify).
Iowa:	IOWA R. EVID. 601 (1985); (child presumed competent).
Missouri:	MO. ANN. STAT. §491.060(2) (Vernon 1985); (competent without prior qualification).
Tennessee:	TENN. CODE ANN. §24-1-101 (1985); (child victim of sexual offense is competent witness).
Utah:	UTAH CODE ANN. §76-5-410 (1985); (competent without prior qualification).

There are also many states which have general rules of competency codified in either their statutes or Rules of Evidence or both. These provisions follow the approach of Federal Rule of Evidence 601, which deems all persons competent unless otherwise provided. A list of these provisions follows.

Alaska:	ALASKA R. EVID. 601.
Arizona:	ARIZ. R. EVID. 601, ARIZ. REV. STAT. ANN. §13-4061 (1985).

Arkansas:	ARK. R. EVID. 601 (found in ARK. STAT. ANN. §28-1001).
Delaware:	DEL. R. EVID. 601 (See also DEL. CODE ANN. tit. 10, §4302 (1985), no child under 10 is to be excluded because he does not understand the oath).
Florida:	FLA. STAT. §90.601 (1983) (See also §90.605, child can testify without taking oath if court finds he understands duty to tell truth or not to lie).
Hawaii:	HAWAII R. EVID. 601.
Maine:	ME. R. EVID. 601.
Maryland:	MD. CTS. & JUD. PROC. §9-101 (See also §9-103, specifically providing that age is not reason to disqualify child witness).
Mississippi:	MISS. CODE ANN. §13-1-3 (1972).
Nebraska:	NEB. REV. STAT. §27-601 (1979).
Nevada:	NEV. REV. STAT. §50.015 (1979).
New Hampshire:	N.H. R. EVID. 601.
New Mexico:	N.M. R. EVID. 601.
North Carolina:	N.C. R. EVID. 601.
North Dakota:	N.D. R. EVID. 601.
Oklahoma:	OKLA. STAT. tit. 12, §2601 (1980).
Oregon:	OR. R. EVID. 601, OR. REV. STAT. §40.310 (1983).
Pennsylvania:	42 PA. CONS. STAT. ANN. §5911 (Purdon 1982).
South Dakota:	S.D. CODIFIED LAWS ANN. §19-14-1 (1979).
West Virginia:	W. VA. R. EVID. 601.
Wisconsin:	WIS. STAT. §906.01 (1975).
Wyoming:	WYO. R. EVID. 601.

Other statutes condition a witness' competency to testify on a judicial determination that he or she is capable of expressing himself or herself, or capable of understanding the duty to tell the truth, or capable of receiving just

impressions of the facts about which he or she is called to testify.

Arizona: ARIZ. REV. STAT. ANN. §12-2202 (1982); (children under 10 who appear incapable of receiving just impressions of facts or relating them are incompetent; apparent conflict between this provision and §13-4061 (1985), permitting every person to be a witness in any criminal trial).

California: CAL. EVID. CODE §700-701 (West 1985); (witnesses not competent if incapable of expressing themselves).

Georgia: GA. CODE §24-9-5 (1985); (children who do not understand nature of an oath are incompetent).

Idaho: IDAHO CODE §9-202 (1985); (children under 10 who appear incapable of receiving just impressions of facts or relating them truly are incompetent).

Indiana: IND. CODE ANN. §34-1-14-5 (Burns 1985); (children under 10 are incompetent unless it appears that they understand the nature and obligation of an oath).

Kansas: KAN. STAT. ANN. §60-417 (1983); (witnesses disqualified if incapable of expressing themselves or of understanding the duty to tell the truth).

Kentucky: KY. REV. STAT. §421.200 (1981); (witnesses not competent if incapable of understanding the facts).

Louisiana: LA. REV. STAT. ANN. §15:469 (West 1981); (court to determine whether child under 12 has sufficient understanding to be a witness).

Michigan: MICH. COMP. LAWS §600.2163 (1968); (court to determine competency of child under 10).

Minnesota: MINN. STAT. ANN. §595.02 (West 1985); (children under 10 who lack capacity to remember or relate truthfully are incompetent).

Montana: MONT. R. EVID. 601; (witnesses disqualified if incapable of expressing themselves or of understanding duty to tell the truth).

