

TESTIFYING MINORS: PRE-TRIAL STRATEGIES TO REDUCE ANXIETY IN CHILD WITNESSES

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INTRODUCTION

Imagine that you are a District Attorney, prosecuting a defendant for molesting his six-year-old niece, Annie. The defendant initially confessed, but later recanted. To convict him, you need Annie’s testimony because she is the crime’s only witness and she is also the sole victim. At trial, Annie climbs the tall steps to the witness stand and promises to tell the truth. She looks very tiny in the witness chair. She keeps glancing nervously at the defense table, where her uncle sits beside his lawyer. You walk toward Annie, simultaneously positioning yourself to block her view of the defendant. While you question her, Annie appears scared and her voice quakes, but she answers unhesitatingly. You thank her, and then state, “No further questions, your Honor.”

Defense counsel, rather than approach the witness stand, strategically remains seated beside the defendant, and begins to gruffly cross-examine Annie, who grows increasingly upset at the sight of her uncle. She takes longer and longer to answer each question; her voice gets softer and softer. Annie suddenly begins to shake and cry, and then hides under the witness stand, sobbing.¹

This Article discusses anxiety in the context of children who testify in legal proceedings. Anxiety² harms children and impairs their testimony, which in turn subverts justice; therefore, any lawyer who interacts with a child witness should strive to reduce the child’s anxiety. Recognizing this issue’s importance, United States Supreme Court Justices William H. Rehnquist and Harry A. Blackmun cautioned:

[T]he fear and trauma associated with a child’s testimony in front of the defendant have two serious identifiable consequences: They may cause psychological injury to the child, and they may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.³

This Article establishes that lawyers have a particular obligation to lessen anxiety in child witnesses: doing so reduces harm to children, promotes more effective testimony, and supports justice. Most important, it offers reliable strategies to help lawyers accomplish this goal. Accordingly, Section I exam-

¹ This is based on a true story. The defendant was convicted; Annie (not her real name) now lives with a foster family, and is reportedly doing well. Interview with Alexandra Varela, law student, William S. Boyd Sch. of Law at Univ. of Nev., in Las Vegas, Nev. (Oct. 10, 2012).

² To avoid redundancy, the author uses the words “anxiety,” “stress,” and “distress” synonymously throughout this Article.

³ *Coy v. Iowa*, 487 U.S. 1012, 1032 (1988) (Blackmun, J. and Rehnquist, C.J., dissenting).

ines the evolution of children as witnesses; Section II explores precisely how anxiety breeds harm; Section III evaluates why lawyers, despite criticism, should strive to reduce anxiety in child witnesses; and Section IV focuses on specific pre-trial strategies that typically diminish anxiety in children.⁴

I. THE EVOLUTION OF CHILDREN AS WITNESSES

Countless lawyers interact with child witnesses, whose prevalence in the American justice system is both firmly entrenched and likely to continue. In 1779, English common law established that witnesses need not meet a minimum age requirement.⁵ Contrastingly, the United States nearly barred children from the courtroom⁶ until 1975, when a new evidence rule⁷ dramatically changed the role of child witnesses. Still good law, Federal Rule of Evidence 601 presumes all witnesses competent, regardless of age. Following Congress's lead, several states initiated similar laws in the 1980s,⁸ paving the way for considerably more children to testify. In 1985, the United States Supreme Court upheld Rule 601, allowing a five-year-old boy to testify in a murder trial.⁹ Some jurisdictions now allow testimony from minors as young as three years old.¹⁰

Consequently, millions of child witnesses participate in the U.S. legal system each year.¹¹ They contribute in a wide variety of legal settings, and frequently play an integral role in divorce, custody, child protection, and criminal proceedings.¹² Children therefore appear regularly in family, juvenile, and criminal courts.¹³ Sometimes, like Annie, they testify as a crime's sole witness or victim.¹⁴ In such cases, definitive physical evidence and adult witnesses rarely exist: justice only occurs with the child's assistance.¹⁵

Several factors support the likelihood that countless children will continue to testify. For example, society generally seeks to punish guilty parties, which requires testimony from all relevant witnesses, including minors.¹⁶ Further, the Supreme Court decided in 2004 that children who testify in criminal trials must

⁴ This Article broadly covers pre-trial strategies while purposefully excluding specific interview and examination questions, topics on which plentiful literature exists. Practitioners should check current applicable laws before following suggestions.

⁵ See *R v. Brasier*, (1779) 168 Eng. Rep. 202, 203.

⁶ See Gail S. Goodman et al., *Innovations for Child Witnesses: A National Survey*, 5 PSYCHOL. PUB. POL'Y & L. 255, 255 (1999).

⁷ FED. R. EVID. 601 ("Every person is competent to be a witness . . .").

⁸ Goodman et al., *supra* note 6, at 255.

⁹ *Wheeler v. United States*, 159 U.S. 523, 524–26 (1985).

¹⁰ E-mail from Rebecca Nathanson, Ph.D., James Rogers Professor of Educ. & Law, William S. Boyd Sch. of Law, Univ. of Nev., in Las Vegas, Nev. to author (Nov. 1, 2013 11:20 PST) (on file with author).

¹¹ See Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCHOL. PUB. POL'Y & L. 392, 392 (2012).

¹² Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. TRAUMATIC STRESS 149, 149 (2003).

¹³ *Id.*

¹⁴ See LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM 189 (5th ed. 2002).

¹⁵ See Quas & Goodman, *supra* note 11, at 406.

¹⁶ See WRIGHTSMAN ET AL., *supra* note 14, at 189.

appear in court rather than via previously recorded video.¹⁷ In addition, national and judicial bar associations uniformly emphasize the importance of children's testimony, especially in cases of alleged child abuse or neglect.¹⁸

Moreover, many people believe that courts must allow children to testify for the sake of the children's psychological health. For instance, the United Nations Convention on the Rights of the Child guarantees children the right to be heard in any proceeding that affects them.¹⁹ Psychologists and legal scholars also recognize that children deserve to verbalize their experiences.²⁰ Perhaps this belief was best expressed by a child witness who proclaimed, "[a]ll I ever wanted was to be heard and not just dismissed."²¹ Children who do not testify sometimes suffer adverse emotions, such as feeling less empowered.²² They may describe the legal system as less fair, leading them to have "long-term negative attitudes about the legal system's responsiveness."²³ Conversely, some children find testifying therapeutic.²⁴

II. HOW ANXIETY BREEDS HARM

This section explains how anxiety harms children, how testifying induces anxiety, and how anxiety-impaired testimony impedes the administration of justice. While most evidence of anxiety's effects on children originates from child sexual abuse trials,²⁵ one can reasonably infer that anxiety similarly affects children in most types of legal proceedings.

¹⁷ Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (holding that such measures are necessary to preserve a criminal defendant's Sixth Amendment confrontation rights).

¹⁸ Andrea Khoury, *Seen and Heard: Involving Children in Dependency Court*, 25 CHILD L. PRAC. 145, 145 (2006).

¹⁹ United Nations Convention on the Rights of the Child art. 12, adopted Nov. 20, 1989, 1577 U.N.T.S. 3.

²⁰ See Quas & Goodman, *supra* note 11, at 406.

²¹ Khoury, *supra* note 18, at 145 (quoting a "[y]outh in foster care").

²² See Quas & Goodman, *supra* note 11, at 404.

²³ Jodi A. Quas et al., *Childhood Sexual Assault Victims: Long-Term Outcomes After Testifying in Criminal Court*, 70 MONOGRAPHS SOC'Y FOR RES. IN CHILD DEV. 1, 111 (2005).

²⁴ See Jennifer Marie Batterman-Faunce & Gail S. Goodman, *Effects of Context on the Accuracy and Suggestibility of Child Witnesses*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 301, 311 (Gail S. Goodman & Bette L. Bottoms eds., 1993).

²⁵ See Goodman et al., *supra* note 6, at 264 (noting that children testify most often in child sexual abuse and sexual assault cases); see also JUDITH DAYLEN ET AL., TRAUMA, TRIALS, AND TRANSFORMATION: GUIDING SEXUAL ASSAULT VICTIMS THROUGH THE LEGAL SYSTEM AND BEYOND 23 (2006).

Unfortunately, children and youth make up the majority of sexual assault victims. While this group makes up only 20 percent of the population, they are victims in 60 percent of all reported sexual assaults. Records indicate that 60 percent of female victims and 80 percent of male victims are under the age of eighteen.

Id.

A. Anxiety Hurts Children

Generally, anxiety adversely affects a child's social, emotional, and academic functioning.²⁶ Furthermore, it may lead to substance abuse and inferior career achievement.²⁷ Younger children risk more complications: early onset of anxiety is "likely to lead to a range of associated complications, including poor social skills, reduced social interactions, isolation, and poor coping strategies."²⁸ Left untreated, it appears highly correlated with depression: researchers report comorbidity rates as high as 60 to 70 percent.²⁹

B. Testifying Induces Anxiety in Children

Anxiety occurs when a child worries about future or current events.³⁰ Thus, the mere act of waiting for a trial to begin can cause anxiety. At least eight published studies confirm this phenomenon, called "anticipatory stress,"³¹ in child witnesses who await testifying.³² Corroborating the studies' results, children often report that long pre-trial delays make them anxious.³³

Once the wait is over, the trial itself produces more stress. Trials can intimidate and traumatize children.³⁴ Trial-based sources of their anxiety include the courtroom environment, potential contact with the opposing party, and the child's lack of legal knowledge, coupled with the duty to answer questions.³⁵ Further, trials can trigger a child's perceived fear that he or she will be punished for failing to perform well.³⁶ Likewise, a trial's adversarial nature typically evokes anxiety.³⁷ This is particularly true for older children, who risk heightened anxiety: lawyers tend to cross-examine them more aggressively than they question younger children.³⁸ Last, children who must proceed to trial

²⁶ See Caroline L. Donovan & Susan H. Spence, *Prevention of Childhood Anxiety Disorders*, 20 *CLINICAL PSYCHOL. REV.* 509, 516 (2000).

²⁷ See Lianne J. Woodward & David M. Fergusson, *Life Course Outcomes of Young People with Anxiety Disorders in Adolescence*, 40 *J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY* 1086, 1086 (2001) ("[A]dolescents with anxiety disorders are at an increased risk of subsequent anxiety, depression, illicit drug dependence, and educational underachievement as young adults.").

²⁸ Ronald M. Rapee et al., *Prevention and Early Intervention of Anxiety Disorders in Inhibited Preschool Children*, 73 *J. CONSULTING & CLINICAL PSYCHOL.* 488, 494 (2005).

²⁹ LINDA WILMSHURST, *ESSENTIALS OF CHILD PSYCHOPATHOLOGY* 82 (2005).

³⁰ See *id.* at 83.

³¹ See, e.g., Sherry Grogan & Kathleen Pace Murphy, *Anticipatory Stress Response in PTSD: Extreme Stress in Children*, 24 *J. CHILD & ADOLESCENT PSYCHIATRIC NURSING* 58, 61 (2011).

³² SUSAN R. HALL & BRUCE D. SALES, *COURTROOM MODIFICATIONS FOR CHILD WITNESSES: LAW AND SCIENCE IN FORENSIC EVALUATIONS* 66 (2008).

³³ See Rhona H. Flin, *Hearing and Testing Children's Evidence*, in *CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY*, *supra* note 24, at 279, 283.

³⁴ WILLIAM G. JONES, U.S. DEP'T OF HEALTH & HUMAN SERVS., *WORKING WITH THE COURTS IN CHILD PROTECTION* 57 (2006), available at <http://www.childwelfare.gov/pubs/usermanuals/courts/courts.pdf>.

³⁵ See Flin, *supra* note 33, at 283.

³⁶ See Thomas D. Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 *S. CAL. L. REV.* 1017, 1036 (2000) (noting that a child may "be overly hesitant in answering questions for fear a mistake will land her in jail").

³⁷ See Batterman-Faunce & Goodman, *supra* note 24, at 324.

