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## ARTICLES

### INVESTIGATIVE INTERVIEWS OF CHILDREN: SHOULD THEY BE VIDEOTAPED?

JOHN E.B. MYERS\*

Child sexual abuse is often difficult to prove. The Supreme Court observed in *Pennsylvania v. Ritchie*<sup>1</sup> that “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim.”<sup>2</sup> Although many children are capable witnesses, some are ineffective on the stand, and others are too frightened to testify.<sup>3</sup> The problems of ineffective testimony and few eye-witnesses are compounded by a lack of physical and medical evidence in most cases.<sup>4</sup> Faced with a paucity of evidence, children’s out-of-court statements describing abuse assume extraordinary importance.<sup>5</sup> As the spotlight focuses on children’s hearsay statements, a controversial issue arises. Should investigative interviews of children be videotaped? Some proponents of videotaping point out that taping preserves invaluable evidence. Other proponents of videotaping argue that poorly trained and biased interviewers use suggestive questions to lead children into descriptions of abuse that never happened.<sup>6</sup> Videotaping exposes improper interviewing, and protects the innocent. Opponents of videotaping worry that no

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1. 480 U.S. 39 (1987); see also *People v. McClure*, 779 P.2d 864, 866 (Colo. 1989); *In re Nicole V.*, 518 N.E.2d 914, 915 (N.Y. 1987); *State v. Jones*, 772 P.2d 496, 499 (Wash. 1989).

2. 480 U.S. at 60.

3. See generally 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES ch. 3 (1992).

4. See Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91 (1993); see also MYERS, *supra* note 3, § 4.20, at 268.

5. For a discussion of children’s hearsay statements, see MYERS, *supra* note 3, ch. 7.

6. See Lee Coleman & Patrick E. Clancy, *False Allegations of Child Sexual Abuse: Why is it Happening? What Can We Do?*, CRIM. JUST., Fall 1990, at 14.

matter how flawless the interview, defense counsel will find fault, picking the interview apart question by question. Opponents also fear that unwarranted attention will focus on the videotape, distracting the jury's attention from other evidence of abuse.<sup>7</sup> In this article, I examine the arguments for and against videotaping investigative interviews of children.

## I. ARGUMENTS FOR VIDEOTAPING

The arguments in favor of videotaping fall primarily into three overlapping categories. First, videotaping may reduce trauma to children. Second, videotaped interviews contain evidence that may be admissible to prove child abuse. Third, videotaping increases the quality of interviews because interviewers realize their performance is preserved for later critique.

### A. *Reducing the Number of Interviews and the Number of Interviewers*

When sexual abuse is suspected, the child may be interviewed by several professionals, including the police, social workers, medical professionals, mental health workers, and attorneys.<sup>8</sup> The consensus among experts on child abuse is that multiple interviews conducted by different professionals are traumatic for many children.<sup>9</sup> In California, a committee created by the Legislature to examine child abuse cases wrote that "the most traumatic aspect of the investigative process for child victims was the fact that multiple unfamiliar interviewers

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7. See Paul Stern, *Videotaping Child Interviews: A Detriment to an Accurate Determination of Guilt*, 7 J. INTERPERSONAL VIOLENCE 278 (1992).

8. See NATIONAL INST. OF JUST., U.S. DEP'T OF JUST., *WHEN THE VICTIM IS A CHILD* 135 (2d ed. 1992).

9. See CALIFORNIA ATT'Y GEN.'S OFF., CALIFORNIA CHILD VICTIM WITNESS JUD. ADVISORY COMM., FINAL REPORT 23 (1988) [hereinafter ADVISORY COMMITTEE]. The Committee wrote:

[C]hildren are interviewed numerous times by many individuals during the course of a child abuse investigation. In response to intrafamilial child abuse reports, children may be interviewed by law enforcement officers, social workers, physicians, nurses, mental health professionals, prosecutors, defense attorneys and probation officers. The children may also be questioned by curious onlookers such as noninvolved agency personnel, neighbors and relatives. Children frequently suffer emotional trauma from the frequent requests from numerous interviewers to re-tell their stories.

