

Facilitating Children's Testimony: Closed Circuit Television

Part I of II

BY MARGARET BRANCATELLI¹

Editor's Note: Part I of a two-part series. Part I analyzes the statutory framework for the use of closed circuit television to facilitate children's testimony. Part II, which will print in a later issue of The Prosecutor, examines the use of closed circuit television and the confrontation clause as well as resources to implement the use of closed circuit television.

CHILD ABUSE INJURES AND DESTROYS children and scars communities. The Bureau of Justice Statistics concluded that the younger the person, the more likely he or she is to experience a violent crime.² In 2006, 3.3 million referrals involving the alleged maltreatment of 6 million children were reported for investigation of abuse and neglect, and approximately 905,600 of those children involved cases of substantiated abuse.³ It is essential prosecutors put children first in making charging and trial decisions. The use of closed circuit television enables prosecutors to protect both the trial record and the child victim of abuse. With the aid of closed circuit television, prosecutors are often able to secure justice for child victims who might otherwise be unable to testify in a court proceeding.

Currently, 46 states and three United States territories (Guam,⁴ Virgin Islands,⁵ Puerto Rico⁶) allow for the use of closed circuit television or other alternative means for a child to testify without appearing in court.⁷ The District of Columbia, Maine, North Dakota, and North Carolina cur-

rently do not have statutory authority for the use of closed circuit television for a child's testimony. North Carolina has case law that could be used to argue for the use of closed circuit television for a child's testimony.⁸

Closed circuit television is used for forensic interviews of children and for children's testimony in court. Children can testify either as a victim of a crime or as a witness to a crime. The technology and equipment of closed circuit television allows a child to speak in one room, with the child's image and statements electronically sent into another room to be heard and seen on a monitor.⁹ For a child testifying in court, typically, the judge, defendant, and jury are in the courtroom where monitors display the child's image and the child's testimony. Meanwhile, the child, a pre-authorized support person, the prosecutor (for a criminal case), the defendant's attorney, and operators of the equipment are in a separate room.

Closed circuit television can involve either a one-way system or a two-way system. In a one-way system, the child's image and statements are electronically sent and seen and viewed in a room separate from the child. If a child is testifying in court, the child's image and statement is electronically sent to the courtroom for the judge, jury, and defendant to see and hear. Kentucky,¹⁰ Minnesota,¹¹ and Washington¹² statutorily require the use of a one-way closed circuit television system. California statutorily requires a

Margaret Brancatelli recently served as a staff attorney with NDAA's National Center for Prosecution of Child Abuse.

one-way system for administrative hearings.¹³ West Virginia statutorily requires the use of a one-way closed circuit television system for abuse and neglect proceedings for a child under the age of 11.¹⁴

In a two-way closed circuit television system, a monitor is in front of the child where the child can view and hear what is happening in the courtroom separate from where the child is sitting. For example, the child can see the defendant through a monitor choose not to look at the monitor. Currently, 11 states statutorily require the use of a two-way closed circuit television system: California;¹⁵ Georgia;¹⁶ Hawaii;¹⁷ Indiana;¹⁸ Montana;¹⁹ New York;²⁰ Tennessee;²¹ Vermont;²² Virginia;²³ and, West Virginia.²⁴

TYPES OF CASES

Closed circuit television is ideal for use in criminal proceedings. In fact, 24 states by statute explicitly provide for the use of CCTV in criminal proceedings.²⁵ Indiana,²⁶ Kansas²⁷ and Mississippi²⁸ statutorily permit CCTV in civil cases. Kentucky provides for the use of CCTV in all dependency cases²⁹. Maryland³⁰ and Texas³¹ allow the use of CCTV in family cases, Missouri³² for juvenile cases, Nevada³³ and Idaho³⁴ for non-criminal cases. New York³⁵ allows the use of CCTV for child support and paternity cases and Pennsylvania³⁶ provides for the use of CCTV for an adjudication involving a child victim or child material witness.