³⁸ See JONES, *supra* note 34, at 57.

usually feel high uncertainty about what will happen and they feel less control over their environment; these feelings are markedly stressful for them.³⁹

One noteworthy study demonstrated how the courtroom setting alone creates high anxiety in child witnesses. First, researchers staged an event for two groups of children.⁴⁰ Next, they asked Group A to convey the event in a private room, and Group B to convey it in a mock courtroom that contained observers.⁴¹ Group B reported much greater anxiety than Group A.⁴² They worried most about crying in court, others not believing them, and answering questions while strangers watched and listened.⁴³

Perhaps most telling, when the same researchers conducted a similar study and tracked participants' heart rates, they discovered a remarkable physiological difference: Group B displayed much greater heart rate variability.⁴⁴ At rest, all participants' heart rates averaged from 60 to 90 beats per minute,⁴⁵ but during the exercise, Group A's heart rates averaged between 60 to 120 beats per minute, while Group B's heart rates averaged from 60 to over 240 beats per minute.⁴⁶ So overall, the hearts of the children who appeared in the courtroom beat significantly faster than those who appeared in the private room, a result that is highly indicative of anxiety.⁴⁷ Notably, the children who participated in the study did not testify about a traumatic event that they personally witnessed or experienced. It is probable that testifying about a personally traumatic event would add exponentially more anxiety; therefore, one can reasonably surmise that child witnesses withstand even greater anxiety than the research study participants.

C. Anxiety Impairs Testimony

"If justice is to be served," one expert theorized, "children . . . need to participate in the legal process,"⁴⁸ but whether a child participates effectively depends partly on how much anxiety the child endures.⁴⁹ When anxiety nega-

³⁹ See JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 55 (2012).

⁴⁰ Karen J. Saywitz & Rebecca Nathanson, *Children's Testimony and Their Perceptions of Stress In and Out of the Courtroom*, 17 *CHILD ABUSE & NEGLECT* 613, 615 (1993).

⁴¹ *Id.* at 616.

⁴² *Id.* at 618.

⁴³ *Id.* at 619.

⁴⁴ Rebecca Nathanson & Karen J. Saywitz, *The Effects of the Courtroom Context on Children's Memory and Anxiety*, 31 *J. PSYCHIATRY & L.* 67, 89 (2003).

⁴⁵ Interview with Rebecca Nathanson, Ph.D., James Rogers Professor of Educ. & Law at William S. Boyd Sch. of Law at Univ. of Nev., in Las Vegas, Nev. (Oct. 18, 2012).

⁴⁶ *Id.*

⁴⁷ See Barry E. Hurwitz et al., *Differential Patterns of Dynamic Cardiovascular Regulation as a Function of Task*, 36 *BIOLOGICAL PSYCHOL.* 75, 75 (1993) (finding that "behavioral stressors elicited increases in blood pressure and heart rate").

⁴⁸ Quas & Goodman, *supra* note 11, at 408.

⁴⁹ See Batterman-Faunce & Goodman, *supra* note 24, at 324; see also John E.B. Myers et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 *PAC. L.J.* 3, 41 (1996) (suggesting that "emotional reactions and psychiatric symptoms may affect a child's presentation in a pretrial interview or during courtroom testimony").

tively impacts a child, it impairs the child's ability to testify. This section explores precisely how anxiety impedes the judicial process: it impairs children's testimony by hampering their testimonial performance, credibility, and memory.

1. *Anxiety Damages Performance and Credibility*

Anxious children typically encounter three automatic response patterns: behavioral, cognitive, and physiological.⁵⁰ These responses often elicit escape and avoidance behavior, negative self-appraisals, and a wide array of physiological reactions.⁵¹ The physiological reactions include increased heart rate, rapid breathing, muscle tension,⁵² sweating, dry mouth, nausea,⁵³ jumpiness, and flinching.⁵⁴ Unfortunately, these automatic responses focus a child's attention on the perceived danger,⁵⁵ which compels the child to ignore other important information.⁵⁶ For instance, a distressed child witness retains less cognitive capacity for the task at hand—testifying.⁵⁷

Anxiety also negatively affects a child's trial performance,⁵⁸ because anxious children can become tearful, ill, or inarticulate.⁵⁹ They tend to display poorer free recall, answer questions less accurately, and produce more "I don't know" responses.⁶⁰ Their abilities to understand questions, remember relevant information, and follow counsels' instructions are hindered.⁶¹ Additionally, they provide descriptions that are less complete.⁶² They can become preoccupied by intrusive thoughts about testifying, which initiates more inaccurate answers.⁶³ They also acquiesce to misleading questions more frequently.⁶⁴ The problem worsens for younger children, who might freeze and become unable to respond to even simple questions.⁶⁵ Anxious child witnesses therefore appear less credible, more argumentative, or too malleable.⁶⁶

⁵⁰ See WILMSHURST, *supra* note 29, at 83.

⁵¹ *Id.*; cf. HALL & SALES, *supra* note 32, at 183–84 (noting that some physical responses may appear to be caused by anxiety but are actually caused by other medical conditions, and these physical responses should be ruled out as anxiety-induced).

⁵² WILMSHURST, *supra* note 29, at 83.

⁵³ See DAYLEN ET AL., *supra* note 25, at 42.

⁵⁴ HALL & SALES, *supra* note 32, at 255.

⁵⁵ See Guinevere Tufnell, *Stress and Reactions to Stress in Children*, 7 PSYCHIATRY 299, 299 (2008).

⁵⁶ See DAYLEN ET AL., *supra* note 25, at 42.

⁵⁷ See Deborah Davis & William T. O'Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in HANDBOOK OF FORENSIC PSYCHOLOGY: RESOURCE FOR MENTAL HEALTH AND LEGAL PROFESSIONALS 897, 957 (William T. O'Donohue & Eric R. Levensky eds., 2004).

⁵⁸ See HALL & SALES, *supra* note 32, at 188.

⁵⁹ See Myers et al., *supra* note 49, at 70.

⁶⁰ See Paula E. Hill & Samuel M. Hill, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 814–16 (1987).

⁶¹ ROBBENOLT & STERNLIGHT, *supra* note 39, at 343.

⁶² Saywitz & Nathanson, *supra* note 40, at 617.

⁶³ See Davis & O'Donohue, *supra* note 57, at 957–58.

⁶⁴ Saywitz & Nathanson, *supra* note 40, at 617.

⁶⁵ JONES, *supra* note 34, at 57.

⁶⁶ See ROBBENOLT & STERNLIGHT, *supra* note 39, at 343 (citing Robert K. Bothwell & Mehri Jalil, *The Credibility of Nervous Witnesses*, 7 J. SOC. BEHAV. & PERSONALITY 581

Troublingly, a child witness who is a victim of the underlying crime encounters at least three additional challenges. First, child victims suffer considerable anticipatory stress⁶⁷: studies of 574 victimized children showed that virtually all suffered significant anxiety before trial.⁶⁸ Second, child victims experience heightened anxiety at trial.⁶⁹ This is likely because they endure unique factors such as crime flashbacks,⁷⁰ which can also block them from testifying effectively.⁷¹ Third, child victims must often withstand questions about sensitive, traumatic, or embarrassing events, causing compounded anxiety.⁷² Like other child witnesses, when victimized children exhibit symptoms of anxiety, they might appear highly reluctant or uncooperative,⁷³ traits that may bode poorly at trial.

2. Anxiety Inhibits Memory

Most experts agree that stress negatively affects memory. Although rare discrepancies exist in the research,⁷⁴ nearly 66 percent of specialists in the field of eyewitness testimony believe that anxiety negatively impacts memory accuracy.⁷⁵ It also interferes with the ability to recall information at all⁷⁶: anxious children sometimes subconsciously reduce their effort and motivation until they can no longer recall the occasion under investigation.⁷⁷ They may suffer impaired memory,⁷⁸ and become inclined to recall events inaccurately or to develop distorted memories.⁷⁹

(1992); Barbara A. Spellman & Elizabeth R. Tenney, *Credible Testimony In and Out of Court*, 17 *PSYCHONOMIC BULL. & REV.* 168 (2010)).

⁶⁷ See *supra* note 31 and accompanying text.

⁶⁸ DEBRA WHITCOMB ET AL., NAT'L INST. JUSTICE, THE EMOTIONAL EFFECTS OF TESTIFYING ON SEXUALLY ABUSED CHILDREN 3–4 (1994), available at <https://www.ncjrs.gov/pdffiles1/Digitization/146414NCJRS.pdf>.

⁶⁹ DIANE H. SCHETKY & ELISSA P. BENEDEK, *CLINICAL HANDBOOK OF CHILD PSYCHIATRY AND THE LAW* 107 (1992).

⁷⁰ DAYLEN ET AL., *supra* note 25, at 43–45.

⁷¹ *Id.* at 104.

⁷² See Batterman-Faunce & Goodman, *supra* note 24, at 305.

⁷³ See Myers et al., *supra* note 49, at 41.

⁷⁴ See Karen J. Saywitz, *Improving Children's Testimony: The Question, the Answer, and the Environment*, in *MEMORY AND TESTIMONY IN THE CHILD WITNESS* 113, 135 (Maria S. Zaragoza et al. eds., 1995) (noting two studies that failed to “demonstrate a link between legal knowledge and memory performance”); see also Nathanson & Saywitz, *supra* note 44, at 86 (finding no evidence that heart rate variability constricts free recall).

⁷⁵ See Saul M. Kassin et al., *On the “General Acceptance” of Eyewitness Testimony Research: A New Survey of the Experts*, 56 *AM. PSYCHOLOGIST* 405, 413 (2001). The 66 percent figure is the average percentage of two studies conducted, one conducted in 1989 and the other in 2001. *Id.*

⁷⁶ See ROBBENNOLT & STERNLIGHT, *supra* note 39, at 332 (noting that if a “deponent is more than mildly upset . . . her emotion may interfere with her ability to remember events well or to recount them clearly”).

⁷⁷ See Saywitz, *supra* note 74, at 135; see also *supra* notes 55–57 and accompanying text (describing how automatic physical responses to anxiety compel children to ignore important information).

⁷⁸ See Nathanson & Saywitz, *supra* note 44, at 89–92.

⁷⁹ See Matthew P. Gerrie et al., *False Memories*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 222, 236 (Neil Brewer & Kipling D. Williams eds., 2005).

Anxiety has a particular way of obstructing a child's memory. When questioned, a distressed child's focus involuntarily narrows to the questions, or to internal efforts to regulate his or her emotions.⁸⁰ Thus, anxiety interferes with a child's ability to be attentive, an important part of memory retrieval.⁸¹ Although some researchers report that anxiety can have beneficial effects on memory, the effects tend to be limited⁸² and largely outweighed by detrimental consequences.⁸³

The nexus between anxiety and memory was illustrated in the previously noted study that compared children who conveyed a staged event in a private room to those who conveyed it in a courtroom—the courtroom group recalled only half as much information.⁸⁴ Even more disturbing, significantly more children in the courtroom group failed to recall any part of the staged event at all.⁸⁵ When highly anxious children attempt to articulate their memories, they also function less efficiently and less accurately.⁸⁶ Naturally, testifying requires a child to both recall and verbalize memories, so anxiety's effects on memory may devastate a case's outcome.

D. Anxiety Subverts Justice

As Justices Rehnquist and Blackmun acknowledged, a child witness's anxiety can undermine the trial's truth-finding function.⁸⁷ The Justices almost certainly recognized that anxiety's undesirable impact on performance, credibility, and memory may render a child incapable of testifying effectively, or unable to testify at all. Moreover, prosecutors who lack strong witnesses may be forced to file less serious charges, enter inequitable plea negotiations, or forgo filing any charges at all.⁸⁸ Similarly, fact-finders who lack effective testimonial evidence might reach unfair verdicts or impose more lenient penalties. Conversely, defendants who lack exculpatory witnesses could become more disposed to accept unfair plea agreements or risk harsher charges and penalties. When a trial outcome rests solely on a child's testimony, which occurs frequently, especially in child sexual abuse trials, the child's anxiety is particularly consequential.⁸⁹

⁸⁰ See Davis & O'Donohue, *supra* note 57, at 957–58.

⁸¹ *Id.* at 958.

