

*“a full
and candid
account”*



Using Special Accommodations and Testimonial
Aids to Facilitate the Testimony of Children

BOOK

5

Designated Support Person

*by Alison Cunningham
and Pamela Hurley*

The opinions expressed herein are those of the authors and do not necessarily reflect those of the Department of Justice Canada or the Government of Canada.

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Eleven-year-old Ainsley is testifying at a preliminary hearing where her uncle is charged with sexually assaulting her. During court preparation sessions, Ainsley described fear of seeing her uncle in court. She also worried she might cry while testifying. Ainsley was upset when first told that her mother could not be in the courtroom because she was an excluded witness. Ellie from the Child Witness Program told Ainsley that, if the judge said it is okay, Ellie could sit in the witness box with her. Would Ainsley like that, Ellie asked? Yes she would. Ellie told the Crown attorney, who made an application to the presiding judge. The Crown attorney had already notified the uncle's lawyer that she would be making this application. Ainsley is relieved when Ellie blocks the view of her uncle as they walk past the defence table to the witness box. Ainsley looks around the courtroom and sees no familiar faces apart from the accused and the Crown attorney. Ellie had already explained the “rules.” Ainsley cannot speak to Ellie and Ellie cannot not speak to Ainsley. They cannot touch each other, either. But Ainsley feels protected and reassured by Ellie’s presence. At the point in her testimony where she is asked to describe the sexual assault for the third time, Ainsley becomes so upset that she can’t talk. The judge asks Ellie to take her for a 15 minute break, reminding both of them not to discuss the case. Ellie helps her relax and tells Ainsley that she is doing a great job in court. She returns to the courtroom and completes her testimony.

A support person, sometimes called a designated support person, is someone permitted by the judge/justice, upon application, to sit or stand close to a child witness while he or she testifies. Provision is made for this special accommodation in s. 486.1 of the Criminal Code.

The focus here is on the role of a designated support person: someone who accompanies child witnesses as they testify. Compared with the other testimonial aids available in Canada, this type of support is arguably the easiest and most practical assistance available. It can be used in any courtroom environment, from the largest city to the most remote village. Children appreciate the assistance of a support person and it can be used in conjunction with other aids such as the witness screen or testimony outside the courtroom.

Designated Support Person: Introduction

A “support person” is one testimonial aid available to witnesses under the age of 18 years. As with the other measures, a presumption exists that a child witness can have a support person if they want. The exception would be if the judge or justice ruled that using a support person would interfere with the proper administration of justice.

Reducing testimony related stress yields higher quality and fuller evidence from children and teenagers. The simple measure of a support person will, at no cost and minimal inconvenience, serve both the needs of child witnesses and the needs of the Court. The physical presence of a familiar and trusted adult is an easy and practical way to lessen a child's anxiety and help them focus.

The support person can:

- give emotional support to the child before, during and after the testimony
- assist in reducing stress and anxiety
- provide reassurance and increase a child's sense of safety and security



PRACTICE TIP: The use of a support person does not eliminate the need for court preparation sessions nor the assistance of victim services. It does not address common stressors such as seeing the accused and testifying in open court.

A support person can play a role in these circumstances:

- in or beside a witness box in a courtroom
- in a courtroom when a witness screen is used
- in a closed-circuit testimony room in the courthouse
- in a location where remote testimony is transmitted to the courthouse
- to support a child who reads a victim impact statement to the Court



*International Bureau for Children's Rights (2003).
Guidelines on Justice for Child Victims and Witnesses of Crime*

5.(d) Professionals should develop and implement measures to make it easier for children to give evidence and to improve communication and understanding at the pre-trial and trial stages. These measures may include:

(ii) support persons, including [child victim/witness] specialists and appropriate family members to accompany the child during testimony.

Why Use a Support Person?

The comforting reassurance of a support person's presence can lessen the stress typically associated with testifying. When children feel secure and less anxious, they provide better quality evidence to the Court.