*Id.* See also Catherine Stephenson, *Videotaping and How It Works Well in San Diego*, 7 J. INTERPERSONAL VIOLENCE 284, 286 (1992).

conduct numerous detailed interviews covering the same ground."<sup>10</sup>

Videotaping the investigative interview reduces the number of times children are interviewed.<sup>11</sup> Rather than re-interview a child, other professionals view the tape. Of course, a professional's willingness to forego an interview and settle for a videotape turns on whether the videotape supplies the information needed by the professional. For example, the needs of law enforcement differ in some respects from those of child protective services.<sup>12</sup> If a videotaped interview conducted by a protective services worker fails to provide the information needed by law enforcement, the police have little choice but to re-interview the child.

Training is available to help professionals ask the "right" questions.<sup>13</sup> In an increasing number of jurisdictions, children are interviewed by professionals with cross-disciplinary training. Thus, if the interviewer is a social worker, the worker is aware of the investigative needs of law enforcement. By the same token, if a police officer conducts the interview, the officer obtains data that is relevant to other disciplines interested in the case.

In addition to creating a cadre of specialized interviewers, interviews can be conducted in settings that allow interested professionals to observe the interview from behind a one-way mirror. Observers can communicate with the interviewer, and suggest additional questions. The one-way mirror has the benefit of reducing the number of adults in the room with the child.

In some cases, defense counsel seeks to interview the child prior to trial.<sup>14</sup> Additionally, the defense may seek a court-ordered psychological examination of the child.<sup>15</sup> The existence on videotape of a thorough and well-conducted investigative interview may reduce the need to submit the child to defense-initiated interviews and psychological examinations.<sup>16</sup>

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10. ADVISORY COMMITTEE, *supra* note 9, at 20.

11. See ADVISORY COMMITTEE, *supra* note 9; Stephenson, *supra* note 9, at 286.

12. See ADVISORY COMMITTEE, *supra* note 9.

13. For recommendations on training interviewers, see ADVISORY COMMITTEE, *supra* note 9. High quality training is increasingly available. For a description of an intensive one-week course designed to train interviewers, contact Ms. Beth Gould, Crime Prevention Center, Department of Justice, 1515 K. St., Sacramento, CA., (916) 322-2900.

14. See MYERS, *supra* note 3, § 1.13.

15. *Id.* §§ 2.22, 5.16.

16. See Stephenson, *supra* note 9, at 286 ("It is also much easier to

### B. Videotaping Preserves Evidence of Abuse

A child's interview statements may contain graphic and detailed descriptions of abuse. Videotaping documents exactly what the child said. Moreover, videotaping preserves the child's emotion, demeanor, and body language at the moment of disclosure. This nonverbal accompaniment is often as important as the child's words. Of course, a child's interview statements describing sexual abuse are hearsay when offered for the truth. Nevertheless, in many cases, the statements are admissible, and the videotape is the best evidence of what the child said.<sup>17</sup>

A child's videotaped description of abuse may be offered under an exception to the hearsay rule. Depending on the circumstances and the type of litigation, the statements may fall within the excited utterance exception,<sup>18</sup> the state of mind exception,<sup>19</sup> the exception for statements to health care providers,<sup>20</sup> the exception for past recollection recorded,<sup>21</sup> the catch-all exception,<sup>22</sup> or a special hearsay exception for statements by victims of child abuse.<sup>23</sup> Additionally, the child's statements may be admissible as prior inconsistent statements or prior consistent statements.<sup>24</sup> In a few jurisdictions, descriptions of sexual abuse may be admissible as statements against social interest.<sup>25</sup> The child's disclosure may be admissible under the doctrine of fresh complaint of rape.<sup>26</sup> Finally, for some purposes, the child's statements may be admissible as non-hearsay.<sup>27</sup>

The proponent of a child's out-of-court statements must persuade the court that the statements meet the foundational requirements of one or more of the hearsay exceptions. In many cases, the verbal and non-verbal data preserved on videotape provide irreplaceable information to help determine the

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curtail defense requests for victim interviews when the defendant has had an opportunity to see and hear the victim on tape.").

17. When the proponent of a videotaped interview seeks to prove the contents of the tape, the best evidence rule applies, requiring the original or a duplicate. See FED. R. EVID. 1002.

18. *Id.* 803(2).

19. *Id.* 803(3).

20. *Id.* 803(4).

21. *Id.* 803(5).