⁸² See Brian H. Bornstein & Timothy R. Robicheaux, *Methodological Issues in the Study of Eyewitness Memory and Arousal*, 42 CREIGHTON L. REV. 525, 534 (2009) (finding that anxious witnesses tend to remember main events but forget forensically significant peripheral details).

⁸³ See *supra* Part II.A (describing the adverse effects of anxiety on children).

⁸⁴ Nathanson & Saywitz, *supra* note 44, at 89; see also *supra* Part II.B (discussing the private room versus courtroom study).

⁸⁵ Nathanson & Saywitz, *supra* note 44, at 89.

⁸⁶ See Laura Visu-Petra et al., *Effects of Anxiety on Memory Storage and Updating in Young Children*, 35 INT'L J. BEHAV. DEV. 38, 38, 44 (2011).

⁸⁷ See *supra* note 3 and accompanying text.

⁸⁸ See John E. B. Myers et al., *Jurors' Perceptions of Hearsay in Child Sexual Abuse Cases*, 5 PSYCHOL. PUB. POL'Y & L. 388, 411 (1999) (noting that “prosecutors are reluctant to take child sexual abuse cases to trial unless the victim is available to testify”).

⁸⁹ See WRIGHTSMAN ET AL., *supra* note 14, at 191.

III. WHY LAWYERS, DESPITE CRITICISM, SHOULD ATTEMPT TO REDUCE ANXIETY IN CHILD WITNESSES

Despite evidence that anxiety adversely affects children, children's testimony, and the judicial process,⁹⁰ critics typically argue against reducing anxiety in child witnesses for three primary reasons. First, critics complain that teaching anti-anxiety strategies causes delay. This criticism, however, should be weighed against the havoc that anxiety inflicts on case outcomes and on children. Anxiety's consequences can undermine a child's welfare for years,⁹¹ contravening the core principal of family law: that a child's best interest—not time or money—is the single most important consideration in cases involving children. Accordingly, the Supreme Court recognizes that a child's well-being sometimes outweighs a defendant's Sixth Amendment rights.⁹² Critics should therefore excuse any minor delays when lawyers help alleviate anxiety's debilitating effects on cases and on children.

Second, critics argue that not all anxiety is inherently bad⁹³: sometimes it evokes positive responses from fact-finders.⁹⁴ For instance, a child who is noticeably upset while testifying may be more persuasive⁹⁵ because some jurors deem children who cry or otherwise manifest emotion while testifying as more believable.⁹⁶ This indicates that a certain level of anxiety can be more advantageous than detrimental.

A recent occurrence illustrates the notion that some anxiety enhances a child's testimonial credibility: during a bench trial, when the defendant, a man accused of molesting his young son, entered the courtroom, the boy immediately began to sob.⁹⁷ The son's emotional reaction, in addition to his testimony, helped convince the judge to find the defendant guilty.⁹⁸ Critics who prefer that child witnesses retain a slight bit of anxiety for credibility purposes should consider that most lawyers do not possess the resources to completely eliminate a child's anxiety. Even if a lawyer could entirely erase a child's anxiety, the lawyer ought to strive for a balanced witness instead: one who can competently testify while still exhibiting some emotion.

Third, critics contend that not all anxious child witnesses experience adverse effects.⁹⁹ This may be true; some children probably survive severe stress without difficulty. Nonetheless, this argument fails to obviate the value of helping children who are harmed.

Because reduced anxiety diminishes harm to children, elicits better testimony, and facilitates justice, lawyers should seek opportunities to reduce anxiety in child witnesses when feasible.

⁹⁰ See *supra* Part II.D.

⁹¹ See *supra* notes 26–29 and accompanying text.

⁹² *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

⁹³ See *ROBBENNOLT & STERNLIGHT*, *supra* note 39, at 345.

⁹⁴ See *id.* at 63, 345.

⁹⁵ *Flin*, *supra* note 33, at 287.

⁹⁶ See *Myers et al.*, *supra* note 88, at 407.

⁹⁷ Interview with Alexandra Varela, *supra* note 1.

⁹⁸ *Id.*

⁹⁹ *Batterman-Faunce & Goodman*, *supra* note 24, at 313.

IV. STRATEGIES THAT REDUCE ANXIETY IN CHILD WITNESSES

Numerous strategies tend to minimize anxiety in child witnesses. The sheer number of available tactics can seem overwhelming, especially to lawyers, who generally lack both time and psychology training. However, lawyers ought to remember that children benefit from *any* efforts that can lessen the negative aspects of testifying.¹⁰⁰ To help, lawyers should implement as many of the following strategies as possible: 1) provide legal system education; 2) conduct desensitization training; 3) teach coping methods; 4) foster child-focused communication; 5) schedule interactions at appropriate times; 6) recruit a support person; and 7) request particular trial procedures.¹⁰¹ These strategies, especially in the aggregate, effectively reduce anxiety in child witnesses. Where contradictory research exists, this Article examines it; however, abundant research confirms that these techniques combat anxiety and benefit children.

A. Provide Legal System Education

Child witnesses who learn about the judicial system before they testify encounter less anxiety,¹⁰² partly because they know what to expect.¹⁰³ Stated slightly differently, education demystifies their experience.¹⁰⁴ To illustrate, a study of 186 child witnesses found that those who better understood the legal system expressed the least anxiety about testifying.¹⁰⁵ Understanding the legal system also helps children respond to questions. Specifically, children who acquire legal knowledge produce greater recall and fewer “I don’t know” responses.¹⁰⁶ This is because legal knowledge decreases distraction and confusion, so it frees a child’s attentional resources to better serve memory demands.¹⁰⁷

Conversely, a lack of legal knowledge harms children: those who do not understand what is expected of them report more anxiety.¹⁰⁸ They tend to retain unrealistic expectations and beliefs, which originate from their unfamiliarity with the courtroom.¹⁰⁹ For example, when one study’s participants were asked

¹⁰⁰ SHERRIE BOURG CARTER, CHILDREN IN THE COURTROOM: CHALLENGES FOR LAWYERS AND JUDGES 132 (2d ed. 2009).

¹⁰¹ Notably, lawyers should sometimes direct parties to seek outside support. Credible websites such as the American Psychological Association’s www.apahelpcenter.org is an excellent source. See DAYLEN ET AL., *supra* note 25, at 215.

¹⁰² See Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 LAW & HUM. BEHAV. 165, 188 (1998) (“[C]hildren with a better understanding of the legal system expressed the least anxiety about taking the stand.”); *but see* Nathanson & Saywitz, *supra* note 44, at 87 (finding “no evidence that legal knowledge and past court experience . . . decreased anxiety”).

¹⁰³ See CARTER, *supra* note 100, at 132.

¹⁰⁴ See Nathanson & Saywitz, *supra* note 44, at 93.

¹⁰⁵ Goodman et al., *supra* note 102, at 173, 188.

¹⁰⁶ Nathanson & Saywitz, *supra* note 44, at 86–87.

¹⁰⁷ *Id.* at 93.

¹⁰⁸ *Id.* at 85.

¹⁰⁹ Karen J. Saywitz & Lynn Snyder, *Improving Children’s Testimony with Preparation*, in CHILD VICTIMS, CHILD WITNESSES, *supra* note 24, at 117, 121.

what they thought might happen in court, some children believed they would go to jail if they answered a question incorrectly, or that an opposing party might be allowed to yell at them.¹¹⁰ One child assumed that “[c]ourt is a room you pass through on your way to jail.”¹¹¹ Judges’ robes remind some children of priests, witches, or vampires.¹¹² These misperceptions interfere with effective testimony.¹¹³

A lawyer can help by personally educating a child witness or, where available, sending the child to a program that educates children about court. Court-education programs target anticipatory stress and provide beneficial support,¹¹⁴ improving outcomes for child witnesses.¹¹⁵ Because they understand the legal system better, child witnesses who attend the programs gain confidence¹¹⁶ and enhanced trial performance.

Distinguished child-witness expert Rebecca Nathanson, Ph.D., created one such program, called “Kids’ Court School” (KCS), which she has directed for over ten years at the William S. Boyd School of Law at the University of Nevada, Las Vegas.¹¹⁷ At KCS, law-student volunteers educate child witnesses about the legal system, teach several anxiety-reduction techniques, and conduct mock trials to allow children to practice testifying about facts that are unrelated to their actual cases.¹¹⁸ Consequently, KCS, which acts as a neutral third party, decreases the system-induced anxiety often associated with participation in the judicial process.¹¹⁹

Dr. Nathanson maintains that if anxiety vitiates memory, one can reasonably surmise that KCS strengthens a child’s testimonial completeness and accuracy, as well.¹²⁰ Anecdotally, she regularly receives reports from legal professionals who verify that children who attend the program fare much better in court than those who do not.¹²¹ The program is so impactful, some Nevada judges *require* child witnesses to attend KCS before they testify.¹²² In further

¹¹⁰ Sandra L. D’Angelo, *When Children Testify in Court*, 15 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 170, 171 (2002).

¹¹¹ *Id.*

¹¹² Karen J. Saywitz, *Children’s Conceptions of the Legal System: “Court is a Place to Play Basketball”*, in PERSPECTIVES ON CHILDREN’S TESTIMONY 131, 153 (S.J. Ceci et al. eds., 1989).

¹¹³ See Myers et al., *supra* note 49, at 69.

¹¹⁴ HALL & SALES, *supra* note 32, at 67.

¹¹⁵ Lisa M. Jones et al., *Criminal Investigations of Child Abuse: The Research Behind “Best Practices”*, 6 TRAUMA VIOLENCE & ABUSE 254, 260 (2005).

¹¹⁶ Claire S. Ellis, *Court School: Supporting Child Witnesses*, 22 CHILD. TODAY 10, 12 (1993).

¹¹⁷ *Boyd’s Kids’ Court School Wins Bright Idea Award*, UNIV. NEV. LAS VEGAS, WILLIAM S. BOYD SCH. OF L. (Oct. 11, 2012), <http://www.law.unlv.edu/node/14582>.

¹¹⁸ See REBECCA NATHANSON & KAREN SAYWITZ, ELEMENTARY CURRICULUM: KIDS’ COURT SCHOOL 37 (2012).

¹¹⁹ Rebecca Nathanson, *Kids’ Court School: Addressing Contextual Influences on Children’s Testimony*, Presentation at William S. Boyd Sch. of Law Cmty. Serv. Program Orientation (Jan. 24, 2012).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Based on the author’s personal experience as Co-Coordinator of the Kids’ Court School at the University of Nevada, Las Vegas William S. Boyd School of Law during 2012 and

support, Harvard University recently recognized KCS as one of the most exemplary programs in the nation.¹²³

Similar court education programs for children continue to emerge across the country.¹²⁴ Several county governments consider them so beneficial that they fund them.¹²⁵ Whether a lawyer utilizes a program like KCS or personally conducts training, a child's expectations and anxiety can be better managed if the child generally understands what happens in court and by whom. For instance, children should know how the courtroom will look, who will attend the trial, where each person will sit, and what each person's role entails.¹²⁶ To best explain, a lawyer might show the child a photo or display of a typical courtroom. KCS uses a dollhouse-like miniature courtroom, replete with small wooden figures that represent the primary court actors.¹²⁷

Lawyers should also define or clarify basic legal terms that children often hear in court, such as "witness," "accuse," "investigation," "defendant," "oath," and "verdict."¹²⁸ Moreover, lawyers should explain that judges and juries, who do not favor either party, are there to listen, and only find defendants guilty if the evidence proves guilt.¹²⁹

Additionally, because children benefit when they know what to expect, a lawyer should warn the child that family members might not be allowed in the courtroom while the child testifies.¹³⁰ Likewise, lawyers should advise children that legal proceedings routinely get delayed,¹³¹ and that it sometimes takes years to resolve a legal matter. Last, they should caution children that numerous appearances are likely; for example, child witnesses may need to appear at a number of interviews and depositions, not just the trial itself.