WHO MAKES THE MOTION

For 13 states, by statute, the court on its own, or any party, can request that the child testify by closed circuit television.³⁷ In New Jersey³⁸ and Mississippi³⁹, the victim's parent or legal guardian may make the request. Three states, by statute, only allow the prosecution to request CCTV for a child's testimony.⁴⁰

CONSIDERATIONS

In eight states, statutes authorizing the use of closed circuit television require the court to examine: i) the child's age ii) level of development iii) child's general physical health and, iv) the effect testifying in the presence of the defendant will have on the child when determining whether to allow the child to testify via closed circuit television.⁴¹

California requires a hearing out of the presence of the jury to determine whether to allow a child to testify with

CCTV.⁴² Florida requires an in camera hearing for the decision.⁴³ Indiana⁴⁴, Louisiana⁴⁵, and West Virginia⁴⁶ require expert testimony for the decision to allow a child to testify with CCTV. Indiana requires expert testimony from a psychiatrist, physician or psychologist.⁴⁷

LOCATION OF INDIVIDUALS — AUTHORIZED BY STATUTE

In 12 states, the child, prosecuting attorney, attorney for defendant, operators of closed circuit television equipment, and support person for the child are statutorily authorized to be in the room with the child when the child testifies.⁴⁸ The court, defendant and jury remain in the courtroom. For such arrangements, the defendant and defense counsel by statute must have means of separate and private communication between them while the child witness testifies.

In 14 states, the judge, child, prosecutor, defense attorney, support person, and operators of the equipment are present in the room where the child testifies.⁴⁹ In New York, the defendant, attorney for defendant, and prosecutor remain in the courtroom, separate from the room where the child testifies.⁵⁰

AGE OF THE CHILD

States vary on the age requirements for a child to testify by closed circuit television. Hawaii's statute allows for the use of closed circuit television for a child "younger than 18 at the time of testimony."⁵¹ While this allows for wider legal latitude for a child to testify using CCTV, it puts more discretion on the prosecutor to decide on a case by case basis when to use CCTV. Louisiana⁵² and Rhode Island⁵³ allow the use of CCTV for a child under 17 years of age testifying. Alaska,⁵⁴ Florida,⁵⁵ Michigan,⁵⁶ New Hampshire,⁵⁷ New Jersey,⁵⁸ Mississippi,⁵⁹ New Mexico⁶⁰ allow the use of CCTV for a child who is 16 years of age or younger. Alabama⁶¹ and Massachusetts⁶² allow for the use of CCTV for a child younger than 15 who is testifying. Arizona⁶³ and Nevada⁶⁴ statutes provide for the use of CCTV for a child 14 years of age or younger. Kansas,⁶⁵ California,⁶⁶ Tennessee,⁶⁷ Utah,⁶⁸ and West Virginia⁶⁹ allow the use of CCTV for a child 13 and younger who is testifying. Wisconsin allows CCTV for a child under 12 or in the "interest of justice" when a child under 16 years of age is testifying.⁷⁰

The United States Supreme Court affirmed in *Maryland v. Craig* the State's interest in protecting the physical and

emotional well-being of child abuse victims and protecting child victims from further trauma.⁷¹ After the Supreme Court decision in *Crawford v. Washington*, the necessity for children to testify has intensified. The defendant's confrontation rights have become paramount in criminal cases and yet the trauma for children has not decreased. Eighteen years ago the United States Supreme Court in *Maryland v. Craig* set the standards for the use of CCTV in court.⁷² That standard makes it clear that the use of CCTV is only legally valid when testifying in front of the defendant will cause the child emotional trauma, and that trauma must impair the child's ability to communicate." The trial court must make a case-specific finding that (1) the use of the closed circuit television procedure is necessary to protect the welfare of the testifying child witness (*Craig* requires that the testimony must be "functionally equivalent to live, in-court testimony and must be subject to rigorous adversarial testing); (2) the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) that the emotional distress suffered by the child witness is more than de minimis, that is, more than mere nervousness, excitement, or some reluctance to testify.⁷³

The reality of testifying in front of the defendant is often overwhelming to child victims and can impact their capacity to testify in court. Closed circuit television can be used to protect children, facilitate their testimony, and hold accountable perpetrators of child abuse.