22. *Id.* 803(24), 804(b)(5).

23. See MYERS, *supra* note 3, § 7.46.

24. FED. R. EVID. 801(d)(1).

25. CAL. EVID. CODE § 1230 (West 1966).

26. See MYERS, *supra* note 3, § 7.31.

27. *Id.* §§ 7.6-7.8, 7.16.

foundational issue. With the residual and child victim hearsay exceptions, for example, the primary issue is the reliability of the child's statement.<sup>28</sup> In assessing reliability, the court considers the circumstances surrounding the statement.<sup>29</sup> The videotape captures with unparalleled precision the circumstances pointing toward and away from reliability.

C. *Videotaping Provides an Incentive for Interviewers to Use Proper Technique*

Defense counsel regularly take aim at the techniques employed by investigative interviewers. The defense argues that poorly trained and biased interviewers distort children's memories by plying them with leading questions.<sup>30</sup> Commentators echo this concern.<sup>31</sup> For example, David Raskin and John Yuille write of "the problematic nature of interviews of children as they are currently conducted . . . . Inadequacies in such methods frequently lead to lack of substantiation of valid allegations and may also reinforce false allegations of sexual abuse."<sup>32</sup> Courts too are worried about the quality of interviews.<sup>33</sup>

Apprehension is warranted regarding the skill and objectivity of some professionals interviewing children. Although videotaping does not eliminate this concern, taping puts the interviewer in the spotlight, thus increasing the incentive to use proper interview technique,<sup>34</sup> and decreasing the temptation to hurry the child along or use improperly suggestive questions.

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28. See *Idaho v. Wright*, 497 U.S. 805 (1990).

29. *Id.* at 819.

30. See MYERS, *supra* note 3, § 4.5.

31. See, e.g., RALPH UNDERWAGER & HOLLIDA WAKEFIELD, *THE REAL WORLD OF CHILD INTERROGATIONS* (1990).

32. David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases*, in *PERSPECTIVES ON CHILDREN'S TESTIMONY* 184, 184 (Stephen J. Ceci et al. eds., 1989).

33. See, e.g., *Idaho v. Wright*, 497 U.S. 805 (1990); *People v. Diefenderfer*, 784 P.2d 741 (Colo. 1989); *People v. McMillan*, 597 N.E.2d 923 (Ill. App. Ct. 1992); *State v. Cain*, 427 N.W.2d 5 (Minn. Ct. App. 1988); *State v. Babayan*, 787 P.2d 805 (Nev. 1990); *Gotwald v. Gotwald*, 768 S.W.2d 689 (Tenn. Ct. App. 1988); *State v. Hadfield*, 788 P.2d 506 (Utah 1990); *State v. Bullock*, 791 P.2d 155 (Utah 1989), *cert. denied*, 497 U.S. 1024 (1990).

34. Professor Mike McConville studied the impact of videotaping on the way English police officers interrogate suspects. McConville found that when officers knew they were on camera, they generally played by the rules. When the officers thought the camera was turned off, the officers sometimes took off the kid gloves, and employed highly coercive and abusive interrogation techniques. Mike McConville, *Videotaping Interrogations: Police Behavior On and Off Camera*, 1992 CRIM. L. REV. 532.

Reducing inappropriate interviewing is not the only advantage of videotaping. When an interview is done *properly*, the videotape attests convincingly to the quality of the interview, making it very difficult to argue that the interviewer asked improper questions.

#### D. *The Videotape May Discourage Recantation*

Once children disclose sexual abuse, powerful forces may convince them to recant.<sup>35</sup> Recantation is particularly likely in incest cases, where the perpetrator pressures the child to change or deny allegations.<sup>36</sup> David Jones and Mary McQuiston describe the psychological dynamics of recantation:

After the disclosure has been made by the victims, the guilt connected with their participation in the abuse may intensify over the ensuing months. The feelings of guilt and personal responsibility may become combined with feelings of loss, and grieving for the emotional warmth that the abuser provided. At that stage, it is difficult for the victim to appreciate that the warmth and emotional availability were only provided at a price. The victims begin to feel that they caused the family's break-up, and perhaps the incarceration of the abuser. Retraction may be a frequent accompaniment at this stage.<sup>37</sup>

A videotape is an irrefutable record of a child's words. Knowledge of the tape makes it more difficult for the child to say, "I didn't say that" or "That's not what I meant." The tape can be used to help the youngster resist pressure to recant. Of course, the fact that a disclosure of sexual abuse is taped does not make it true. Defense counsel may argue that videotaping a false allegation sets it in concrete, and provides the prosecution improper leverage to coerce the child to adhere to a false charge. Although this argument is appealing, defense counsel is not without weapons to attack false allegations. In light of the documented pressure to recant that is placed on many *actual* victims, the use of videotape to help children maintain truthful allegations is justified.