Some critics claim that instead of helping, increased knowledge underscores the seriousness of court, leading to increased anxiety.¹³² Although this concern has some merit, the benefits of legal system education outweigh the risks. Beside the previously mentioned benefits, another is that children who obtain legal education often acquire enhanced memory performance.¹³³ Other

2013, under the supervision of Rebecca Nathanson, Ph.D., a recognized expert and author on the topic of educating child witnesses about court.

¹²³ *Boyd's Kids' Court School Wins Bright Idea Award*, *supra* note 117.

¹²⁴ Ellis, *supra* note 116, at 10.

¹²⁵ Walter W. Peters & Narina Nunez, *Complex Language and Comprehension Monitoring: Teaching Child Witnesses to Recognize Linguistic Confusion*, 84 J. APPLIED PSYCHOL. 661, 661 (1999).

¹²⁶ DAYLEN ET AL., *supra* note 25, at 279; *see also* SCHETKY & BENEDEK, *supra* note 69, at 258 (noting that the lawyer or trial prosecutor should orient the child to the courtroom layout, the participants, and procedures the child will observe).

¹²⁷ *See supra* note 122.

¹²⁸ *See, e.g.*, NATHANSON & SAYWITZ, *supra* note 118, at 3–13 (demonstrating how to define basic legal terms to a child witness).

¹²⁹ *Id.* at 8, 13.

¹³⁰ DAYLEN ET AL., *supra* note 25, at 279.

¹³¹ This is important because some studies find that delays and numerous appearances increase children's anxiety. *See infra* Part IV.G.1.

¹³² *See* Quas & Goodman, *supra* note 11, at 402; *cf.* Nathanson & Saywitz, *supra* note 44, at 87 (finding "no evidence that legal knowledge and past court experience . . . decreased anxiety . . ." in one particular study).

¹³³ Nathanson & Saywitz, *supra* note 44, at 92 (finding a positive relationship between legal knowledge and memory performance).

critics allege that no anxiety can be just as troublesome as too much¹³⁴: over-prepared witnesses may become overconfident,¹³⁵ which makes them appear insincere.¹³⁶ Yet, jurors might discount the testimony of under-confident child witnesses, which is equally problematic.¹³⁷ Given the importance of protecting children against harm, promoting better testimony, and furthering fair adjudication, most people would likely agree that lawyers should provide child witnesses with some pre-trial education about the legal system.

B. Conduct Desensitization Training

Another strategy, desensitization, helps children overcome irrational fears.¹³⁸ Desensitization is a cognitive behavioral therapy that may mitigate or eliminate undesirable psychological, emotional, and behavioral reactions to a stimulus.¹³⁹ If a person's fears stem from an unavoidable task, the strategy can be exceptionally effective.¹⁴⁰ Because child witnesses usually cannot avoid testifying, it follows that this technique would assist them.

Although similar to education, desensitization is more hands-on. It works by first gradually exposing a child to a feared event, like testifying.¹⁴¹ Then it eases the association between the event and the child's negative emotions, such as anxiety and apprehension, by replacing them with positive ones, such as reassurance and relaxation.¹⁴² Desensitization succeeds because people gain knowledge more easily through concrete, rather than abstract, learning.¹⁴³

To illustrate, children who face unfamiliar, frightening medical procedures suffer less anxiety when they are first desensitized and then taught coping methods based on increased knowledge of the upcoming procedure.¹⁴⁴ One can reasonably infer that a child's fear of medical procedures is similar to a child's fear of legal proceedings: desensitization, coupled with coping strategies, should similarly alleviate a child witness's distress.¹⁴⁵ Desensitization pro-

¹³⁴ Some anxiety can boost credibility and otherwise help persuade fact-finders. *See supra* notes 93–98 and accompanying text.

¹³⁵ *See* ROBBENOLT & STERNLIGHT, *supra* note 39, at 344.

¹³⁶ *See id.* at 338.

¹³⁷ David Dunning, *Research on Children's Eyewitness Testimony: Perspectives on Its Past and Future*, in PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 112, at 230, 235.

¹³⁸ *See* WILMSHURST, *supra* note 29, at 88.

¹³⁹ *See id.*; THOMAS J. HUBERTY, ANXIETY AND DEPRESSION IN CHILDREN AND ADOLESCENTS: ASSESSMENT, INTERVENTION, AND PREVENTION 255 (2012) ("The primary premise [of exposing a child to anxiety-producing stimuli] is that systematic, graded exposure to the anxiety-producing event improves the ability to develop coping strategies to reduce anxiety."); *see also* Brendan Gail Rule & Tamara J. Ferguson, *The Effects of Media Violence on Attitudes, Emotions, and Cognitions*, 42 J. SOC. ISSUES 29, 42 (1986) (finding that "repeated exposure [to media violence] leads to declines in physiological arousal and decreases in the intensity of self-reported emotions").

¹⁴⁰ *See* HUBERTY, *supra* note 139, at 255.

¹⁴¹ WILMSHURST, *supra* note 29, at 88.

¹⁴² *Id.*

¹⁴³ *See* ROBBENOLT & STERNLIGHT, *supra* note 39, at 167.

¹⁴⁴ Saywitz, *supra* note 112, at 132. For a discussion on coping methods, see *infra* Part IV.C.

¹⁴⁵ Saywitz, *supra* note 112, at 132.

motes higher-quality children's testimony¹⁴⁶ because children who appear in recognizable settings display less anxiety.¹⁴⁷ Moreover, when children see familiar people in recognizable surroundings, they relax and exhibit improved information-processing and communication skills.¹⁴⁸ Accordingly, this section explores two targeted desensitization tactics that help child witnesses: perform a mock trial and encourage court visits.

1. *Perform a Mock Trial*

Because child witnesses learn better in environments similar to the ones in which they will testify, mock trials are particularly useful to reduce their anxiety.¹⁴⁹ Lawyers who perform mock trials effectuate less fear, more knowledge, and better testimony from child witnesses.¹⁵⁰ Likewise, lawyers who simulate other proceedings, such as depositions, can reasonably expect their efforts to benefit children and their testimony.

For maximum effectiveness, the mock trial should occur in a real courtroom or similarly situated room, and the lawyer should tailor explanations to the child's comprehension level.¹⁵¹ Accomplished by simulating interactions, role-playing supplants mere conversation because children who become familiar with courtroom procedures can confront and conquer their court-related fears.¹⁵² Role-playing has various advantages: it desensitizes a child to different court actors and their functions, it familiarizes them with testifying, and it acclimates them to the notion that numerous people may attend the trial. Further, role-playing allows children to practice under pressure, which has been proven in other contexts to enhance performance.¹⁵³ It also mitigates the negative effects of lengthy trials.¹⁵⁴

Mock trials should involve multiple parties. The more participants, the better the simulation, as many people might attend the actual trial. Participants can play lawyers, the opposing party, the judge, and any jurors. Ideally, participants should include a costumed judge and marshal, to help desensitize children

¹⁴⁶ See Nathanson & Saywitz, *supra* note 44, at 93.

¹⁴⁷ See DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 65 (2003), available at <https://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf>.

¹⁴⁸ See Karen Saywitz & Lorinda Camparo, *Interviewing Child Witnesses: A Developmental Perspective*, 22 CHILD ABUSE & NEGLECT 825, 835 (1998).

¹⁴⁹ See Marcus T. Boccaccini et al., *Effects of Witness Preparation on Witness Confidence and Nervousness*, 3 J. FORENSIC PSYCHOL. PRAC. 39, 49–50 (2003).

¹⁵⁰ Flin, *supra* note 33, at 286–87 (citing Louise Dezwirek-Sas, *Empowering Child Witnesses for Sexual Abuse Prosecution*, in CHILDREN AS WITNESSES 181 (Helen Dent & Rhona Flin eds., 1992)).

¹⁵¹ Author's personal experience, *supra* note 122.

¹⁵² See ROBBENNOLT & STERNLIGHT, *supra* note 39, at 345.

¹⁵³ See Raoul R. D. Oudejans & J. Rob Pijpers, *Training with Anxiety Has a Positive Effect on Expert Perceptual-Motor Performance Under Pressure*, 62 Q.J. EXPERIMENTAL PSYCHOL. 1631, 1637 (2009) (“[P]racticising under elevated levels of anxiety prevents choking in experts.”).

¹⁵⁴ See Flin, *supra* note 33, at 286–87; Louise Dezwirek-Sas, *Empowering Child Witnesses for Sexual Abuse Prosecution*, in CHILDREN AS WITNESSES 181, 195–96 (Helen Dent & Rhona Flin eds., 1992).

who fear uniformed authority figures.¹⁵⁵ If enough people participate, the lawyer can demonstrate direct and cross-examinations, objections, rulings, and the verdict.¹⁵⁶

To prevent possible sanctions or prejudicial error, a lawyer who conducts a mock trial must avoid improperly coaching the child to give specific answers in court. One way to preclude inadvertent coaching is to use unrelated, hypothetical facts during the mock trial, such as facts from a familiar fairy tale.¹⁵⁷ Lawyers should also explain that mock trials are just for practice, and verify that children understand they must tell the truth in actual court, not testify about made-up facts or fairy tales like they may in mock trials.¹⁵⁸ Similarly, lawyers should allow children to *hear* the oath during mock trials,¹⁵⁹ but should not ask children to *take* the oath because that could confuse child witnesses into thinking it is acceptable to pretend in court.¹⁶⁰ Another benefit of mock trials: lawyers can use them to assess children's anxiety and encourage child witnesses to practice and use coping methods.¹⁶¹

While critics may object to any delays caused by mock trials, judicial efficiency will almost certainly offset the small time investment, because less anxious children usually require fewer breaks and adjournments.¹⁶² Additionally, critics could allege that a mock trial tends to prejudice a child against the opposing party, but a 1991 study confirmed that no such prejudicial effect typically occurs.¹⁶³ To further allay any apprehension about alleged bias, the lawyer can ask a third-party neutral, such as a court-education program,¹⁶⁴ to administer the mock trial using a generic curriculum approved by both parties. Last, to dispel any concerns about expense, the lawyer may conduct the mock trial on his own, or seek organizations that offer free programs for child witnesses.¹⁶⁵

2. Encourage Court Visits

The courtroom layout alone heightens anxiety,¹⁶⁶ so a child witness should visit a courtroom before testifying. Ideal visits include both a tour and observation of an actual proceeding. Compellingly, child psychiatrists recommend routine courtroom tours for all children who must testify.¹⁶⁷ It helps if a child visits a vacant courtroom, where the child can get oriented to the space¹⁶⁸

¹⁵⁵ See *supra* notes 112–13 and accompanying text (discussing how some children, when they see judges' robes, are reminded of priests, witches, or vampires, and how such misperceptions interfere with effective testimony).

¹⁵⁶ *Id.*

¹⁵⁷ Author's personal experience, *supra* note 122.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *infra* Part IV.C.

¹⁶² See *infra* notes 289–92 and accompanying text.

¹⁶³ See Saywitz & Snyder, *supra* note 109, at 123.

¹⁶⁴ See *supra* notes 114–29 and accompanying text.

¹⁶⁵ *Id.*

¹⁶⁶ See Flin, *supra* note 33, at 287.

¹⁶⁷ SCHETKY & BENEDEK, *supra* note 69, at 258.

¹⁶⁸ *Id.*

and freely explore the room.¹⁶⁹ In a national study of 153 district attorneys' offices, children who toured courtrooms before their court appearances were more comfortable and less anxious when they eventually testified.¹⁷⁰

Similarly, children who observe court proceedings prior to their own ultimately encounter less anxiety.¹⁷¹ Whether a child views a trial related or unrelated to his or her case does not matter; either is ordinarily beneficial.¹⁷² To maximize the benefits, the child should observe a proceeding in the courtroom where he or she will testify.¹⁷³ A lawyer must also consider timing: the visit should be near the trial's start date to reduce anticipatory stress,¹⁷⁴ but not too near, because the child needs time to assimilate the new information before testifying.¹⁷⁵ If a time constraint or lack of opportunity prevents observation of a live proceeding, the lawyer can instruct the child to view a trial on television or video instead, but only if the lawyer has previewed and approved the material beforehand.