New Jersey:	N.J. R. EVID. 17 (See also N.J. REV. STAT. §2A-81-1 (1976)); (witnesses disqualified if incapable of expressing themselves or of understanding duty to tell the truth).
New York:	N.Y. R. EVID. 60.20 (McKinney 1979); (child under 12 must be found to understand nature of oath, but if no such finding made child may give unsworn testimony if he possesses sufficient intelligence and capacity).
North Carolina:	N.C. GEN. STAT. §8C-1, R.601; (witnesses disqualified if incapable of expressing themselves or of understanding duty to tell the truth).
Ohio:	OHIO REV. CODE ANN. §2317.01 (Page 1981), OHIO R. EVID. 601 (identical provisions); (children under 10 who appear incapable of receiving just impressions of facts or relating them truly are incompetent).
Texas:	TEX. CODE CRIM. PROC. ANN. art. 38.06 (Vernon 1979); (children incapable of relating facts and understanding an oath are incompetent).
Vermont:	VT. R. EVID. 601; (witnesses disqualified if incapable of expressing themselves or of understanding duty to tell the truth).
Washington:	WASH. REV. CODE ANN. §5.60.050 (1963); (children under 10 who appear incapable of receiving just impressions of facts or relating them truly are incompetent).

SUMMARY OF OTHER LEGISLATIVE REFORMS

Videotaped Interview Statutes (through November 1, 1985)

Arizona:	ARIZ. REV. STAT. ANN. §13-4252 (1985).
Hawaii:	Act of June 7, 1985, Act No. 279, 1985 Hawaii Sess. Laws 593.
Iowa:	IOWA CODE §232.96(6) (1984).
Kansas:	Act of April 9, 1985, Ch. 112, 1985 Kan. Sess. Laws.
Kentucky:	KY. REV. STAT. §421.350 (1984).
Louisiana:	LA. REV. STAT. ANN. §§440.1 to 440.4 (West 1984).
Missouri:	MO. REV. STAT. §492.304 (1985).
New York:	N.Y. CRIM. PROC. LAW §190.30(4) and 190.32 (McKinney 1984).
Rhode Island:	R.I. GEN. LAWS §§11-37-13.2, 14-1-68 and 40-11-7.2 (1985).
Tennessee:	TENN. CODE ANN. §24-7-116 (1985).
Texas:	TEX. CODE CRIM. PROC. ANN. art. 38.071 (Vernon 1983).
Utah:	UTAH CODE ANN. §77-35-15.5 (1985).

See Eatman, Videotaping Interviews with Child Sex Offense Victims, 7 CHILDREN'S LEGAL RIGHTS JOURNAL (1986); Alexander v. State, 692 S.W.2d 563 (Tex. Ct. App. 1985); Long v. State, 694 S.W.2d 185 (Tex Ct. App. 1985); Jolly v. State, 681 S.W.2d 689 (Tex Ct. App. 1984).

Courtroom Closure Statutes (through December 31, 1985)

The following states provide for the closure of the courtroom during certain proceedings. The statutes which are followed by an asterisk specifically address closure of the courtroom during the testimony of child victims.

Alabama:	ALA. CODE §12-21-202 (1975).
Alaska:	ALASKA STAT. §12.45.048* (1982).
Arizona:	ARIZ. R. CR. P. 9.3 (1973).

Arkansas:	ARK. STAT. ANN. §43-615 (1977).
California:	CAL. PENAL CODE §868.7* (West 1985).
Connecticut:	CONN. GEN. STAT. §46b-11 (1978).
Florida:	FLA. STAT. §918.16* (1977).
Georgia:	GA. CODE §17-8-54* (1985). See also §17-8-53 (1985).
Illinois:	ILL. ANN. STAT. ch.38, §115-11* (Smith-Hurd 1984).
Iowa:	IOWA CODE §813.2, R.25.
Kansas:	KAN. STAT. ANN. §38-1552* (1982). See also §§38-111 and 38-1652 (1982).
Louisiana:	LA. REV. STAT. ANN. §15:469.1* (West 1981).
Maine:	ME. REV. STAT. ANN. tit. 15, §457 (1979).
Massachusetts:	MASS. GEN. LAWS ANN. ch. 278, §16A* and 16C (West 1978).
Minnesota:	MINN. STAT. ANN. §631.045* (West 1982).
Mississippi:	MISS. CONST. art. III, §26.
Nevada:	NEV. REV. STAT. §171.204 (1983).
New Hampshire:	N.H. REV. STAT. ANN. §632-A:8* (1979).
New York:	N.Y. JUD. LAW §4 (McKinney 1968).
North Carolina:	N.C. GEN. STAT. §15-166 (1981).
North Dakota:	N.D. CENT. CODE §27-01-02 (1974).
South Dakota:	S.D. CODIFIED LAWS ANN. §23A-24-6* (1983).
Utah:	UTAH CODE ANN. §78-7-4 (1953).
Vermont:	VT. STAT. ANN. tit. 12, §1901 (1947).
Virginia:	VA. CODE §19.2-266 (1978). See also §18.2-67.8 (1981).
Wisconsin:	WIS. STAT. §970.03(4) (1979).