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35. See MYERS, *supra* note 3, § 4.41; Teena Sorensen & Barbara Snow, *How Children Tell: The Process of Disclosure in Child Sexual Abuse*, 70 CHILD WELFARE 3 (1991) (study of 116 cases of confirmed sexual abuse; approximately 22% of the victims recanted); Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177 (1983).

36. Summit, *supra* note 35, at 177.

37. DAVID P.H. JONES & MARY MCQUISTON, INTERVIEWING THE SEXUALLY ABUSED CHILD 8 (Royal College of Psychiatrists, Gaskell 1988) (1985).

### E. *Convincing the Nonoffending Parent that Abuse Occurred*

When sexual abuse occurs within a family, the nonoffending parent sometimes believes and supports the child, sometimes not.<sup>38</sup> A videotaped disclosure can be used to persuade a skeptical nonoffending parent that abuse occurred.

### F. *Videotapes Encourage Confessions*

Viewing a child's videotaped disclosure may persuade defense counsel that the child will be an effective witness, and that the best course for the defendant is to negotiate a plea with the prosecutor. In some cases, the defendant views the tape and realizes for the first time the harm caused by the abuse. A guilty conscience prompts a guilty plea.

### G. *Videotapes Are Useful to Refresh the Child's Recollection*

It is common for months or years to elapse between episodes of sexual abuse and the trial where the victim testifies. Predictably, the passage of time often has a deleterious effect on the child's memory. In such circumstances, it is proper for the prosecutor to use documents and other items to refresh the child's memory prior to trial.<sup>39</sup> A videotaped interview — made when the child's memory was fresh — is an appropriate tool to help the child remember the details of the offense.<sup>40</sup>

### H. *Expert Witnesses May Use the Tapes*

In some states, a mental health professional who qualifies as an expert may offer an opinion that a child was sexually abused.<sup>41</sup> A videotaped interview may supply important data to support such an opinion.<sup>42</sup>

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38. See KEE MACFARLANE & JILL WATERMAN, *SEXUAL ABUSE OF YOUNG CHILDREN* 206-07 (1986); Suzanne M. Sgroi et al., *A Conceptual Framework for Child Sexual Abuse*, in *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* 9, 28 (Suzanne M. Sgroi ed., 1982).

39. For discussion of the technique of refreshing recollection, see MYERS, *supra* note 3, §§ 5.11-5.14.

40. See Stephenson, *supra* note 9, at 287 (where the author writes that "[a]ll witnesses, including children, have the right to be able to refresh their recollection. The videotape of the evidentiary interview is a very legitimate means by which to refresh the child's recollection before trial.>").

41. See MYERS, *supra* note 3, § 4.37.

42. It is clear in many cases that an expert would be justified in considering a child's videotaped statements along with other evidence to reach a clinical opinion about sexual abuse. See FED. R. EVID. 703; MYERS, *supra* note 3, § 4.11.

### I. *Videotaping Is Viewed Positively in Communities Where It Is Used*

Several communities videotape investigative interviews. For the most part, professionals in these communities speak positively about videotaping. In San Diego, California, for example, investigative interviews are videotaped. The chief of the child abuse unit of the San Diego County Attorney's Office, Catherine Stephenson, writes that "[a] multiagency approach to videotaping evidentiary interviews of suspected child abuse victims enhances prosecution efforts and serves the best interests of the child . . . ."<sup>43</sup>

### J. *Summary*

There are many advantages to videotaping investigative interviews. Children are spared multiple interviews, convincing evidence is preserved on tape, the camera provides a strong incentive to use proper interviewing technique, and the videotape helps children ward off pressure to recant.