C. Teach Coping Methods

Even knowledgeable adults and expert witnesses occasionally battle anxiety when they interact with lawyers. Unsurprisingly, children who experience anxiety *and* who usually lack strategies for coping with emotions, typically perform poorly in legal settings.¹⁷⁶ Like legal-system education, coping methods ease stress, diminish fears, and improve testimony¹⁷⁷ because they tend to alleviate uncertainty and enhance feelings of control in children.¹⁷⁸ Although numerous methods exist, at a minimum, lawyers should implement one or more of the following fast, simple techniques: 1) practice deep breathing; 2) instill positivity; and 3) explain how to answer troublesome questions. Though these tactics must be taught *before* trial, lawyers should continuously encourage children to practice and employ them *before and during* all proceedings.

1. Practice Deep Breathing

Most people breathe faster and shallower when anxious.¹⁷⁹ This generates more anxiety and even shallower breathing, which creates a vicious cycle.¹⁸⁰ To break the cycle, lawyers should teach children to breathe deeply, which

¹⁶⁹ *Id.*

¹⁷⁰ Goodman et al., *supra* note 6, at 255, 267.

¹⁷¹ SCHETKY & BENEDEK, *supra* note 69, at 258.

¹⁷² *But see* DAYLEN ET AL., *supra* note 25, at 236 (suggesting that sexual assault victims watch unrelated trials to prepare for trial).

¹⁷³ SCHETKY & BENEDEK, *supra* note 69, at 258.

¹⁷⁴ *Id.*; *see also supra* notes 30–33 and accompanying text (discussing anticipatory stress in children awaiting trial).

¹⁷⁵ SCHETKY & BENEDEK, *supra* note 69, at 258.

¹⁷⁶ Saywitz & Snyder, *supra* note 109, at 122.

¹⁷⁷ *See* Flin, *supra* note 33, at 286–87.

¹⁷⁸ DAYLEN ET AL., *supra* note 25, at 138.

¹⁷⁹ *Id.* at 145.

¹⁸⁰ *Id.*

produces a calming effect.¹⁸¹ Because deep breathing induces relaxation, it reduces anxiety and helps prevent panic.¹⁸²

Lawyers should instruct children to breathe deeply whenever they want to calm themselves, especially during any interviews, depositions, and in-court examinations. A lawyer might effectively teach this to a child by first demonstrating how to slowly and audibly breathe in through the nose and out through the mouth.¹⁸³ The lawyer should then ask the child to try it, while explaining that deep breathing looks just like “smelling roses” and “blowing out candles.”¹⁸⁴

2. *Instill Positivity Through Positive Self-Talk, Visual Imagery, and Comfort Objects*

Thoughts greatly influence emotions,¹⁸⁵ and negative emotions substantially correlate with anxiety.¹⁸⁶ A lawyer can therefore lessen a child’s anxiety if the lawyer helps the child replace negative emotions with positive ones. Introducing positive self-talk, visual imagery, and comfort objects facilitates positivity in children who must testify.

Lawyers should encourage child witnesses to think positively because children who engage in excessive undesirable thoughts, also known as negative “self-talk,” perpetuate harmful cycles of anxiety and negative expectations.¹⁸⁷ Of course, negative feelings are not conducive to successful testimony. Because anxious children often feel worthless, sad, helpless, and hopeless,¹⁸⁸ it follows that child witnesses who replace negative self-talk with positive self-talk perform better because they feel less anxious. So lawyers should instruct children to pay attention to their negative thoughts, and teach children how to change them. To illustrate, the lawyer can explain that when the child catches himself or herself thinking a negative thought, the child should first think of a transition word, such as “Oops!”¹⁸⁹ Then the child ought to replace the negative thought with an affirmative one.¹⁹⁰ For example, when a child thinks, “I’m scared; I can’t answer questions,” the child should first think, “Oops!” Then the child should purposefully think a positive thought, such as “I am okay; I can do this.”

¹⁸¹ See *id.* at 146.

¹⁸² See Susan M. Gerik, *Pain Management in Children: Developmental Considerations and Mind-Body Therapies*, 98 S. MED. J. 295, 298 (2005).

¹⁸³ See NATHANSON & SAYWITZ, *supra* note 118, at 25–27 (demonstrating how a lawyer might teach a child witness to breathe deeply).

¹⁸⁴ *Id.* at 26.

¹⁸⁵ DAYLEN ET AL., *supra* note 25, at 154.

¹⁸⁶ See Jackie Lodge et al., *Think-Aloud, Thought-Listing, and Video-Mediated Recall Procedures in the Assessment of Children’s Self-Talk*, 24 COGNITIVE THERAPY & RES. 399, 408 (2000).

¹⁸⁷ See HUBERTY, *supra* note 139, at 251.

¹⁸⁸ See DAYLEN ET AL., *supra* note 25, at 154 (noting that feelings of worthlessness, helplessness, hopelessness, and sadness are associated with a depressed mood); WILMSHURST, *supra* note 29, at 82 (noting that “[c]omorbidity rates as high as 60–70% have been reported between anxiety and depression”).

¹⁸⁹ DAYLEN ET AL., *supra* note 25, at 155.

¹⁹⁰ See NATHANSON & SAYWITZ, *supra* note 118, at 27–29 (demonstrating how a lawyer might teach a child witness to engage in positive self-talk when feeling “nervous or embarrassed or scared”).

Lawyers could also invite children to try visual imagery, a form of relaxed, focused concentration prompted by asking children to imagine a favorite place or activity.¹⁹¹ By distracting children, visual imagery enhances relaxation. It helps quell children's fears and allows them to feel safe.¹⁹² In support, researchers who studied children with recurrent abdominal pain found that those who practiced visual imagery experienced less discomfort.¹⁹³ One can reasonably expect visualization to produce similar positive results in a legal context.

To teach visual imagery to children, lawyers can use this expert-endorsed script: "Relax for a few minutes and imagine a happy, comfortable place. This place may be a place you have been before or a place you would like to go."¹⁹⁴ Some experts suggest that children imagine an enjoyable holiday gathering.¹⁹⁵ For instance, when a child witness feels anxious, the lawyer might ask the child to visualize a favorite vacation or birthday party.

Further, lawyers can instruct child witnesses to bring and hold comfort objects when they testify: such items can help calm frightened or nervous children.¹⁹⁶ To augment emotional security, the child should bring something to court that he or she associates with happiness and safety.¹⁹⁷ Typical comfort objects include a favorite toy, stuffed animal, or small blanket.¹⁹⁸ Depending on the child, it could be an item blessed by a spiritual leader¹⁹⁹ or a loved one's photo. Comfort objects benefit children in unfamiliar or intimidating situations like court²⁰⁰ because children generally feel stronger or more supported when holding them.²⁰¹ More than mere toys, comfort items replicate a caregiver's soothing abilities,²⁰² helping to calm anxious child witnesses.²⁰³

3. *Explain How to Answer Troublesome Questions*

Witnesses who are told they may exercise different responses when they testify exhibit less anxiety and more accuracy.²⁰⁴ Because guessing can provide

¹⁹¹ See Gerik, *supra* note 182, at 298.

¹⁹² See DAYLEN ET AL., *supra* note 25, at 146.

¹⁹³ Gerik, *supra* note 182, at 298 (citing Thomas M. Ball et al., *A Pilot Study of the Use of Guided Imagery for the Treatment of Recurrent Abdominal Pain in Children*, 42 CLINICAL PEDIATRICS 527 (2003)).

¹⁹⁴ *Id.*

¹⁹⁵ See DAYLEN ET AL., *supra* note 25, at 146.

¹⁹⁶ AM. BAR ASS'N CRIMINAL JUSTICE SECTION TASK FORCE ON CHILD WITNESSES, THE CHILD WITNESS IN CRIMINAL CASES 28 (2002) [hereinafter TASK FORCE ON CHILD WITNESSES].

¹⁹⁷ DAYLEN ET AL., *supra* note 25, at 143.

¹⁹⁸ TASK FORCE ON CHILD WITNESSES, *supra* note 196, at 28.

¹⁹⁹ DAYLEN ET AL., *supra* note 25, at 143.

²⁰⁰ HALL & SALES, *supra* note 32, at 30.

²⁰¹ DAYLEN ET AL., *supra* note 25, at 144.

²⁰² Myers et al., *supra* note 49, at 71 (citing Ellen Matthews & Karen J. Saywitz, *Child Victim Witness Manual*, 12 CENTER FOR JUD. EDUC. & RES. J. 5, 34 (1992)).

²⁰³ See 2 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 6.19, at 63 (3d ed. 1997).

²⁰⁴ ROBBENOLT & STERNLIGHT, *supra* note 39, at 40.

new but incorrect information,²⁰⁵ lawyers should explain that children must not guess when they testify. They should clarify that it is acceptable to answer “I don’t know” or “I don’t remember” while under oath, as long the answer is truthful.²⁰⁶

Similarly, children who truthfully reply, “I don’t understand,” “I don’t get it,” or “I don’t know what you mean,” demonstrate better testimonial performance.²⁰⁷ Thus, a lawyer should instruct a child to tell an interviewer if a question is unclear, which will help generate more accurate answers.²⁰⁸ Lawyers should employ this strategy sparingly, however. Some children cope with overwhelming emotions by shutting down while testifying, either falling into silence or into a series of answers such as “I don’t know.”²⁰⁹ Although children may simply fall silent because they feel overwhelmingly anxious, fact-finders might misinterpret these responses as denials or recantations.²¹⁰

D. Foster Child-Focused Communication

The reliability of a child witness’s testimony relies heavily on the quality of contact between the child and lawyer.²¹¹ To improve testimonial reliability, a lawyer ought to strive to improve communication through the following techniques: 1) build rapport and trust; 2) practice perspective-taking; 3) attend to nonverbal cues; 4) use props; and 5) enforce limits.

1. Build Rapport and Trust

Although children rarely interact with lawyers as the result of a pleasant event, they feel more relaxed when they sense rapport and trust.²¹² Rapport between lawyers and child witnesses²¹³ improves testimonial accuracy,²¹⁴ and trust helps establish good communication.²¹⁵ Trusting relationships also help relieve children’s anxiety.²¹⁶ A lawyer who wants to help build rapport and trust with a child witness can implement these strategies: create a child-friendly environment; aim for appropriate tone, questions, and physical space; and practice positive reinforcement.

²⁰⁵ See ROBBENOLT & STERNLIGHT, *supra* note 39, at 40 (“One recent study found that when witnesses were forced to guess, more information was provided, but this new information included both more correct information *and* more incorrect information.”).

²⁰⁶ See NATHANSON & SAYWITZ, *supra* note 118, at 11.

²⁰⁷ See Saywitz & Camparo, *supra* note 148, at 838.

²⁰⁸ Saywitz & Snyder, *supra* note 109, at 131–33.

²⁰⁹ Myers et al., *supra* note 49, at 70 (citation omitted).

²¹⁰ *Id.*

²¹¹ See Kamala London, *Investigative Interviews of Children: A Review of Psychological Research and Implications for Police Practices*, 4 POLICE Q. 123, 140 (2001).

²¹² *Id.* at 134.

²¹³ CARTER, *supra* note 100, at 61.

²¹⁴ Kim P. Roberts et al., *The Effects of Rapport-Building Style on Children’s Reports of a Staged Event*, 18 APPLIED COGNITIVE PSYCHOL. 189, 189, 197 (2004).

²¹⁵ ROBBENOLT & STERNLIGHT, *supra* note 39, at 158.

²¹⁶ See Jim Henry, *System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure*, 12 J. INTERPERSONAL VIOLENCE 499, 501–02 (1997) (noting that a lack of a trusting relationship between a sexually abused child and a professional within the judicial system, such as an interviewing attorney, exacerbates the child’s anxiety).

Child-friendly environments include cheerfully painted walls, plentiful lighting, and comfortable furniture.²¹⁷ Props such as age-appropriate toys, dolls, puppets, and art supplies similarly assist.²¹⁸ During conversations, when the child must remain attentive,²¹⁹ the lawyer should only introduce simple items. Video games, for instance, would probably hinder more than help.