8-55); Hawaii (HRS § 616); Idaho (Idaho Code § 9-1801 to Idaho Code § 9-1809); Illinois (§ 725 ILCS5/106B-5); Indiana (Burns Ind. Code Ann. § 31-34-14-12, Burns Ind. Code Ann. § 31-35-5-2, Burns Ind. Code Ann. § 35-37-4-8, Iowa (Iowa Code § 915-38); Kansas (K.S.A. § 22-3434, K.S.A. § 38-2359, K.S.A. § 38-2249); Kentucky (KRS § 26A.140, KRS § 421.350); Louisiana (La. R.S. 15:283, La. Ch.C. Art. 323, La. Ch. Co. Art. 329, La. Ch. C. Art. 1034); Maryland (Md. Criminal Procedure Code Ann. § 11-303); Massachusetts (ALM GL ch. 278, §16D); Michigan (MCLS §712A.17b, MCR 3.923); Minnesota (Minn. Stat. § 595.02); Mississippi (Miss. Code Ann. §13-1-405, Miss. R. Evid. Rule 617); Missouri (§491.680 R.S. Mo., §491.699 R.S. Mo); Montana (Mont. Code Anno., §41-3-110, Mont. Code Anno., §46-10-202, Mont. Code Anno., §46-16-227, Mont. Code Anno., §46-16-229); Nebraska (R.R.S. Neb. §29-1926); Nevada (Nev. Rev. Stat. Ann. §50.500, Nev. Rev. Stat. Ann. 50.520, Nev. Rev. Stat. Ann. §50.530, Nev. Rev. Stat. Ann. §50.540, Nev. Rev. Stat. Ann. §50.570, Nev. Rev. Stat. Ann. §50.580, Nev. Rev. Stat. Ann. §50.590, Nev. Rev. Stat. Ann. §50.600, Nev. Rev. Stat. Ann. §50.610); New Hampshire (RSA 517:13-a); New Jersey (N.J. Stat. § 2A:61B-1, N.J. Stat. § 2-A:84A-32.4); New Mexico (N.M. Stat. Ann. §30-9-17; N.M. Dist. Ct. R. Cr. P. 5-504, N.M. Children's Ct. Rule 10-217); New York (NY CLS CPL §65.00, NY CLS Exec §642-a, NY CLS CPL §65.10, NY CLS CPL §65.20, NY CLS CPL §65.30, NY CLS Family Ct. Act §343.1, NY CLS Unif. Civ. Rules, NYC Civ. Ct §208.12, NY CLS Unif. Rules, Family Ct §205.44, NY CLS Standards & Admin Pol §35.1, NY CLS Jud §211); Ohio (ORC Ann. 2152.81, ORC Ann. 2945.481, ORC Ann. 2937.11); Oklahoma (10 Okl. St. §7003-4.3, 10 Okl. St. §7303-1.1, 12 Okl. St. §2611.3, 12 Okl. St. §2611.4 to 12 Okl. St. §2611.110); Oregon (ORS § 40.460 Rule 803 (24), ORS §419C.025); Pennsylvania (42 Pa.C.S. §5982, 42 Pa.C.S. §5984.1, 42 Pa.C.S. §5985); Rhode Island (R.I. Gen. Laws §11-37-13.2, R.I. Gen. Laws § 12-28-8); South Carolina (S.C. Code Ann. §16-3-1550, S.C. Code Ann. §19-1-180); South Dakota (S.D. Codified Laws §26-8A-30, S.D. Codified Laws §26-8A-31); Tennessee (Tenn. Code Ann. §24-7-120); Texas (Tex. Code Crim. Proc. Art. 38.071, Tex. Fam. Code § 104.004, Tex. Gov't Code § 2001.121); Utah (Utah R. Crim. P. Rule 15.5, Utah Code Ann. § 76-

¹ The author thanks NCPCA law clerk Juliana Pape for her assistance with the CCTV statutory compilation.

² www.ojp.usdoj.gov/bjs

³ U.S. Department of Health and Human Services, Administration on Children, Youth and Families. Child Maltreatment 2006 (Washington, DC: U.S. Government Printing Office, 2008).