These issues are also important considerations.

- A support person can be used anywhere and everywhere including places where no other testimonial aid (e.g., closed-circuit television) is available.
- It is a simple and cost-effective strategy to address some common concerns children have about testifying, such as walking past the accused to the witness box and feeling isolated and alone while testifying.
- The *Criminal Code* provisions are flexible and easy to apply.
- Children choosing to have a support person generally feel less stressed and more confident than they would have otherwise.
- Even when other testimonial aids are used, many children find a support person reduces their anxiety.
- When all or most family and supportive friends are excluded from the courtroom as potential witnesses, a child can feel especially vulnerable and alone: a support person provides a friendly and familiar face.
- Children with developmental delays will be especially comforted by the nearby presence of a familiar face.

Overall, having a support person is a protective measure. Courtrooms can be intimidating, the process is adversarial, and children are often required to describe acts of violence they witnessed or experienced.



PRACTICE TIP: As with all testimonial aids, it is best to identify the need for a support person early in the process. Applying as early as possible for a measure helps lessen the child's anxiety.

Diagrams of Four Possible Configurations

While most courthouses have common elements, one can find wide variation in the physical layouts of witness “boxes” across Canada. We have the grand, wood-panelled courtrooms of Victorian edifices and we have the Legion halls and community centres used in rural or remote areas. As new courthouses are built, and older ones retro-fitted, the needs of testifying children are reflected in testimony rooms and other features of “child-friendly” courtrooms. Elsewhere, some creativity may be needed to devise a satisfactory arrangement.

Figure 1

Space permitting, a support person can sit or stand in the witness box with the child. Elsewhere, the support person can stand nearby, either next to or behind the witness box.

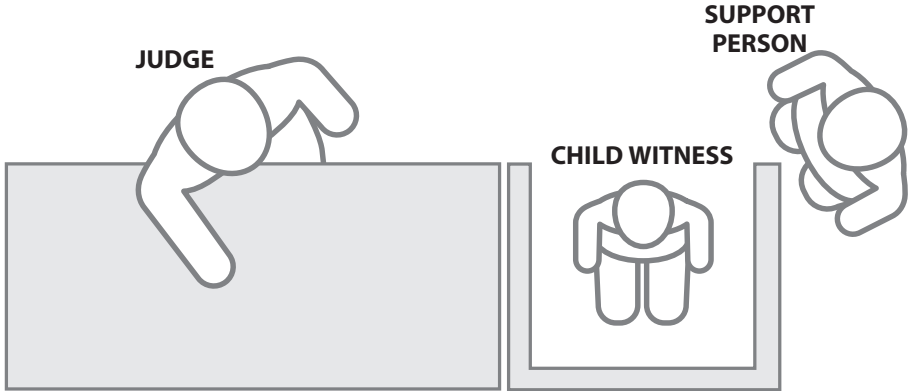
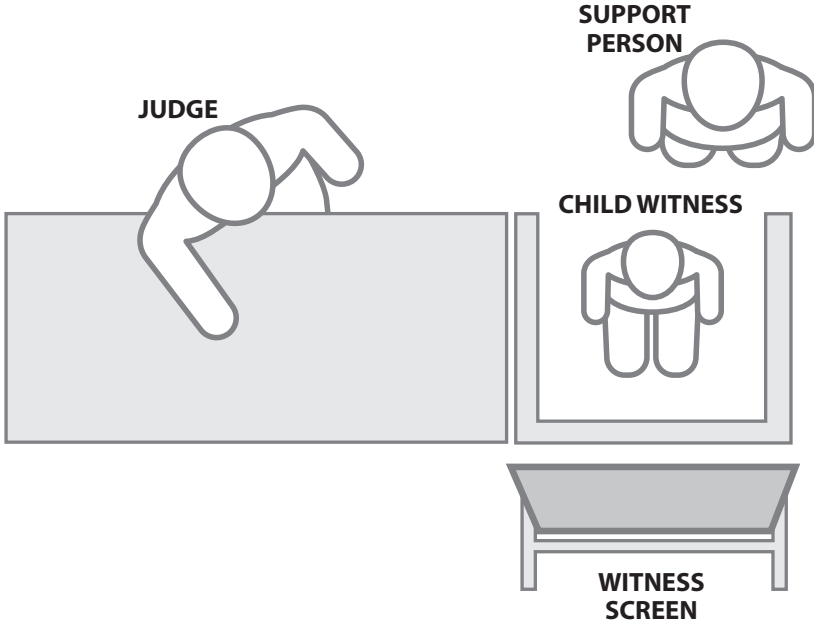