Other Statutes With Special Protections for Child Victims or Witnesses (through November 1, 1985)

Alabama:	Act of May 29, 1985, Act. No. 85-742, 1985 Ala. Acts (limiting number of interviews of child; closure of court records).
	Act of May 29, 1985, Act No. 85-743, 1985 Ala. Acts (speedy trial).
Arkansas:	ARK. STAT. ANN. §22-159 (1985) (precedence given to criminal trials involving child victim), §43-2038 (1985) (authorizing presence of parent or custodian at all proceedings involving child sexual assault victim), ARK. R. EVID. 616 (1985) (presence of child's custodian during any hearing, deposition or trial in criminal case).
California:	CAL. PENAL CODE §868.5 (West 1985) (presence of support persons during child's testimony) and §868.8 (West 1985) (precautions to provide for comfort, support and protection).
	CAL. GOV'T CODE §6254(f)(2) (West 1985) (protection of privacy).
Colorado:	COLO. REV. STAT. §24-4.1-304 (1985) (support, advice and assistance for child during court proceedings).
Connecticut:	CONN. GEN. STAT. §54-86d (1985) (protection of privacy).
Delaware:	DEL. CODE ANN. tit. 11, §1263A (1985) (creates offense of interfering with a child witness) and tit. 11, §§5131 to 5134 (1985) (prompt trial; support and assistance for child).
Florida:	Act of July 1, 1985, Ch. 85-53, 1985 Fla. Sess. Law. Serv. 124 (West) (legislative request that state Supreme Court adopt speedy trial rule); FLA. STAT. §92.55 (1985) (giving court discretion to enter a variety of orders to protect child victim/witnesses).
Idaho:	IDAHO CODE §19-3023 (1985) (presence of support persons during child's testimony).
Iowa:	IOWA CODE §802.2 (1985) (time limitation for filing information or indictment); §910A.2 (1985) (protection of privacy); §910A.5 (1985) (child victim services).

	IOWA R. CR. PROC. 3(4)(k) (West 1985) (prohibits requiring a child to testify live at grand jury proceedings against a family or household member, unless certain findings made by the court) .
	IOWA R. CR. PROC. 8.1 (3) (West 1985) (docket priority to certain cases).
Maine:	ME. REV. STAT. ANN. tit. 30, §508 (1985) (protection of privacy).
Minnesota:	MINN. STAT. ANN. §609.3471 (West 1985) (protection of privacy) and §631.046 (1985) (presence of support persons during child's testimony).
New York:	N.Y. CRIM. PROC. LAW §190.25 (McKinney 1985) (presence of support person during grand jury testimony).
Rhode Island:	R.I. GEN. LAWS §12-28-9 (1985) (child victims' bill of rights).
South Carolina:	S.C. CODE ANN. §16-3-1530(G) (Law. Co-op. 1985) (right to special recognition and attention).
Washington:	Child Victims and Witnesses of Crime, Ch. 394, 1985 Wash. Leg. Serv. 9 (West) (bill of rights).
Wisconsin:	WIS. STAT. §950.055 (1983) (rights of child victims and witnesses) and §971.105 (1983) (speedy trial).

APPROVED BY THE

AMERICAN BAR ASSOCIATION

JULY 1985

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association approves the "Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged" dated May 1985.