⁴ Guam (6 GCA Appx. A, Rule 804.1).

⁵ 5 V.I.C. § 3510

⁶ 25 L.P.R.A. §973a1, 34 L.P.R.A. Ap. II R. 131.1, 4 L.P.R.A. Ap. II 131.2

⁷ Alabama (Code of Alabama Section 15-25-3, 15-25-32); Alaska (Alaska Stat. Section 12.45.046); Arizona (A.R.S. Section 13-4251, 13-4253); Arkansas (A.C.A. Section 16-43-1001); California (Cal. Health & Safety Code Section 1596.8871, Cal. Penal Code Section 1347); Colorado (C.R.S. 16-10-402); Connecticut (Conn. Gen. Stat. § 54-86g); Delaware (11 Del. C. §3514); Florida (Fla. Stat. § 92.54, Fla. R. Juv. P. 8.104, Fla. R. Juv. P. 8.255); Georgia (O.C.G.A. § 17-

5-411, Utah R. Evid. Rule 1102, Utah R. Juv. P. Rule 29A, Utah R. Juv. P. Rule 37A); Vermont (V.R.E. Rule 804, V.R.E. Rule 807); Virginia (Va. Code Ann. §18.2-67.9); Washington (Rev. Code Wash. (ARCW) §9A.44.150); West Virginia (W.Va. Code §62-6B-2, W.Va. Code § 62-6B-3, W.Va. Code §62-6B-4, W.Va. Child Abuse and Neglect Proceedings, Rule 9); Wisconsin (Wis. Stat. §972.11, Wis. Stat. §908.08); Wyoming (Wyo. Stat. §7-11-408, W.R. Cr. P Rule 26).

⁸ *North Carolina v. Jones*, 89 N.C. App. 584, 367 S.E. 2d 139 (1988).

⁹ *Maryland v. Craig*, 497 U.S. 836, 841-842 (1990).

¹⁰ KRS §421.350

¹¹ Minn. Stat. § 595.02

¹² Rev. Code Wash. (ARCW) § 9A.44.150

¹³ Cal. Health & Safety Code §1596.8871

¹⁴ W.Va. Child Abuse and Neglect Proceedings, Rule 9

¹⁵ Ca. Penal Code § 1347

¹⁶ O.C.G.A. § 17-8-55

¹⁷ HRS § 616

¹⁸ Burns Ind. Code Ann. § 31-37-4-8

¹⁹ Mont. Code Anno., §46-10-202, Mont. Code Anno., § 46-16-227, Mont. Code Anno., § 46-16-229