Along with the setting, the lawyer's tone affects anxiety and responsiveness.²²⁰ Warm, friendly interactions foster rapport and trust, reducing anxiety by facilitating better communication.²²¹ If the child possesses enough maturity to understand, the lawyer should first explain his or her own role and the interview's purpose.²²² Then, the child should be encouraged to ask questions, which further alleviates anxiety.²²³

To gather more information of better quality, lawyers should begin with questions that help children feel more comfortable before asking about sad, upsetting, or embarrassing topics.²²⁴ Rapport-building questions that put children at ease include queries about family, friends, or favorite activities.²²⁵ Silence is just as important, especially with initially reluctant children: lawyers must pause often and avoid interrupting, allowing children ample time to think and respond.²²⁶ Lawyers should not pressure uncommunicative child witnesses, which can derail rapport and produce more anxiety instead.²²⁷ Lawyers should also avoid introducing multiple interviewers,²²⁸ asking closed-ended questions,²²⁹ and using too many words.²³⁰ Correspondingly, the ratio of each person's words should favor the child.²³¹

Appropriate physical space fosters rapport and trust, too. Certain children, including those from specific cultures as well as some sex crime victims, prefer generous personal space. Child sex crime victims, in particular, might remain understandably wary and distrustful of physical contact due to previous

²¹⁷ Lynn W. England & Charles L. Thompson, *Counseling Child Sexual Abuse Victims: Myths and Realities*, 66 J. COUNSELING & DEV. 370, 372 (1988).

²¹⁸ *Id.*

²¹⁹ CARTER, *supra* note 100, at 68.

²²⁰ Helene M. Snyder & Susan A. McDaniels, *Effectively Representing Children*, CHI. BAR. ASS'N REC. 34, 35 (2000).

²²¹ See James M. Wood et al., *Suggestions for Improving Interviews in Child Protection Agencies*, 1 CHILD MALTREATMENT 223, 228 (1996); see also Kee MacFarlane & Sandy Krebs, *Techniques for Interviewing and Evidence Gathering*, in SEXUAL ABUSE OF YOUNG CHILDREN: EVALUATION AND TREATMENT 67, 86 (Kee MacFarlane et al eds., 1986) ("Sexually abused children should be able to leave a diagnostic interview feeling good about what occurred and feeling understood, validated, and safe in a newly established protective relationship.").

²²² Snyder & McDaniels, *supra* note 220, at 35.

²²³ *Id.*

²²⁴ See CARTER, *supra* note 100, at 61.

²²⁵ Yee-San Teoh & Michael E. Lamb, *Preparing Children for Investigative Interviews: Rapport-Building, Instruction, and Evaluation*, 14 APPLIED DEVELOPMENTAL SCI. 154, 155 (2010).

²²⁶ Roberts et al., *supra* note 214, at 189–90.

²²⁷ Wood et al., *supra* note 221, at 228.

²²⁸ London, *supra* note 211, at 134.

²²⁹ Wood et al., *supra* note 221, at 227.

²³⁰ ROBBENOLT & STERNLIGHT, *supra* note 39, at 164.

²³¹ See CARTER, *supra* note 100, at 66.

betrayal and unwanted touch.²³² Even if these children appear to seek physical contact, lawyers must allow plenty of room and proceed with caution.²³³ Conversely, excessive personal space could be problematic. Lawyers should thus observe and accept children's preferences.²³⁴

Last, lawyers can facilitate rapport and trust by employing positive reinforcement, which also shapes good interview behaviors.²³⁵ For example, a lawyer could use positive reinforcement to encourage narrative replies to open-ended questions, and to encourage verbal, rather than nonverbal, responses.²³⁶ When applying positive reinforcement, a lawyer might proclaim, "Thank you for explaining that so well!" or "You did a great job when you used your words instead of nodding your head!" Lawyers must be very cautious with this technique, however. If used selectively to orchestrate answers, it might significantly damage the accuracy of a child's testimony.²³⁷ It can also be interpreted as improper coaching.

2. Practice Perspective-Taking

People customarily impute their own knowledge and perspective to others.²³⁸ When this happens, we expect others to understand our views, and we believe we understand theirs. This can be particularly true with children, whom adults might stereotype based solely on age.

A lawyer who assumes shared understanding risks myriad miscommunications.²³⁹ To prevent mishaps, lawyers should persistently practice "perspective-taking," the act of empathically recognizing others' viewpoints.²⁴⁰ When working with a child witness, a lawyer should ascertain what knowledge the child already possesses, and how the child comprehends the situation at hand.²⁴¹

Optimally, a lawyer should regard a child's perspective literally *and* figuratively, because environments that appear familiar to adults can frighten children. For instance, from a small child's vantage point, a courtroom can appear exceedingly tall and imposing. To help, a lawyer should interact with a child witness at the child's eye level, maintaining constant eye contact. This alleviates discomfort in children who hesitate to disclose information.²⁴² For very small children, booster seats may be beneficial.

²³² MacFarlane & Krebs, *supra* note 221, at 84–85.

²³³ *Id.* at 85.

²³⁴ *Id.*

²³⁵ See CARTER, *supra* note 100, at 44.

²³⁶ *Id.* at 44, 64.

²³⁷ *Id.* at 44.

²³⁸ ROBBENNOLT & STERNLIGHT, *supra* note 39, at 143.

²³⁹ See *id.*

²⁴⁰ See JOAN SKOLNICK ET AL., THROUGH OTHER EYES: DEVELOPING EMPATHY AND MULTICULTURAL PERSPECTIVES IN THE SOCIAL STUDIES 3, 5 (Sean Stokes ed., 2d ed. 2004).

²⁴¹ See ROBBENNOLT & STERNLIGHT, *supra* note 39, at 143.

²⁴² Cf. Aron W. Siegman & Mark A. Reynolds, *Effects of Mutual Invisibility and Topical Intimacy on Verbal Fluency in Dyadic Communication*, 12 J. PSYCHOLINGUISTIC RES. 443, 444 (1983).

It is not unreasonable to assume . . . that the elimination of visual contact between two speakers would produce discomfort and disrupt the communication process. . . . [W]hen the visibility of one of the partners in a conversation was reduced by means of dark glasses or a mask, it significantly decreased the other partner's reported comfort level.

Perspective-taking also helps lawyers remember that age may impede effective exchanges. Age largely determines a child's abilities to communicate.²⁴³ Because children often fear that they will not understand what is asked or said, lawyers should use age-appropriate language,²⁴⁴ keeping in mind that seemingly simple words sometimes sound foreign to children. In one case, a scared little girl attended a hearing where the judge decided who would become the girl's guardian.²⁴⁵ When the judge announced, "[t]he minor will live with her grandmother," the devastated girl cried out, "I heard him say *the minor* was gonna live with [G]randma, but where am I gonna live?"²⁴⁶

To battle terminology barriers, lawyers should imagine listening to their own words through children's ears, keeping language clear, simple, and free of legalese. A lawyer who uses developmentally appropriate questions will likely improve the child's communication abilities and reduce anxiety, confusion, and frustration.²⁴⁷

Further, a lawyer ought to regard how culture, race, ethnicity, and socio-economic class might influence a child's comfort and willingness to communicate.²⁴⁸ For example, in some cultures, it is impolite for children to contradict statements or questions posed by adults. Children from these cultures might require more practice to learn how to truthfully respond while testifying, especially in response to leading questions.

Last, a lawyer who asks a child to discuss a traumatic event should employ perspective-taking to address the child's potential sensitivity to the topic.²⁴⁹ Just as many lawyers would appreciate benevolence under similar circumstances, they should expect that children might equally crave compassion. For instance, if a child forgets a stressful event and withdraws or becomes agitated, aggressive, or hyperactive, the lawyer should sympathetically acknowledge the child's feelings, then subtly change the subject.²⁵⁰ After the child can participate calmly and fully again, the lawyer may return to the bothersome subject; if the child remains upset, the lawyer might need to revisit the topic on another day.

3. *Attend to Nonverbal Cues*

Attention to nonverbal cues cultivates better communication, and can lessen anxiety. Researchers tested the importance of nonverbal cues by questioning seventy-two children who experienced a medical procedure.²⁵¹ When

Id.

²⁴³ Snyder & McDaniels, *supra* note 220, at 35.

²⁴⁴ HALL & SALES, *supra* note 32, at 70.

²⁴⁵ Saywitz, *supra* note 112, at 132.

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ HALL & SALES, *supra* note 32, at 31.

²⁴⁸ Snyder & McDaniels, *supra* note 220, at 35.

²⁴⁹ *Id.* at 36.

²⁵⁰ *Id.*

²⁵¹ Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, in *THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS* 92, 97 (John Doris ed., 1991). The questioning concerned possible abuse committed during the procedure ("e.g., 'She touched your bottom, didn't she?' 'How many times did she kiss you?' "). *Id.*

the researchers posed questions while acting friendly rather than neutral, children erred half as many times when they answered.²⁵² Consequently, lawyers who want to achieve optimal outcomes must attend to their own nonverbal cues.

Likewise, lawyers should consider how mood, an important nonverbal signal, can be contagious through a process known as “mood congruency effect.”²⁵³ A child affected by mood congruency will detect and adopt another person’s demeanor.²⁵⁴ As a result, a lawyer who interacts with a child witness ought to act relaxed and calm in the child’s presence.²⁵⁵ For example, lawyers should lean forward, smile, and uncross their arms to appear more approachable.²⁵⁶ Additionally, lawyers must remember that cross-cultural differences affect body language²⁵⁷: foreign or offensive nonverbal communication could exacerbate children’s anxiety. When interacting with a child whose culture or nonverbal cues are unfamiliar, a quick Internet search or discussion with the child’s caregiver will likely produce enough information to provide guidance.

Of course, a lawyer must also closely observe a child’s nonverbal responses, especially when the lawyer asks questions.²⁵⁸ Once a very young child reacts with extreme emotion, a lawyer might struggle to recover the child’s cooperation and feeling of safety.²⁵⁹ To prevent such a mishap, a lawyer should watch for signs that an interaction has become confusing or traumatic to the child. If the child reacts emotionally to a question, the lawyer could temporarily change tactics or take a break.²⁶⁰ The lawyer can broach key issues again after the child’s behavior suggests a mood improvement.

Many nonverbal cues are important: not all witnesses cry when they feel fearful, angry, or upset.²⁶¹ Generally, frowns, wrinkled brows, or thinning lips can signal negative emotions, too.²⁶² So can restless pacing, hand-wringing, foot-tapping, nail-biting, trembling, clinging to a loved one, and stuttering.²⁶³ Children who exhibit these cues may consider an experience painful or may be approaching some limit.²⁶⁴

²⁵² *Id.*

²⁵³ ROBBENNOLT & STERNLIGHT, *supra* note 39, at 50 (italics omitted).

²⁵⁴ Specifically, an individual affected by mood congruency will more easily accept positions that are congruent with their own current mood: “Those in a positive mood tend to pay attention to and recall more positive information Conversely, those in a negative mood tend to pay attention to and recall more negative information” *Id.*

²⁵⁵ MacFarlane & Krebs, *supra* note 221, at 85.

²⁵⁶ See ROBBENNOLT & STERNLIGHT, *supra* note 39, at 159.

²⁵⁷ Snyder & McDaniels, *supra* note 220, at 35.

²⁵⁸ MacFarlane & Krebs, *supra* note 221, at 86.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 84 (“After asking a child a series of questions about possible abuse, it is important to lessen the emotional climate and intensity of the moment by ‘backing off’ the material and giving the child some time out to focus on less threatening and more enjoyable things.”).

²⁶¹ *Cf.* ROBBENNOLT & STERNLIGHT, *supra* note 39, at 49 (discussing how a facial expression can reflect an emotion different than an emotion commonly associated with the expression).

²⁶² *Id.*

²⁶³ HALL & SALES, *supra* note 32, at 187.

²⁶⁴ *Cf.* ROBBENNOLT & STERNLIGHT, *supra* note 39, at 64 (discussing how lawyers within a negotiation setting might determine their negotiation strategy by observing opposing counsel’s demeanor).