Figure 2

Wherever the support person sits or stands, a screen can obscure the child's view of the accused. A child behind the screen can feel isolated so the support person's presence will be comforting.



Handbook No. 3 describes issues related to using a screen in the courtroom.

Figure 3

We have pictured here a support person positioned in an increasingly popular layout found in courtrooms designed with children in mind.

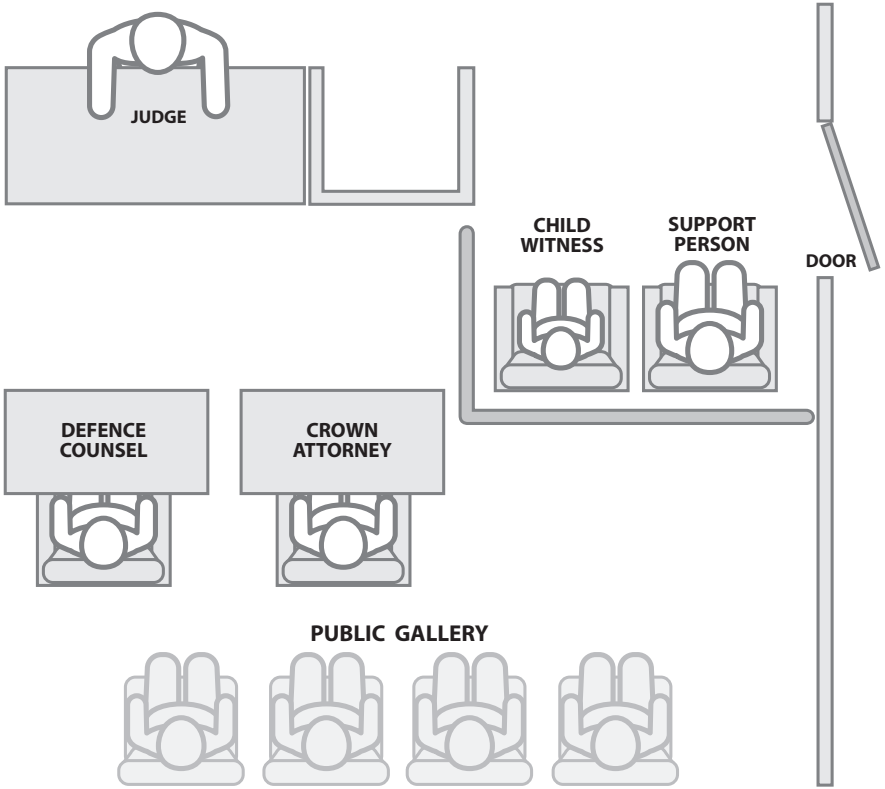
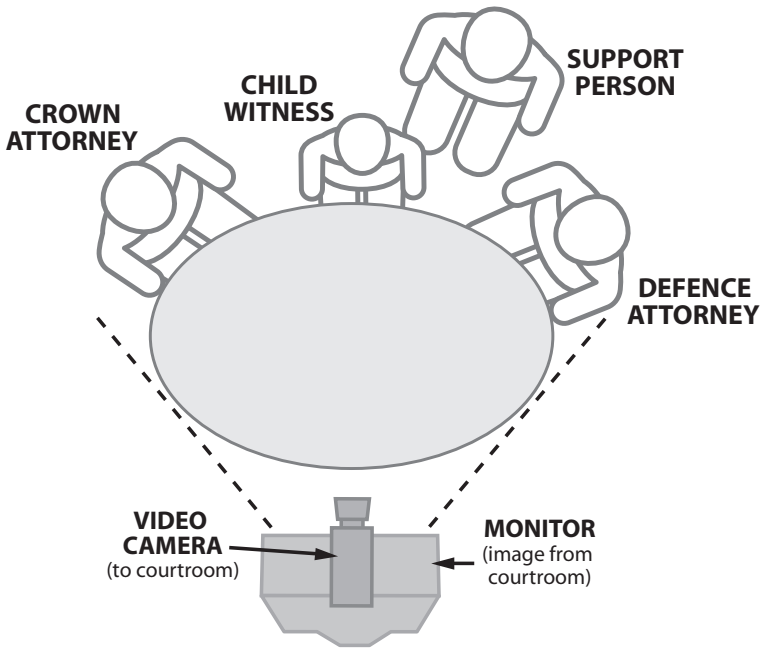