Approved by ABA House of Delegates
July, 1985

AMERICAN BAR ASSOCIATION

GUIDELINES FOR THE FAIR TREATMENT OF CHILD WITNESSES IN CASES WHERE CHILD ABUSE IS ALLEGED

A TEAM APPROACH

1. A multidisciplinary team involving the prosecutor, police, and social services resource personnel should be utilized in the investigation and prosecution of cases where a child is alleged to be the victim of or witness to abuse in order to reduce the number of times that a child is called upon to recite the events involved in the case as well as to create a feeling of trust and confidence in the child.

a) Members of such teams should receive specialized training in the investigation and prosecution of cases where children are alleged victims and witnesses of abuse.

b) Whenever possible, the same prosecutor should handle all aspects of a case involving an alleged child victim or witness including related proceedings outside the criminal justice system.

A SPEEDY TRIAL

2. In all proceedings involving an alleged child victim, the court should take appropriate action to ensure a speedy trial in order to minimize the length of time a child must endure the stress of his or her involvement in the proceeding. In ruling on any motion or request for a delay or continuance of a proceeding involving an alleged child victim, the court should consider and give weight to any potential adverse impact the delay or continuance may have on the well-being of a child.

PROCEDURAL REFORM

3. In criminal cases and juvenile delinquency and child protection proceedings where child abuse is alleged, court procedures and protocol should be modified as necessary to accommodate the needs of child witnesses including:

a) If the competency of a child is in question, the court should evaluate competency on an individual basis without resort to mandatory or arbitrary age limitations.

b) Leading questions may be utilized on direct examination of a child witness subject to the court's direction and control.

c) To avoid intimidation or confusion of a child witness, examination and cross-examination should be carefully monitored by the presiding judge.

d) When necessary, the child should be permitted to testify from a location other than that normally reserved for witnesses who testify in the particular courtroom.

e) A person supportive of the child witness should be permitted to be present and accessible to the child at all times during his or her testimony, but without influencing the child's testimony.

f) The child should be permitted to use anatomically correct dolls and drawings during his or her testimony.

g) When necessary, the child should be permitted to testify via closed-circuit television or through a one-way mirror or any other manner, so long as the defendant's right to confrontation is not impaired.

h) Persons not necessary to the proceedings should be excluded from the courtroom at the request of a child witness or his or her representative during pretrial hearings in cases where the child is alleged to be the victim of physical, emotional, or sexual abuse.

i) At pretrial hearings and in child protection proceedings the court, in its discretion, if necessary to avoid the repeated appearance of a child witness, may allow the use of reliable hearsay.

j) When necessary the court should permit the child's testimony at a pretrial or noncriminal hearing to be given by means of a videotaped deposition.

LEGISLATIVE INITIATIVE

4. State legislatures should, where necessary, enact appropriate legislation to permit modification of court procedures and evidentiary rules as suggested herein and in addition should:

a) extend the statute of limitations in cases involving the abuse of children;

b) establish programs to provide special assistance to child victims and witnesses or enhance existing pro-

grams to improve the handling of child abuse cases and minimize the trauma suffered by child victims, in cooperation with local communities and the federal government.

MEDIA RESPONSIBILITY

5. The public has a right to know and the news media has a right to report about crimes where children are victims and witnesses; however, the media should use restraint and prudent judgement in reporting such cases and should not reveal the identity of a child victim.

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The above guidelines were approved by the American Bar Association's House of Delegates at its meeting in Washington, D.C. on July 10th, 1985. These black-letter guidelines constitute official ABA policy.

RECOMMENDATIONS FOR IMPROVING LEGAL INTERVENTION IN INTRAFAMILY CHILD SEXUAL ABUSE CASES

National Legal Resource Center for
Child Advocacy and Protection
Young Lawyers Division
American Bar Association

Reporter
Josephine Bulkley

October, 1982

4th Printing, April 1985

RECOMMENDATIONS

PART I. GENERAL PRINCIPLES

1.1 Innovative Approaches

Innovative approaches in the legal system's handling of intrafamily child sexual abuse cases should be adopted which protect the child from further abuse, prevent additional trauma to the child and family, and provide treatment for the child, the family, and where appropriate, the offender.

1.2 Interdisciplinary Approach

An interdisciplinary approach should be established among agencies responsible for handling intrafamily child sexual abuse cases.

1.3. Coordinated Court Proceedings

Procedures should be developed for coordinating child protection, criminal and other judicial proceedings involving intrafamily child sexual abuse.

1.4 Reducing Trauma to the Child

Procedures should be established for reducing trauma to the child caused by legal intervention in child sexual abuse cases.