²⁰ NY CLS CPL § 65.00, NY CLS Exec § 642-a, NY CLS CPL § 65.10, NY CLS CPL § 65.20, NY CLS CPL § 65.30,

²¹ Tenn. Code Ann. §24-7-120

²² V.R.E. Rule 807

²³ Va. Code Ann. § 18.2-67.9

²⁴ W.Va. Code § 62-6B-2, W.Va. Code §62-6B-3, W.Va. Code § 62-6B-4

²⁵ Alabama (Code of Alabama Section 15-25-3, 15-25-32, the state bears the cost of using CCTV), Alaska (Alaska Stat. Section 12.45.046), Arizona (A.R.S. Section 13-4251, 13-4253), Arkansas (A.C.A. Section 16-43-1001), California (Cal. Penal Code Section 1347, court bears the cost of using CCTV), Connecticut (Conn. Gen. Stat. § 54-86g, only for prosecution of enumerated offenses), Delaware (11 Del. C. §3514), Georgia (O.C.G.A. § 17-8-55), Idaho (Idaho Code § 9-1801 to Idaho Code § 9-1809), Illinois (§ 725 ILCS5/106B-5, only for enumerated offenses), Indiana (Burns Ind. Code Ann. §35-37-4-8), Kansas (K.S.A. §22-3434), Kentucky (KRS § 26A.140, KRS § 421.350), Maryland (Md. Criminal Procedure Code Ann. § 11-303), Mississippi (Miss. Code Ann. §13-1-405, Miss. R. Evid. Rule 617), Missouri (§491.680 R.S. Mo., §491.699 R.S. Mo), New Hampshire (RSA 517:13-a), Nevada (Nev. Rev. Stat. Ann. §50.500, Nev. Rev. Stat. Ann. 50.520, Nev. Rev. Stat. Ann. §50.530, Nev. Rev. Stat. Ann. §50.540, Nev. Rev. Stat. Ann. §50.570, Nev. Rev. Stat. Ann. §50.580, Nev. Rev. Stat. Ann. §50.590, Nev. Rev. Stat. Ann. §50.600, Nev. Rev. Stat. Ann. §50.610), New Mexico (N.M. Stat. Ann. §30-9-17, N.M. Ct. R. Cr. P. 5-504, cost of using CCTV paid for by prosecution), New Jersey (N.J. Stat. § 2A:61B-1, N.J. Stat. § 2-A:84A-32.4), New York (NY CLS Exec § 642-a, NY



NDAA will soon begin electronic distribution of brochures and some publications. Please send us your e-mail address so

you don't miss delivery of news about NDAA conferences and publications. Send your e-mail address to cathy.yates@ndaa.org.