Figure 4

While there are several configurations to closed-circuit testimony rooms, a support person can sit close to the child who is testifying.



Handbook No. 2 in this series describes issues related to testimony outside the courtroom.

Criminal Code Section 486.1

Selected excerpts from s. 486.1[†] as amended by Bill C-2.

Support person - witnesses under 18 or who have a disability

(1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor or of a witness who is under the age of eighteen years or of a witness who has a mental disability, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Application

(2.1) An application referred to in subsection (1) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.

Witness not to be a support person

(4) The judge or justice shall not permit a witness to be a support person unless the judge or justice is of the opinion that doing so is necessary for the proper administration of justice.

No communication while testifying

(5) The judge or justice may order that the support person and the witness not communicate with each other while the witness testifies.

No adverse inference

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

[†] Sections 486.1(2) and 486.1(3), pertaining to other types of adult witnesses, have been omitted.

Bill C-2: What's the Same? What's Changed?

These features of the support-person provisions changed.

NEW

- no restriction on type of offence
- any witness under age 18
- presumptively available, unless having a support person would interfere with the proper administration of justice

PREVIOUS

- use was restricted to specified offences, mainly sexual offences and offences in which violence was used, threatened, or attempted
- only available to qualifying witness under age 14
- available at the discretion of the Court

These features of the support-person provisions did not change.

- Application is made by the Crown prosecutor (or the witness).
- A witness in the proceedings usually cannot be a support person.
- The judge or justice may order no communication between the support person and the witness while the witness testifies.
- Witness may select the support person (subject to judicial approval).
- Support person can be close to the witness while testifying.
- No adverse inference should be drawn from the fact that an order is or is not made for a support person.



For more information on the Bill C-2 amendments to the Criminal Code and the Canada Evidence Act, see handbook No. 1: Overview of Issues Related to Child Testimony.

Basic Facts About the Role of a Support Person

A support person can be used in any type of criminal case and there are few restrictions on who can serve in this role.

Who qualifies to have a support person?

Any witness under age 18 who wants one (subject to judicial approval).



PRACTICE TIP: Age is not the only (or even best) indicator of the need for a testimonial aid. Don't assume only young children need a support person. Some teenaged witnesses can be extremely frightened and would benefit from the reassuring presence of adult support person. For teenage witnesses, find a "tip sheet" on page 18 to help them make informed decisions.

Who can be a support person?

Subject to judicial approval, a person of the witness's choice, including (potentially) a parent, relative, family friend, Aboriginal Elder, or a staff member or volunteer from victim support services.



PRACTICE TIP: Ensure each witness knows he or she can ask for a support person. Wherever possible, ask the child's opinion about who is acceptable in the role.

Who cannot be a support person?

A witness in the proceeding cannot be a support person, unless the judge or justice approves.