Last, lawyers should remain wary of children's smiles and laughter, which sometimes indicate comfort and happiness, but might also indicate anxiety. Some studies show that smiles positively correlate with nervousness.²⁶⁵ Anecdotally, student lawyers once conducted a mock trial to help ready a teenage girl for trial; while on the stand, the girl began to giggle.²⁶⁶ Most participants, including the girl's mother, assumed that the girl was not taking the trial seriously, but one law student noticed the girl's eyes welling up with tears.²⁶⁷ When the student asked the girl if she was laughing out of nervousness, the girl vehemently nodded.²⁶⁸ After the student reminded her to take a few deep breaths,²⁶⁹ the girl regained her composure and the mock trial resumed.²⁷⁰

4. Use Props

As previously addressed, props promote child-friendly environments.²⁷¹ They also advance child-focused communication. Props help some children verbalize experiences;²⁷² certain children find interacting with props less stressful than interacting without them.²⁷³ Various items, like stuffed animals or dolls, might also help children overcome embarrassment.²⁷⁴ Others function as icebreakers that ease withdrawn children into interacting.²⁷⁵ For these reasons, lawyers should use props when they question especially scared or nonresponsive children.²⁷⁶ For example, lawyers can introduce puppets as "helpers" that assist children who must discuss difficult topics.²⁷⁷ If a child enjoys playing with a specific doll, the lawyer may encourage the child to audibly tell the doll the answers to the lawyer's questions, rather than answer the lawyer directly.

²⁶⁵ See Ken J. Rotenberg et al., *The Contribution of Adults' Nonverbal Cues and Children's Shyness to the Development of Rapport Between Adults and Preschool Children*, 27 INT'L J. BEHAV. DEV. 21, 25 (2003).

²⁶⁶ Author's personal experience, *supra* note 122.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *supra* Part IV.C.1 (discussing the coping method of deep breathing).

²⁷⁰ Author's personal experience, *supra* note 122.

²⁷¹ See *supra* notes 218–19 and accompanying text.

²⁷² Cf. HALL & SALES, *supra* note 32, at 31 (noting that the use of anatomical dolls by children to "recount an experience may be less distressing than speaking" and "may help them give a report," but, for some children, may also be "just as anxiety provoking as talking about the alleged abuse").

²⁷³ *Id.*

²⁷⁴ MacFarlane & Krebs, *supra* note 221, at 79.

²⁷⁵ See LUCY S. MCGOUGH, CHILD WITNESSES: FRAGILE VOICES IN THE AMERICAN LEGAL SYSTEM 246 (1994) (noting that anatomical dolls "can be an 'icebreaker' and comforter, easing a withdrawn child toward interacting with the clinician").

²⁷⁶ "The court may permit a child to use anatomical dolls, puppets, drawings, mannequins, or any other demonstrative device the court deems appropriate for the purpose of assisting a child in testifying." 18 U.S.C. § 3509(l) (2012). See also *United States v. Archdale*, 229 F.3d 861, 866 (9th Cir. 2000) (allowing the use of an anatomical diagram to assist the child in testifying pursuant to 18 U.S.C. § 3509(l)); CARTER, *supra* note 100, at 70 (relying upon 18 U.S.C. § 3509(l) and *Archdale*, 229 F.3d at 866, to conclude that "legal precedent seems to indicate an acceptance of anatomical dolls as an aid to the testimony of child witnesses"). Note, however, that some experts advise using dolls only to help child sexual abuse victims clarify previously disclosed information, such as names of body parts. London, *supra* note 211, at 137.

²⁷⁷ MacFarlane & Krebs, *supra* note 221, at 77.

5. Enforce Limits

Child witnesses often undergo multiple, duplicative interviews by numerous professionals.²⁷⁸ Each successive encounter requires a child to recount embarrassing, frightening, or angst-provoking experiences and feelings.²⁷⁹ Children often regard the mere act of repeating negative information as emotionally painful.²⁸⁰ Similarly, repeating details too often typically creates anxiety.²⁸¹ Thus, some child witnesses find repeated interviews particularly distressing.²⁸²

In response, select jurisdictions now limit the quantity of interviews and interviewers who interact with children.²⁸³ By eliminating unnecessary or repetitive practices, laws in these jurisdictions shield children from the psychological damage caused by repeated questioning.²⁸⁴ In states that lack such laws, a lawyer should limit the number of interactions that a child witness must withstand.²⁸⁵ Where available, the lawyer can consider a child advocacy center (CAC), where a trained interviewer talks to the child while others observe through a one-way mirror.²⁸⁶ Endorsed by the American Bar Association,²⁸⁷ CACs reduce the number of interviews and interviewers, lessening children's anxiety.²⁸⁸

Additionally, lawyers should limit the length of time spent at each interview and initiate small breaks when possible. Breaks can alleviate a child's negative emotions²⁸⁹ and are critical when a child looks tired, anxious, or inattentive.²⁹⁰ Some children who become stressed or frustrated with ongoing questioning make inquiries such as, "How many more questions?" "Can I leave?" or "When will this end?"²⁹¹ A lawyer should regard these types of

²⁷⁸ Kee MacFarlane & Sandy Krebs, *Videotaping of Interviews and Court Testimony*, in *SEXUAL ABUSE OF YOUNG CHILDREN: EVALUATION AND TREATMENT*, *supra* note 221, at 164, 165.

²⁷⁹ *Id.*

²⁸⁰ *See id.*

²⁸¹ *See* MacFarlane & Krebs, *supra* note 278, at 165 ("Each successive interview, whether it be for medical, clinical, or legal purposes, necessitates the retelling of experiences and feelings that are usually embarrassing, frightening, guilt-invoking, and anxiety-producing"); Quas & Goodman, *supra* note 11, at 401 ("[C]hildren routinely cite repeated interviewing as a particularly negative aspect of their experiences, for instance, by claiming that they had to recount details of their abuse too often and to too many people.").

²⁸² *See* Lisa M. Jones et al., *Do Children's Advocacy Centers Improve Families' Experiences of Child Sexual Abuse Investigations?* 31 *CHILD ABUSE & NEGLECT* 1069, 1070 (2007).

²⁸³ HALL & SALES, *supra* note 32, at 29 (citing N.D. CENT. CODE § 12.1-35-04 (2007)).

²⁸⁴ *See id.*

²⁸⁵ *Id.* at 21 ("In situations in which a state or federal law does not address the use of a particular modification, a court has the authority to fashion and apply a modification if it is in the best interests of the child and does not violate the defendant's constitutional rights.").

²⁸⁶ *See* CARTER, *supra* note 100, at 86-87.

²⁸⁷ *See* ANTHONY JOSEPH, CHAIR OF CRIM. JUSTICE SECTION OF A.B.A., AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION REPORT TO THE HOUSE OF DELEGATES (Feb. 2009), available at <http://www.nationalchildrensalliance.org/index.php?s=36>.

²⁸⁸ *See* CARTER, *supra* note 100, at 86-87.

²⁸⁹ *See* ROBBENOLT & STERNLIGHT, *supra* note 39, at 197.

²⁹⁰ *See* MYERS, *supra* note 201, at 63 (noting that a child needs rest to suitably testify).

²⁹¹ *See* CARTER, *supra* note 100, at 79.

questions as reminders that the child likely needs a break. Predictably, several short interviews ordinarily produce better results than one long one.²⁹²

For children who struggle to sustain uninterrupted focus, lawyers can keep noiseless toys on hand, such as puzzles or coloring books.²⁹³ A child might enjoy the toys either during breaks or during the interview if the child can simultaneously play and attend to the conversation. Sometimes a child's anxiety or inattentiveness signals that the child needs to use a restroom, but is too shy to ask.²⁹⁴ Consequently, lawyers ought to occasionally ask children if they need a bathroom break.²⁹⁵

E. *Schedule Interactions at Appropriate Times*

Because children generally behave best when well-rested, lawyers should plan appointments strategically.²⁹⁶ Morning appointments usually trump afternoon interactions, especially with very young children, for whom morning testimony can make the difference between great testimony and no testimony at all.²⁹⁷ Mornings also typically lessen a child's anxiety because the child will not worry about the upcoming appointment all day.²⁹⁸ Additionally, interrupting a child's regular schedule creates even more anxiety;²⁹⁹ when feasible, a lawyer should schedule interactions to accommodate a child's standard schedule. For instance, a very young child's normal nap and meal times should remain intact.³⁰⁰

F. *Recruit a Support Person*

Witnesses who receive support normally experience less anxiety³⁰¹ and trauma.³⁰² Without support, anxiety can overwhelm a child's coping resources.³⁰³ A lawyer should thus recruit a support person to assist the child, especially before and during the trial.

First, the lawyer must determine the most appropriate candidate for the support role. Conceivable contenders include caregivers,³⁰⁴ relatives, friends, counselors, or other trusted adults.³⁰⁵ Not all caregivers are suitable, how-

²⁹² *Id.*

²⁹³ *See id.* at 78–79.

²⁹⁴ *See id.* at 80.

²⁹⁵ *See id.*

²⁹⁶ HALL & SALES, *supra* note 32, at 28.

²⁹⁷ *Id.*

²⁹⁸ *See* CARTER, *supra* note 100, at 128; *see also* HALL & SALES, *supra* note 32, at 66 (“At least eight published studies and technical reports have demonstrated that the *anticipation* of testifying in criminal court is related to increased anxiety and distress in some children.”) (emphasis in original); *supra* notes 30–33 and accompanying text.

²⁹⁹ *See* CARTER, *supra* note 100, at 80, 128.

³⁰⁰ *See* MYERS, *supra* note 201, at 63.

³⁰¹ Quas & Goodman, *supra* note 11, at 407 (finding that witness support buffers children from distress); Nathanson & Saywitz, *supra* note 44, at 87 (“[T]he greater a child's . . . perceived social support, the less anticipatory anxiety the child reported.”).

³⁰² *See* SCHETKY & BENEDEK, *supra* note 69, at 259 (noting that child witnesses who lacked maternal support “showed continuing emotional disturbance after testimony”).

³⁰³ Quas & Goodman, *supra* note 11, at 400.

³⁰⁴ *See id.*

³⁰⁵ HALL & SALES, *supra* note 32, at 23.

ever—those who will likely become upset or angry during the child’s testimony should not be designated³⁰⁶ due to the risk of negative mood congruency effect on the child.³⁰⁷ Additionally, lawyers should not select from people who could be called to testify in the same trial³⁰⁸; judges may order other witnesses excluded from the courtroom while the child testifies.

After selecting the best candidate, the lawyer should assign the support person four primary goals: practice coping methods with the child, meet the child’s basic healthcare needs, help the child maintain a positive affective state, and accompany the child to court.

Some educators believe that children learn best by imitating others before they practice a new skill, and then obtain feedback to correct any errors.³⁰⁹ Therefore, to help the child learn the previously discussed coping methods,³¹⁰ the lawyer can instruct the support person to demonstrate one of the methods, then ask the child to imitate it. Next, the support person and the child should practice the coping method together before the support person offers feedback to help the child improve and retain the new skill.

Nutritious food, physical activity, medical checkups, and rest provide even more physical and psychological benefits.³¹¹ The lawyer should ask the support person to furnish the child with basic healthcare, especially immediately before any legal proceedings. Adequate sleep, for example, is important because it is known to combat negative moods, including anxiety.³¹² By ensuring that the child adheres to a regular sleep schedule, avoids caffeine near bedtime, and practices relaxing bedtime routines, a support person can foster favorable sleep habits.³¹³

Further, the support person should help the child maintain a positive affective state, which represents a spectrum of positive feelings and attitudes, such as upbeat moods.³¹⁴ Positive affective states produce better outcomes in various stressful settings,³¹⁵ including interactions with lawyers. Children who feel optimistic about going to court retain a sense of control that contributes to successful coping and fewer adverse outcomes.³¹⁶ Moreover, positive moods allow children to perceive events more hopefully and leniently, and to display

³⁰⁶ *Id.*

³⁰⁷ See *supra* notes 253–55 and accompanying text.

³⁰⁸ See HALL & SALES, *supra* note 32, at 23.