- CLS CPL § 65.20), Oklahoma (12 Okl. St. §2611.4, 12 Okl. St. §2611.5, 12 Okl. St. §2611.6, 12 Okl. St. §2611.7), Pennsylvania (42 Pa.C.S. §5982, 42 Pa.C.S. §5984.1, 42 Pa.C.S. §5985), Tennessee (Tenn. Code Ann. §24-7-120), Texas (Tex. Code Crim. Proc. Art. 38.071)
- ²⁶ Burns Ind. Code Ann. § 31-34-41-2, § 31-35-5-2
- ²⁷ K.S.A. § 38-2249
- ²⁸ Miss. Code Ann. § 13-1-405, Miss. R. Evid. Rule 617
- ²⁹ KRS § 421.350
- ³⁰ Md. Criminal Procedure Code Ann. §11-303
- ³¹ Tex. Fam. Code § 104.004
- ³² §491.699 R.S. Mo.
- ³³ Nev. Rev. Stat. Ann. §50.570
- ³⁴ Idaho Code § 9-1802, Idaho Code § 9-1804, § 9-1805
- ³⁵ NY CLS Unif. Rules, Family Ct §205.44
- ³⁶ 42 Pa.C.S. § 5984.1
- ³⁷ Colorado (C.R.S. §16-10-402), Connecticut (Conn. Gen. Stat. §54-86g), Florida (Fla. R. Juv. P. 8.104), Iowa (Iowa Code § 915.38), Louisiana, (La. R.S. 15.283, La. Ch.C. Art. 329), Massachusetts (ALM GL ch. 278 §16D), Mississippi (Miss. Code Ann. §13-1-405, Miss. R. Evid. Rule 617), Minnesota (Minn. Stat. §595.02), New Jersey (N.J. Stat. §2A:61B-1, N.J. Stat. §2A:84A-32.4), Nevada (Nev. Rev. Stat. Ann. §50.570), Oklahoma (12 Okl. St. §2611.6), Pennsylvania (42 Pa.C.S. §5985)
- ³⁸ N.J. Stat. §2A:61B-1, N.J. Stat. §2A:84A-32.4
- ³⁹ Miss. Code Ann. § 13-1-405, Miss. R. Evid. Rule 617
- ⁴⁰ Arkansas (A.C.A. §16-43-1001), Indiana (Burns Ind. Code Ann. § 35-37-4-8), Missouri (§491.680)
- ⁴¹ Alaska (Alaska Stat. §12.45.046), Delaware (11 Del. C. §3514, 11 Del. C. §3513), Idaho (Idaho Code §9-1805, Idaho Code §9-1806), Nebraska (R.R.S. Neb. §29-1926), Nevada (Nev. Rev. Stat. Ann. §50.580), Oklahoma (12 Okl. St. §2611.7, 12 Okl. St. §2611.8), South Carolina (S.C. Code Ann. §19-1-180), West Virginia (W.Va. Code 62-6B-3)
- ⁴² Cal. Pen. Code §1347
- ⁴³ Fla. Stat. §92.54, Fla. R. Juv. P. 8.104, Fla. R. Juv. P. 8.255
- ⁴⁴ Burns Ind. Code Ann. §35-37-4-8
- ⁴⁵ La. R.S. 15.283, La. Ch.C. Art. 329
- ⁴⁶ W.Va. Code §62-6B-3
- ⁴⁷ Burns Ind. Code Ann. §35-37-4-8
- ⁴⁸ Alaska (Alaska Stat. §12.45.046), Alabama (Code of Ala. §15-23-3), Arizona (A.R.S. §13-425), Delaware (11 Del. C. §3514), Kansas (K.S.A. §22-3434, K.S.A. §38-2359, K.S.A. §38-2249), Kentucky (K.R.S. §421.350), Maryland (Md. Criminal Procedure Code Ann. §11-303), Nebraska (R.R.S. Neb. §29-1926), New Jersey (N.J. Stat. §2A:61B-1, N.J. Stat. §2A:84A-32.4), Oklahoma (10 Okl. St. §7003-4.3), Tennessee (Tenn. Code Ann. §24-7-120), Virginia (Va. Code Ann. § 18.2-67-9)
- ⁴⁹ Arkansas (A.C.A. §16-43-1001), Colorado (C.R.S. 16-10-402), Connecticut (Conn. Gen. Stat. §54-86g), Florida (Fla. Stat. §92.54, Fla. R. Juv. P. 8.104), Georgia (O.C.G.A. §17-8-55), Illinois (§725 ILCS5/106B-5), Indiana (Burns Ind. Code Ann. §35-37-4-8), Iowa (Iowa Code §915.38), Louisiana (La. R.S. 15:283, La. Ch.C. Art. 329, La. Ch. C. Art. 1034), Minnesota (Minn. Stat. §595.02), Montana (Mont. Code Anno. §46-10-202, Mont. Code Anno. §46-16-229), Pennsylvania (42 Pa.C.S. §5984.1, 42 Pa.C.S. §5985), Rhode Island (R.I. Gen. Laws §11-37-13.2), Utah (Utah R. Crim. P. Rule 15.5)
- ⁵⁰ NY CLS CPL §65.30
- ⁵¹ HRS §616
- ⁵² La. Ch. C. Art. 323
- ⁵³ R.I. Gen. Law §11-37-13.2
- ⁵⁴ Alaska Stat. §12.45.046
- ⁵⁵ Fla. Stat. §92.54, Fla. R. Juv. P. 8.104
- ⁵⁶ MCLS §712A.17b
- ⁵⁷ RSA 517:13-a
- ⁵⁸ N.J. Stat. §2A:84A-32.4
- ⁵⁹ Miss. Code Ann. §13-1-405, Miss. R. Evid. Rule 617
- ⁶⁰ N.M. Stat. Ann. §30-9-17, N.M. Dist. Ct. R. Cr. P. 5-504, N.M. Children's Ct. Rule 10-217
- ⁶¹ Code of Ala. §15-25-3
- ⁶² ALM GL ch. 278 §16D
- ⁶³ A.R.S. §13-4251
- ⁶⁴ Nev. Rev. Stat. Ann. §50.530
- ⁶⁵ K.S.A. §22-3434, K.S.A. §38-2359, K.S.A. §38-2249
- ⁶⁶ Cal. Pen. Code §1347
- ⁶⁷ Tenn. Code Ann. §24-7-120
- ⁶⁸ Utah R. Crim. P. Rule 15.5, Utah R. Juv. P. Rule 29A
- ⁶⁹ W.Va. Code §62-6B-2
- ⁷⁰ Wis. Stat. §972.11, Wis. Stat. §908.08
- ⁷¹ *Maryland v. Craig*, 497 U.S. 836, 852-853(1990).
- ⁷² *Maryland v. Craig*, 497 U.S. 836
- ⁷³ *Id* at 855-866.