## II. ARGUMENTS AGAINST VIDEOTAPING

Opponents of videotaping assert that taping undermines the search for truth.<sup>44</sup> Three primary arguments are tendered against videotaping. First, opponents argue that defense counsel place exaggerated emphasis on minor inconsistencies between videotaped statements and a child's other statements describing abuse. Second, opponents charge that the videotape assumes exaggerated importance at trial, forcing other evidence into the background. Finally, opponents assert that defense attorneys and their experts exaggerate errors committed by interviewers.

### A. *Videotaping Places Exaggerated Emphasis on Inconsistencies in Children's Descriptions of Abuse*

Critics of videotaping worry that defense counsel will exaggerate the importance of (1) the child's inconsistencies during the videotaped interview, (2) inconsistencies between the videotaped interview and the child's other out-of-court statements describing abuse, and (3) inconsistencies between the

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43. Stephenson, *supra* note 9, at 284.

44. See Paul Stern, *Videotaping Child Interviews: A Detriment to an Accurate Determination of Guilt*, 7 J. INTERPERSONAL VIOLENCE 278 (1992) ("Routinely videotaping investigative interviews with children suspected of being victims of sexual abuse does not promote an accurate determination of guilt, is not in the best interests of children, is counterproductive to prosecution, and is unnecessary.").

videotaped interview and the child's trial testimony. Inconsistencies across time are inevitable, particularly about the peripheral details of abuse. Yet, with videotape in hand, defense counsel magnifies the importance of minor inconsistencies, unfairly undermining the child's credibility.

Opponents of videotaping emphasize that inconsistency is a common feature of children's disclosure of sexual abuse.<sup>45</sup> Inconsistency occurs for many reasons, four of which are particularly relevant. First, a child who is repeatedly molested over months or years does not remember specific molestations because memory blurs. When the child is asked to recall specific instances, the child becomes confused, leading to inconsistency.

The second reason for inconsistency relates to the psychological dynamics of sexual abuse. Particularly in incest cases, children are ambivalent about the abuser. On the one hand, the child wants the abuse to stop. On the other, the child loves the abusive parent. Mixed feelings lead to inconsistencies, including recantation.<sup>46</sup> In a study of 116 sexually abused children, Teena Sorensen and Barbara Snow found that approximately twenty-two percent of the children recanted.<sup>47</sup> "Of those who recanted, ninety-two percent reaffirmed their abuse allegations over time."<sup>48</sup>

The third source of inconsistency combines embarrassment and fear. Many children know that sexual activity is "wrong," and hesitate to disclose. Moreover, many children are threatened into silence, and, when disclosure finally begins, the telling is halting and piecemeal.<sup>49</sup>

When disclosure occurs, many children refrain from telling the whole story, revealing a little at a time to "test the waters" and see how adults react. According to Jones and McQuiston: "Usually children disclose a small portion of their total experience initially in an apparent attempt to test the adult's response before letting them know more about the assault. If they receive a positive and supportive response, they may feel safe enough to disclose more about their experience." A young child who has been abused many times may begin by saying,

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45. For more detailed discussion of children's inconsistency, see MYERS, *supra* note 3, §§ 1.10, 2.12, 4.42; John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 97-100 (1989).

46. See Summit, *supra* note 35, at 177.

47. Sorensen & Snow, *supra* note 35, at 11.

48. *Id.*

49. Summit, *supra* note 35, at 177.

“He only did it once.” Or “He never put in me, he just touched me with it.” Or “He only did it to the other kids, not to me.” Such disclosure is [inconsistent], of course, but considering the child’s uncertainty, and the common belief among children that adults will think they are bad because they were abused, such behavior is understandable.<sup>50</sup>

The fourth reason for children’s inconsistency arises from youth itself.<sup>51</sup> Psychologist Karen Saywitz points out that young children have difficulty monitoring their communications for error and inconsistency.<sup>52</sup> Adults, by contrast, monitor themselves as they speak. When error creeps in, adults stop and clarify. Not so with young children, who are not adept at self-monitoring, and who often fail to detect their own communication errors and inconsistencies. As a consequence of developmental immaturity, then, young children’s statements contain inconsistencies that adults detect and clarify.