PRACTICE TIP: A parent expected to be a witness will probably be precluded from being a support person. This possibility should be explained when discussing the choice of a support person.

In what type of court proceedings can a child have a support person?

In any criminal court or youth justice court proceeding.

When can the Crown prosecutor make an application for a support person?

At any point, to the presiding judge or justice, ideally as early as possible prior to the day the child will testify.



PRACTICE TIP: An application for a support person can be made in conjunction with an application for closed-circuit television or a screen. The use of a support person does not replace the need for these and other measures when a child is afraid of seeing the accused or testifying in an open courtroom.

Can the judge or justice refuse to permit a support person?

No, unless he or she is “of the opinion that the order would interfere with the proper administration of justice.”

Are there any circumstances when having a support person is not recommended?

No. There is generally no downside or reason to be cautious about using a support person, from the child's point of view. Some older children and teenagers strongly resist any suggestion they need someone to “hold their hand.” It is not advised to force a child to use a support person when they are adamantly opposed. However, try and recognize the difference between sincere confidence in a witness and the false bravado masking a true fear about testifying.



PRACTICE TIP: When children decline the offer of a support person, respect their wishes. However, check in again as the proceedings start. Sometimes, young witnesses change their minds once the court process is underway.

FAQs About Support Persons

- Q.** *What are my responsibilities as a support person?*
- A.** You have three duties in most cases:
- accompany the witness to the witness box or CCTV testimony room (shielding his or her view of the accused if necessary)
 - be close to the witness during the testimony
 - stay with the child during breaks such as recess or lunch time
- Q.** *What should I do when the witness is crying and distressed?*
- A.** The law states that you may not communicate with the witness, so you cannot speak with the child. The judge may ask you to determine if the child wants a break. Some judges may allow you to comfort a distressed child, but there is great variation in this regard. In other words, look for direction from the judge.
- Q.** *What should I do when the child witness misunderstands a question or the child is misunderstood by others as he testifies?*
- A.** There is nothing you can do. It is up to the presiding judge/justice or the lawyers to monitor the child's understanding and communication.
- Q.** *What should I do if, during a recess, the child asks me a question about her evidence or what she testified to?*
- A.** Remind her that the two of you cannot talk about her testimony and advise her instead that the Crown prosecutor is the only person with whom she can discuss her evidence.
- Q.** *Will the judge ask me any questions?*
- A.** It's possible. You could, for example, be asked to state your name and relationship to the child and professional role (if any).
- Q.** *Will I be able to sit down?*
- A.** The judge may tell you where to sit or stand. Some witness boxes have insufficient space for two chairs or two people. In a closed-circuit television room, all participants are usually seated.

- Q. What if the child looks at me or turns to me as if to ask a question?
- A. Don't engage in any communication, even non-verbal. The judge may notice and remind the child to look at the questioner or at the judge.



PRACTICE TIP: It is imperative that you appear neutral, especially in the presence of a jury. This includes, for example, not nodding, appearing shocked or confused, or getting visibly upset. Your gestures or facial expressions may prejudice the proceedings.

- Q. How long might the child's testimony take?
- A. You may have to wait hours for testimony to begin and most judges permit liberal breaks and recesses for children. The testimony itself may elapse over ten minutes, several hours, or be split over two or more days.
- Q. I don't know much about the legal process. Where can I find information about the court system, the terminology, and the role of victims and witnesses?
- A. Most provinces and territories have informational material for victims and witnesses, describing their rights, responsibilities and local services. For general information on the legal process, the Department of Justice web site is an excellent resource: www.justice.gc.ca/



Department of Justice Canada (2005). *Canada's Court System*.

Department of Justice Canada (2006). *A Crime Victim's Guide to the Criminal Justice System*.

Department of Justice Canada (2004). *The Youth Criminal Justice Act: Summary and Background*.

What Children Say About Having a Support Person

Children tell us how a support person helped them be a witness.