³⁰⁹ Cf. Ellen Criss, *The Natural Learning Process*, 95 MUSIC EDUCATORS J. 42, 26 (2008) (“The Natural Learning Process involves the use of mental imagery, imitation, trial and error, and practice, as well as the use of body feedback for detection and correction of errors.”).

³¹⁰ See *supra* Part IV.C.

³¹¹ See DAYLEN ET AL., *supra* note 25, at 139; see also Grogan & Murphy, *supra* note 31, at 63 (stating that a “[h]ealthy diet, good sleep hygiene, physical exercise, and relaxation techniques” help facilitate recovery of children who suffer from post-traumatic stress disorder).

³¹² See Hyla Cass, *Sleep: The Feel Good Prescription*, 22 TOTAL HEALTH 28, 28 (2000) (reporting that inadequate sleep causes irritability and moodiness).

³¹³ *Id.* at 30.

³¹⁴ Positive affective states carry multiple, interrelated benefits. Barbara L. Fredrickson & Marcial F. Losada, *Positive Affect and the Complex Dynamics of Human Flourishing*, 60 AM. PSYCHOLOGIST 678, 678–79 (2005).

³¹⁵ Quas et al., *supra* note 23, at 107.

³¹⁶ *Id.*

more confidence.³¹⁷ Positive affective states also tend to expand thinking, which allows children to integrate new information.³¹⁸

Naturally, to help the child achieve and maintain a good mood before interacting with the lawyer, the support person should employ methods that are effective with that particular child. If unfamiliar with the child's preferences, the support person can consider the child's age and interests to evaluate which techniques may work best.

Common ways to induce positive affective states in children include singing, playing games, or rhyming.³¹⁹ Exercising, watching movies, bathing, or dancing can help, too.³²⁰ In a study unrelated to testimony, researchers found that listening to music calmed and relaxed children.³²¹ Another study showed that reading quietly helped highly anxious preadolescents.³²² One may reasonably generalize these findings to child witnesses.

Finally, the lawyer should encourage the support person to accompany the child to court and remain in the courtroom when the child testifies, a practice typically allowed by judges.³²³ Research promotes the courtroom presence of support people, who often enhance testimony by reducing any irritable moods of child witnesses.³²⁴ Compellingly, the support person's attendance can also increase the child's capacity to answer more questions during direct examination,³²⁵ and to provide more consistent testimony about peripheral details during cross-examination.³²⁶ Further, when asked precise questions, a child with a support person is more apt to respond correctly on a more frequent basis,³²⁷ and less apt to recant any testimony during cross-examination.³²⁸ These improvements generally contribute to the credibility of child witnesses.³²⁹

The law entitles some child witnesses to in-court support: a federal statute expressly grants children the right to a support person, called an "adult attend-

³¹⁷ ROBBENOLT & STERNLIGHT, *supra* note 39, at 50.

³¹⁸ *Id.*

³¹⁹ DAYLEN ET AL., *supra* note 25, at 151.

³²⁰ *Id.* at 153.

³²¹ Stefan Nilsson et al., *School-Aged Children's Experiences of Postoperative Music Medicine on Pain, Distress, and Anxiety*, 19 PEDIATRIC ANESTHESIA 1184, 1189 (2009).

³²² Michael S. Bahrke & Roselyn G. Smith, *Alterations in Anxiety of Children After Exercise and Rest*, 39 AM. CORRECTIVE THERAPY J. 90, 91-93 (1985) (finding statistically insignificant but decreased anxiety following short periods of either physical activity or quiet rest, and significantly decreased anxiety in participants who were initially highly anxious).

³²³ See JOHN E. B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 171 (1992); see also *infra* note 330.

³²⁴ See HALL & SALES, *supra* note 32, at 254.

³²⁵ TASK FORCE ON CHILD WITNESSES, *supra* note 196, at 31 ("The presence of a parent or loved one was . . . associated with children answering more questions during direct examination at trial.").

³²⁶ Batterman-Faunce & Goodman, *supra* note 24, at 321.

³²⁷ Nathanson & Saywitz, *supra* note 44, at 88 (finding that "the greater children's self-perception and perceived social support, the less the anticipatory anxiety they reported and the more often they responded correctly to specific questions").

³²⁸ MYERS, *supra* note 201, at 57. Specifically, the "[p]resence in the courtroom of a supportive adult was associated with the child being less likely to recant the identity of the perpetrator, and less likely to recant main actions of the perpetrator during defense questioning." *Id.* (internal quotations omitted).

³²⁹ See Batterman-Faunce & Goodman, *supra* note 24, at 321.

ant,” at trial.³³⁰ At the judge’s discretion, the adult may remain close to the child, hold the child’s hand, or place the child on his or her lap, as long as the adult does not improperly coach the child during testimony.³³¹ It is therefore important that lawyers caution support people against prompting children’s testimony or indicating approval or disapproval when children testify.³³²

G. Request Particular Trial Procedures

This Article focuses on pre-trial tactics, but several strategies that occur *during* trial must be considered and requested *prior to* trial; they are addressed next. Principally, lawyers should pursue expeditious case dispositions, limit courtroom observers, and seek courtroom modifications. As with the other strategies discussed, the following tactics are likely to be more effective if employed in conjunction with others.

1. Pursue Expeditious Case Dispositions

Delays adversely affect children.³³³ They induce anxiety and significantly weaken a young child’s memory.³³⁴ Lengthy delays can stretch a child’s recall and resistance to suggestibility “past the breaking point.”³³⁵ Therefore, delayed proceedings can harm children,³³⁶ children’s testimony, and case outcomes. Although multiple delays may seem inevitable, there are a few ways lawyers can try to reduce them.

For instance, federal law recognizes the importance of prompt case dispositions and helps lawyers accelerate litigation involving children: judges may designate cases with child witnesses as matters of “special public importance.”³³⁷ Once a case is so designated, the judge must expedite it, ensuring that it takes precedence over other cases.³³⁸ Additionally, some states require judges to consider the potential negative effects on child witnesses when they rule on certain motions, such as continuances.³³⁹

In states that lack these rules, or in cases that judges refuse to designate as special matters, lawyers should reduce delay as much as possible to lessen children’s anxiety.³⁴⁰ For example, lawyers can try to avoid rescheduling any interviews or depositions that involve child witnesses.³⁴¹ Further, they can try to move litigation along quickly by eliminating as many continuances as feasible.³⁴²

³³⁰ 18 U.S.C. § 3509(i) (2012).

³³¹ See CARTER, *supra* note 100, at 129.

³³² See HALL & SALES, *supra* note 32, at 23.

³³³ SCHETKY & BENEDEK, *supra* note 69, at 259.

³³⁴ See Flin, *supra* note 33, at 284–85.

³³⁵ MCGOUGH, *supra* note 275, at 53.

³³⁶ See CARTER, *supra* note 100, at 127.

³³⁷ 18 U.S.C. § 3509(j) (2012).

³³⁸ CARTER, *supra* note 100, at 127.

³³⁹ See HALL & SALES, *supra* note 32, at 29 (citing WASH. REV. CODE § 10.46.085 (2007)).

³⁴⁰ *Id.* at 22 (noting that “encouraging expeditious disposition” is a permissible courtroom modification).

³⁴¹ CARTER, *supra* note 100, at 127.

³⁴² *Id.*

2. *Limit Courtroom Observers*

The number of people present in the courtroom while a child testifies may impact a case's outcome³⁴³ because numerous courtroom observers can intimidate child witnesses.³⁴⁴ When too many people observe a child's testimony, the child is more apt to display withdrawal, avoidance, or fear.³⁴⁵ Lawyers should therefore attempt to create environments that are less threatening³⁴⁶ by asking judges to restrict the number of courtroom observers when children testify.³⁴⁷ For example, a lawyer could request that the courtroom could be closed off to everyone except the judge, marshal, defendant, court reporter, clerk, support person, counsel, and any jurors.

3. *Seek Courtroom Modifications*

In a criminal trial, a child witness who must face a defendant in court often finds the event traumatic, particularly if the defendant previously threatened or harmed the child, or if the child feels loyalty toward the defendant.³⁴⁸ Children often cite fear of the accused as their biggest court-related stressor: in one study, 90 percent of child witnesses acknowledged that, of their entire legal experience, they were most frightened when required to testify in a defendant's presence.³⁴⁹ Other research suggests that children who fear defendants answer fewer questions.³⁵⁰ It is reasonable to infer that a child witness for the defense could be similarly affected by a plaintiff. To considerably reduce children's anxiety and enhance their testimony, lawyers can seek several courtroom modifications.³⁵¹

Although most people would probably agree that parties should not induce additional anxiety by requiring child witnesses to face opposing parties in court, the law makes this difficult. Previously, a lawyer could position a screen between a defendant and a child witness during the child's testimony, or play a videotaped interview of the child rather than place him or her in the same room with the accused. Then, in 1988, the Supreme Court ruled that all witnesses, including children, must testify unobstructed in court to avoid violating the defendant's Sixth Amendment right to confront any accusers.³⁵²

³⁴³ See MacFarlane & Krebs, *supra* note 278, at 180.

³⁴⁴ See *id.*

³⁴⁵ HALL & SALES, *supra* note 32, at 254.

³⁴⁶ MacFarlane & Krebs, *supra* note 278, at 179.

³⁴⁷ *Id.*

³⁴⁸ Quas & Goodman, *supra* note 11, at 395.

³⁴⁹ Henry, *supra* note 216, at 505.

³⁵⁰ See HALL & SALES, *supra* note 32, at 70.

³⁵¹ CARTER, *supra* note 100, at 132–33 (noting several possible courtroom modifications aimed at reducing children's anxiety and enhancing their performance, such as providing "child-friendly waiting areas with art activities and play areas," "child-sized furnishings," and "specialized training in childhood victimization, child forensic interviews, and child development" for judges, prosecutors, and public defenders).

³⁵² *Coy v. Iowa*, 487 U.S. 1012, 1020, 1022 (1988).

The screen at issue was specifically designed to enable the complaining witnesses to avoid viewing appellant as they gave their testimony, and the record indicates that it was successful in this objective. It is difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter.

Sixth Amendment concerns notwithstanding, current federal law supports the limited use of closed-circuit television (CCTV).³⁵³ For example, a child can testify via CCTV if a federal judge finds that the defendant's presence renders the child unable to testify.³⁵⁴ CCTV enables a child to testify live, outside the courtroom, while the defendant and others simultaneously view the testimony on a courtroom monitor. However, even where allowed, lawyers should regard CCTV cautiously: jurors typically put more faith in face-to-face testimony.³⁵⁵

Despite evolving law, lawyers can typically make some minor modifications that reduce children's anxiety.³⁵⁶ For instance, a lawyer might try to stand in a position that blocks the child's view of the opposing party during much of the child's testimony, like the lawyer in the introductory story who shielded Annie from the constant view of her uncle. A lawyer may also attempt to turn the witness chair slightly away from the opposing party. Minimally, a lawyer should instruct a child who fears an opposing party to avoid eye contact with the person, especially while the child testifies.³⁵⁷

CONCLUSION

Millions of children testify each year, and anxiety harms them and their testimony, which subverts justice. Lawyers therefore have an obligation to reduce anxiety in child witnesses. This Article presented seven strategies that a lawyer can employ to reduce a child witness's anxiety: 1) provide legal system education; 2) conduct desensitization training; 3) teach coping methods; 4) foster child-focused communication; 5) schedule interactions at appropriate times; 6) recruit a support person; and 7) request particular trial procedures. Lawyers should implement as many of the proposed strategies as possible, because doing so protects children's best interests, promotes more effective testimony, and promises to further fairness. Lawyers who ignore anxiety in child witnesses are more likely to encounter children like Annie, who hide, sobbing, under the witness stand.

Id. at 1020.

³⁵³ 18 U.S.C. § 3509(b)(1) (2012).

³⁵⁴ 18 U.S.C. § 3509(b)(1)(B) (2012).

³⁵⁵ See Goodman et al., *supra* note 102, at 195.

³⁵⁶ Practitioners should check current applicable laws before requesting modifications.

³⁵⁷ See HALL & SALES, *supra* note 32, at 8.