Not only do young children lack proficiency in monitoring their *own* communications, they also have difficulty assessing how well they understand communications directed *to them* from adults. A young child who has no idea what an adult is asking is unlikely to interrupt and ask for clarification. Thus, children sometimes try to answer questions they do not understand, with the predictable result that their answers are *non sequiturs* or inconsistencies.

In sum, tentative, self-contradictory disclosure is common among sexually abused children. Opponents of videotaping argue that taping allows defense attorneys to focus unwarranted attention on inconsistencies, unfairly undermining children’s credibility, and diverting the jury’s attention from other evidence of guilt. Proponents of videotaping respond somewhat indignantly to the assertion that emphasizing inconsistencies is unfair. Proponents of taping point out that it is entirely proper for defense counsel to highlight inconsistencies. A leading evidence treatise states that impeachment with inconsistent statements is “probably the most effective and most fre-

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50. JOHN E.B. MYERS, LEGAL ISSUES IN CHILD ABUSE AND NEGLECT 134-35 (1992) (quoting DAVID P.H. JONES & MARY G. MCQUISTON, INTERVIEWING THE SEXUALLY ABUSED CHILD 3-4 (1985)).

51. For more complete discussion of the developmental reasons for children’s inconsistencies, see MYERS, *supra* note 3, § 4.42.

52. Professor Saywitz’s insights are summarized in MYERS, *supra* note 3, § 4.42.

quently employed . . . mode[] of attack upon the credibility of a witness."<sup>53</sup>

Thus, the issue is framed. Opponents argue that videotaping gives the defense too much ammunition. Proponents respond that the defense is entitled to whatever ammunition it can muster, and that inconsistencies may expose the lying or coached child. Who has the better argument? There is merit on both sides. Yet, something rings hollow in the argument against videotaping. Opponents of taping have difficulty answering the question, "What are you trying to hide?" In the final analysis, the most effective way to deal with children's inconsistencies is not to conceal them from the trier of fact, but to equip jurors with the information they need to understand children's inconsistencies.

Prosecutors have means to explain children's inconsistencies. For example, during the testimony of an older child, the youngster can explain away the impeaching value of inconsistencies. Wigmore writes that "[w]hen a witness or a party has been impeached by prior utterances showing bias or self-contradiction, fairness requires that he be allowed to explain away their effect . . . ."<sup>54</sup> With younger children, the prosecutor can call adult witnesses to describe the progressive nature of the child's disclosure, explaining as they go the reasons for inconsistency. If defense counsel concentrates heavily on inconsistencies, the prosecutor may offer expert testimony to explain why many sexually abused children recant or change their stories, and why developmental immaturity leads young children into inconsistency.<sup>55</sup> Finally, the prosecutor can utilize closing argument to remind jurors of the reasons for a child's inconsistency.

#### B. *The Videotape Takes on a Life of Its Own, Forcing Other Evidence into the Background*

Many sexually abused children disclose further details over time. Due to the progressive nature of disclosure, an interview that is taped early in the investigation may provide an incomplete and fragmented picture of the abuse. Moreover, in many

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53. MCCORMICK ON EVIDENCE § 33, at 44 (John W. Strong ed., 4th ed. 1992).

54. 7 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2114(4), at 661 (Chadbourn rev. ed. 1978) (original emphasis removed).

55. There is ample authority permitting expert testimony designed to explain recantation, inconsistency, and similar behaviors. See MYERS, *supra* note 3, § 4.44. Pennsylvania appears to be the only state that prohibits such expert testimony. See *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

cases the child's most spontaneous and convincing statements are off camera. The child's initial disclosure to a parent or teacher, for example, may be compelling despite the fact that it is not taped. Yet, if a later interview is recorded, the tape takes center stage, pushing aside the child's unrecorded statements, and deflecting attention from what is often the most trustworthy and probative evidence of abuse.

Oponents of videotaping worry that when the tape becomes the center of attention, the child may appear unconvincing. Indeed, defense counsel may concentrate on a lackluster videotape to distract the jury from the child's other statements. Although there is reason for concern about undue emphasis on a tape, the solution is not to discourage videotaping, but to turn to the long-established evidentiary principle known as the rule of completeness.<sup>56</sup> When one party takes a statement out of context, the rule of completeness allows the other party to complete the picture by admitting the remainder of the statement.<sup>57</sup> Wigmore wrote:

The general principle, then — which may be termed the principle of completeness — that the whole of a verbal utterance must be taken together, is accepted in the law of evidence; for the law in this respect does no more than recognize the dictates of good sense and common experience.<sup>58</sup>

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We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and effect of

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56. For a detailed discussion of the rule of completeness, see 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE §§ 49-52 (1977); 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 106[01]-[06] (1975); WIGMORE, *supra* note 54, §§ 2094-2125.