Children can feel frightened and alone in the witness box

“I would have been there all alone.” (Rosa, age 7)

Walking past the accused person can scare a child

“I could not have walked past him by myself. I needed a kind of a bodyguard with me. The last time I saw him, he told me that I would be sorry if I told.” (Halim, age 10)

Children feel vulnerable and worry they might be physically harmed

“I was afraid that he [the accused] would hurt me in the courtroom. Having Michelle beside me helped me feel safe.” (Cheyenne, age 15)

Testifying behind a screen creates a sense of isolation

“I was behind a screen so I couldn't see my mom in the courtroom, but I knew he could see me through the screen – it felt weird. I needed someone with me.” (Shakira, age 13)

Children can be intimidated by the aggressive tone or by the intrusion into their personal space by the defence lawyer

“I was shaking and I felt sick when I was in the witness box – his lawyer sounded angry with me. It was good to have someone with me.” (Luis, age 11)

Unwanted separation from family or trusted adults can increase anxiety

“I would not want to be in the CCTV room just with the lawyers.” (Jessica, age 12)



PRACTICE TIP: Asking children to nominate a support person helps them feel more engaged in the process. Find a tip sheet for teens on page 18, suitable for photocopying and distribution to adolescents.

Good Practice Guidance for Using a Support Person

These points represent the optimal use of the support-person provisions. Local contingencies and resource availability may necessitate some modifications.

1. As with all testimonial aids, ascertain the need for a support person early in the process.
2. Ensure children and teenagers know the options locally available for testimonial aids including that they can ask for a support person.
3. A child could decline a support person only to change his or her mind later. Young witnesses cannot always anticipate their reactions to testifying until faced with the task. Ask them again and/or make your own assessment on the day of court.
4. People experienced in the victim support field are well suited to assuming the role because of their training, experience, and neutrality.
5. If the support person is not a court-related professional or trained volunteer, ensure he or she is prepared for the role and know what is expected.



PRACTICE TIP: Find a “tip sheet” for the first-time support person on page 17 of this handbook. This list is a supplement to, but not a replacement for, orientation of a support person for the role.

6. A support person is best used in conjunction with pre-court preparation services and as an adjunct to other measures such as testimony outside the courtroom, if needed and available.
7. All child witnesses are potential candidates for a support person, regardless of their age or the type of offence.
8. Ensure children know what is expected of them including the fact that they cannot communicate in any way with the support person while testifying.
9. The most effective support person takes the time to build rapport with the child.



Good practice standards for court preparation are listed in handbook No. 1 in this series: Overview of Issues Related to Child Testimony.

Situations that May Arise

To be prepared for all contingencies, we list here some examples of issues and situations for which you should be prepared.

- Support persons must not appear to coach or respond to the child in any way. For this reason, the support person's face may be shown on the monitor when CCTV or remote testimony is used.
- It may be difficult to resist comforting a distressed child as he testifies.
- Some children resist returning to the courtroom after a recess or break: be prepared to reassure and encourage them to do their best.
- A child may ask: "Do I have to testify?" As a support person, it is not your place to answer such questions. Refer the child to the Crown prosecutor.
- It can be extremely upsetting to listen to children describe their own victimizations, especially given the level of detail typically required of court witnesses.
- It can be extremely upsetting to watch some defence attorneys confuse or aggressively cross-examine children.
- Judges have personal styles and preferences and what is acceptable in one courtroom may be frowned upon in another.
- It can be frustrating to hear people speak to children using language far above their levels of comprehension.
- A child may testify well and not appear distressed, only to collapse into tears in the corridor outside the courtroom.
- Support persons should have the opportunity to talk with someone or have other resources available to deal with the emotional impact of what they hear, see and experience.



PRACTICE TIP: To avoid frustration and confusion, ensure you understand your role and what it does and does not entail. You are best able to help a child when you are calm, confident and appear comfortable in the role.