1.4.1 Providing an Advocate

In intrafamily child sexual abuse cases, a guardian *ad litem* or legal counsel should be appointed to represent the child in juvenile court proceedings. A victim/witness advocate, guardian *ad litem*, or other special advocate should be appointed to assist the child in criminal proceedings.

1.4.2 Interviewing the Child

Procedures should be developed to prevent duplicative interviews with the child and to provide a suitable environment for interviewing child sexual abuse victims.

1.4.3 Vertical Prosecution

In civil and criminal cases involving child sexual abuse, prosecutors' offices should institute "vertical prosecution," where one prosecutor is assigned to handle a case at all stages of the proceedings.

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.

1.5 Training and Specialization

All professionals who deal with intrafamily child sexual abuse cases should receive training regarding the psychological, social and legal issues of such abuse, the basic principles of child protection and development, and interviewing techniques. Where possible, agencies should establish special units responsible for handling such cases.

1.6 Specific Statutory Definitions

Criminal statutes should specifically define sexual abuse of a child. Juvenile court statutes and child abuse and neglect reporting statutes should include and specifically define sexual abuse of a child, or define such abuse by reference to the definition in the criminal statute. The following acts should constitute sexual abuse of a child:

(1) any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen; or

(2) any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person; or

(3) any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, EXCEPT that, it shall not include acts intended for a valid medical purpose; or

(4) the intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of either the child or the perpetrator, EXCEPT that, it shall not include:
   (a) acts which may reasonably be construed to be normal caretaker responsibilities, interactions with, or affection for a child; or
   (b) acts intended for a valid medical purpose; or

(5) the intentional masturbation of the perpetrator's genitals in the presence of a child; or

(6) the intentional exposure of the perpetrator's genitals in the presence of a child, or any other sexual act, intentionally perpetrated in the presence of a child, if such exposure or sexual act is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose; or

(7) sexual exploitation which includes allowing, encouraging or forcing a child to:
   (a) solicit for or engage in prostitution; or
   (b) engage in the filming, photographing, videotaping, posing, modeling, or performing before a live audience, where such acts involve exhibition of the child's genitals or any sexual act with the child as defined in subsections (1)-(6) of this recommendation.

1.7 Juvenile Offenders

Therapeutic dispositions should be authorized, and specialized treatment available for juvenile child sex offenders who are the subject of criminal, delinquency, status offense, or child protection proceedings.

PART II. CIVIL PROCEEDINGS

2.1 Including the Parent Who Did Not Commit the Sexual Abuse as a Party in a Child Protection Proceeding

In a child protection proceeding involving sexual abuse, the following factors should be considered in deciding whether to include the parent who did not commit the abuse as a party:

(1) whether such parent knew or had reasonable cause to believe the child had been abused and failed to take reasonable steps to prevent it;
(2) the actions such parent took to protect, support and care for the child following disclosure of the abuse; and
(3) whether such parent voluntarily agreed to participate in a specialized counseling or treatment program, and to accept other protective services.

2.2 Civil Protection Orders

Statutory provisions should be enacted to permit judicial issuance of civil protection orders in intrafamily child sexual abuse cases. Such orders should be made available in civil protection order proceedings, as well as child protection and custody actions. Statutes should specifically authorize courts to require the perpetrator to do or refrain from doing one or more of the following:

(1) Vacate the home;
(2) Limit contact or communication with the child victim, or other children in the home, or any other child;
(3) Refrain from further abuse;
(4) Obtain counseling or participate in a specialized treatment program;
(5) Stay away from the home, neighborhood, school, or other place the child frequents;
(6) Have limited or supervised visitation with the child;
(7) Pay temporary support for the child or other family members, and the costs of therapy for the perpetrator, child victim, or other family members.

The statute also should allow the court to order temporary custody of the child to the parent who did not commit the sexual abuse, or, in its discretion, any other relief it deems necessary for the protection of the child. In addition, the statute should authorize the court to recommend counseling for the non-participating parent, the

child, or other family members. Violation of a civil protection order should be a separate criminal offense.

PART III CRIMINAL PROCEEDINGS

3.1 Intrafamily Sexual Abuse of Children

Criminal child sexual abuse statutes should include a provision specifically prohibiting intrafamily sexual abuse of children. "Intrafamily sexual abuse" means sexual abuse committed by a parent, caretaker, or adult household member in a position of authority or control over the child.