Ten Tips for the First-time Support Person

You are about to undertake an important responsibility in a criminal prosecution. If this is your first time in this role, these tips help you prepare for this experience.

1. It is crucial that you be perceived as a neutral person and not a participant or someone with an opinion about the case outcome (even if you do).
2. When walking into the courtroom, shield the child from seeing the accused. When you get to the witness box, position yourself slightly behind the child.
3. Do not communicate in any way with a child in the witness box, including words, gestures or touch, unless the judge gives you permission.
4. You cannot make any facial expressions or gestures that could convey your reaction or opinions to people watching.
5. Decline the opportunity to be a support person if you believe hearing details of the alleged crime may overwhelm you or trigger an emotional reaction.
6. Be prepared to be flexible and appreciate that court proceedings can be unpredictable, lengthy and (at times) tedious.
7. It is comforting to the child if you are calm and appear comfortable in the role.
8. The closer you are emotionally to the child, the more difficult an experience this could be for you.
9. Be prepared for the possibility that the child will get distressed at some point, before, during or after testifying.
10. During breaks, stay with the child but do not talk about the evidence.

Things that Worry Children Most About Testifying

- fear for their own personal safety
- fear of being alone and unprotected
- distress and embarrassment about having to recount details of the offence
- having to remember traumatic events
- being tricked or confused during cross-examination
- crying in the courtroom
- seeing friends and family of the accused
- concern about forgetting important information

Tips for Teens About Using a Support Person

Being a court witness can be stressful and it's normal to be a bit nervous. Using a support person while you testify could make the experience a little easier. It's your choice. Here's some information to help you decide.

A support person walks with you into the courtroom (if that is where you will testify), stays close as you testify, and spends time with you before court starts and during any breaks.

Why some teenagers like to have a support person

- a support person can block your view of the accused as you walk to the witness box
- if you testify behind a witness screen, you might feel cut off from your family and friends: a support person is there so you won't be alone
- a support person can sit near you in the CCTV room, if that is where you testify
- sometimes your family and friends can't be in the courtroom so it's nice to have a friendly face there with you
- sometimes you don't want your family hearing you testify: a support person can be with you instead

Why some teenagers don't want a support person

- some teens aren't nervous about testifying
- some teens think they will appear scared, immature or un-cool

Who can be my support person?

- a victim support worker or volunteer
- someone you trust like a family member, friend of the family, or an Aboriginal Elder
- anyone else you can suggest who is approved by the judge

Some important things to know...

- before court starts, the prosecutor asks the judge to make sure it's okay (there is about a 1% chance the judge could say no)
- a person who is also a witness in the case cannot be your support person (unless the judge approves)
- the choice is yours: you decide if you want to ask for a support person or if you don't want to
- if you say "yes," you can change your mind later
- if you say "no," you can change your mind later

Working with Child Witnesses who are Deaf or Hard of Hearing

While few of us have the specialized training to communicate with the deaf, there's much we can do to understand and meet the needs of this client group.

The deaf are members of a diverse linguistic and cultural community. Their preferred means of expressive communication will likely be one of the sign languages but some people vocalize language, especially if they acquired deafness after birth. Means of receptive communication will include sign language, lip reading, and/or use of a sound amplification device such as a hearing aid.



PRACTICE TIP: Clarify a child's preferred means of expressive and receptive communication before your first meeting. Find the same information for the parent or caregiver, who may also be deaf. Learn to sign your name and the child's preferred sign for his or her name before your first meeting or early in that meeting.

The deaf community in your area may be small and close-knit. If one member was criminally victimized by another member, allegiances and divided loyalties can pre-occupy the child and family. Concern for confidentiality is also an issue when the number of available interpreters is limited.

Basic principles of intervention

- Always use a trained interpreter for pre-court sessions.
- Avoid if possible the temptation to write notes back and forth: this is usually inappropriate for adults and often untenable for children.
- As always with children, be very conscious of your decision to use touch. While tempting to tap the child on the arm to get their attention, this could startle them. Get their attention through eye contact.
- Depending upon the age of the witness, e-mail or text messaging could be an efficient means of communication about peripheral issues, such as setting appointment times.
- Use a family member to interpret only as a last resort (or to arrange another meeting where an interpreter will be present).



Most deaf people who sign will consider English or French as their second language. As children, their signed vocabulary will still be growing and will match their ages. Much of the advice for questioning children listed on page 14 in the Overview handbook will apply here.

Pre-court Preparation

- Put the child's mind at ease by ensuring him or her that an interpreter will help them testify on the day of court.
- Also tell them that, if the accused is deaf, another interpreter will be there to help him or her.
- If the child will testify outside the courtroom, clarify whether the interpreter will be in the courtroom or in the testimony room. Let the child know.
- If the interpreter will be in the testimony room, he or she must be "on camera" so as to be seen by people in the courtroom.
- Have the child choose a trusted adult as the designated support person.
- When possible, make more than one opportunity for courtroom orientation and practice in the witness box or testimony room.
- Use activity booklets and court preparation sites that do not rely on audio presentation of information.

Guidance on using interpreters

- In most areas, arranging for a sign language interpreter must be done weeks in advance of the interview.
- Get the child's attention and eye contact before you begin to speak.
- Always look at and direct your comments to the child and not the interpreter.
- Keep your gaze as much as possible on the child and avoid the temptation to look at the interpreter when he or she is translating.
- If a person reads lips, speaking too slowly will distort your speech and make it difficult for them to follow your words.
- Take breaks: children lose concentration but also be sensitive to the fact that sign-language interpretation is physically and mentally demanding.
- If a noise draws your attention from the conversation, explain what happened and why you looked away.



PRACTICE TIP: Ensure a staff member knows how to use the TTY (teletypewriter) relay service.

Further Reading

Hurley, P., K. Scarth & L. Stevens (2002). *Children as Witnesses - Helping Young People Give Their Evidence in Court: Helping Courts Hear the Evidence of Children*. London ON: Centre for Children and Families in the Justice System.†

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Jennifer Obinna et al. (2005). *Understanding the Needs of the Victims of Sexual Assault in the Deaf Community*. Washington DC: National Institute of Justice.†

† These documents are available on the Internet.

About the Handbook Series

This is one of seven handbooks written to aid front-line justice personnel who use special accommodations and testimonial aids for young victims and witnesses in criminal proceedings. The series title – “*A Full and Candid Account*” – reflects the legislative imperative of facilitating the conditions whereby a child witness can best communicate his or her evidence to the Court. The seven topics covered in the series are:

1. Overview of issues related to child testimony
2. Testimony outside the courtroom
3. Witness screens
4. Video-recorded evidence
5. Designated support person
6. Hearsay evidence and children
7. Children and teenagers testifying in domestic violence cases

These handbooks provide a concise and convenient summary of legislation, operational and logistical issues, FAQs, and helpful tips for working with children and teenagers.



The information, references and guidelines in this handbook focus on child witnesses (under age 18), although material may be relevant for some adult witnesses contemplated in the provisions for vulnerable witnesses.

Over two decades, our own research and experience at the Child Witness Project have clearly demonstrated how the stressful aspects of testifying can be ameliorated to maximize a child's ability to give “*a full and candid account*” of his or her evidence. Special accommodations and testimonial aids are important tools available for this purpose.

Every child witness in Canada has the right to ask for measures which include closed-circuit or remote testimony, witness screens, and recourse to a support person while testifying. Yet, there is wide variation in the frequency of use of the special accommodations and testimonial aids now provided for in the *Criminal Code*. The overarching goal of this handbook series is to ensure that no child is denied access to the appropriate accommodation or testimonial aid only for want of awareness or understanding. By creating these practical handbooks, we hope to fulfill the promise of special protections made available by Parliament so children and young people will not be traumatized by their experiences as witnesses.