3.2 Statutory Degrees of Offenses Based Upon Certain Factors

Criminal statutes should establish degrees of sexual abuse of a child based upon the following factors:

(1) the nature and duration of the abuse;
(2) the age of the child;
(3) the age of the perpetrator;
(4) the relationship of the perpetrator to the child;
(5) the use of force, threats, or other forms of coercion; and
(6) the existence of prior sexual offense convictions or juvenile court adjudications of sexual abuse.

3.3 Alternatives to Traditional Prosecution and Sentencing

Alternatives to traditional criminal prosecution and sentencing should be statutorily authorized for intrafamily child sexual abuse cases. These should include, but not be limited to, pretrial diversion and post-conviction alternatives, conditioned upon mandatory treatment and other protection orders. Specific criteria and mechanisms should be set forth for determining whether treatment is appropriate, and if so, what type of approach should be utilized.

3.4 Sexual Psychopath Statutes

Sexual psychopath statutes should be repealed or their applicability limited in intrafamily child sexual abuse cases.

3.5 Prosecution of Participating Parent

A parent should be held criminally responsible when the other parent commits sexual abuse upon their child, only if such parent participated in committing the abuse, or had actual knowledge of the abuse and intentionally failed to take reasonable steps to prevent its commission or future occurrence. Where such parent is criminally liable, dispositions providing for specialized treatment should be authorized.

PART IV. EVIDENTIARY ISSUES

4.1 Competency

Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony.

4.2 Corroboration

Corroborative evidence of the victim's testimony should not be required to establish a *prima facie* case in any criminal or civil proceeding involving child sexual abuse.

4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

4.4 Marital Privilege

The marital privilege should not apply in any criminal or civil proceeding involving intrafamily child sexual abuse, and the spouse of the offending parent should be considered a compellable witness.

4.5 Expert Testimony

In intrafamily child sexual abuse cases, prosecutors should make use of expert witnesses who qualify under the rules of evidence, to aid the trier of fact in resolving issues relating to the dynamics of intrafamily child sexual abuse and principles of child development.

4.6 Prior Sexual Acts

Courts should have discretion to admit evidence of prior sexual acts between the offending parent and child to show either: (1) a depraved or lustful disposition of the parent; or (2) a plan, scheme, design, motive or *modus operandi*. Evidence of sexual acts by the offending parent with other children also should be admissible to show plan, scheme, design, motive or *modus operandi*.

4.7 Sexually Abused Child Syndrome

Consideration should be given by the legal profession to the evidentiary viability of a "sexually abused child syndrome," which may be analogous to the "battered child syndrome."

Publications List

AMERICAN BAR ASSOCIATION
CHILD SEXUAL ABUSE LAW REFORM PROJECT

#1 Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases [A comprehensive blueprint for improving legal intervention to protect sexually abused children] 1982 - 57 pp. $6.50

#2 Child Sexual Abuse and the Law [A detailed state survey and analysis of laws and legal issues related to child sexual abuse] 1981 - 204 pp. $10.00

#3 Innovations in the Prosecution of Child Sexual Abuse Cases [A survey and description of special prosecutorial approaches and model programs] 1981 - 177 pp. $8.50

#4 Child Sexual Exploitation -- Background and Legal Analysis [A basic summary of legal issues and laws on child pornography and prostitution] Nov., 1984 - 50 pp. $5.00

#5 Child Sexual Abuse-Legal Issues and Approaches [An introduction to the relationship of child sexual abuse and the legal system] Aug., 1981 - 40 pp. $3.00

#6 Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases [Analysis of recent legislation creating a special hearsay exception for a child victim's out-of-court statement of abuse and legislation for video-taping or televising a child's testimony, including discussion of the constitutional issues relating to these reforms, and summary of other new legal issues] 1985 - 28 pp. $3.50

#7 Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases [Compilation of 16 articles that critically discuss new legal reforms, including constitutionality of videotaping and closed-circuit televising of a child's testimony, expert testimony, interviewing techniques with young children, videotaped interviews, children's memory and the law, and others] 1985 - 320 pp. $20.00

#8 Protecting Child Victim/Witnesses: Sample Laws and Materials [A comprehensive approach to legislative reforms for child victim/witnesses, including sample statutes, commentaries, and up-to-date summaries of existing legislation]
1986 58 pp. $7.50

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