57. David Louisell and Christopher Mueller describe the rule of completeness in their treatise on the Federal Rules of Evidence:

The central purpose of Rule 106 is to insure that evidence of a written or recorded statement is presented so as to reflect fairly the whole of the statement in question, a purpose which has two practical consequences: First, the entirety of a statement in appropriate cases may be received in evidence where the absence of context would distort the meaning, and it follows that occasionally the introduction of evidence of one part of a written or recorded statement will call for the introduction of other parts, and that occasionally the introduction of evidence of a single seemingly complete written or recorded statement will call for the introduction of evidence of apparently separate written or recorded statements.

LOUISELL & MUELLER, *supra* note 56, § 49, at 352.

58. WIGMORE, *supra* note 54, § 2094, at 604.

the first part. . . . [T]he greatest possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was.<sup>59</sup>

The rule of completeness appears at Rule 106 of the Federal Rules of Evidence, which states that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

The rule of completeness applies in two ways to videotaped interviews. First, when defense counsel focuses the jury’s attention on one aspect of a taped interview, the prosecutor may offer other portions of the tape “which ought in fairness to be considered contemporaneously with it.”<sup>60</sup>

The second application of the rule of completeness occurs when the defense concentrates on the child’s statements during the videotaped interview, to the exclusion of the child’s statements at other times. Focusing on the tape alone presents an incomplete and, therefore, misleading impression of the child’s disclosure.<sup>61</sup> The rule of completeness addresses this problem by allowing the prosecutor to place the child’s videotaped statements in context by admitting the child’s other statements.<sup>62</sup>

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59. *Id.* § 2094(2), at 601.

60. FED. R. EVID. 106.

61. See FED. R. EVID. 106 advisory committee’s note, where the committee stated that one justification for the rule of completeness “is the misleading impression created by taking matters out of context.”

62. When a party admits one statement of a witness, it is clear that, in selected cases, the opposing party may invoke the rule of completeness to admit statements the witness made at other times. Rule 106 expressly contemplates admission of “other” writings or recordings “which ought in fairness to be considered . . . .” David Louisell and Christopher Mueller address this issue, writing:

Rule 106 expressly recognizes the simple fact that one statement may be so related to another than in fairness both should be considered together even though the two are contained in separate letters, contracts or recordings. Thus, the Rule authorizes the court at the behest of an adverse party to require the proponent to introduce not only the evidence of a recorded statement which he may wish to put in, but also any other written or recorded statement which ought in fairness to be considered at the same time.

By necessary implication, Rule 106 endorses the practice of allowing the adversary to introduce the other writing if for any reason the proponent of the first does not.

LOUISELL & MUELLER, *supra* note 56, § 52, at 377.

The rule of completeness is not the only device to keep the tape from eclipsing other evidence. The jury can be instructed to consider the totality of the child's statements, and to give no special weight to the videotape. The judge may exercise reasonable control over the mode and order of presenting evidence to guard against unfair attention to the videotape.<sup>63</sup> Finally, the jury should not be permitted to take the tape with them to the jury room for endless "instant replays."<sup>64</sup>

### C. *Defense Counsel Exaggerate Interviewer Error*

An increasingly common defense tactic is to attack the way children are interviewed.<sup>65</sup> Defense counsel argue that children have poor memories and are highly suggestible. Asking children suggestive or leading questions capitalizes on this developmental shortcoming and renders children's out-of-court statements and trial testimony unreliable. Opponents of videotaping argue that preserving the interview on tape simply encourages this strategy by handing the interview to the defense on a silver platter. The focus of litigation shifts away from what the child said, and onto the questions asked. The defense attorney, perhaps assisted by an expert, exaggerates the negative impact of suggestive questions and other interview techniques.

As with other objections to videotaping, this argument has some merit, but fails to persuade. First, and foremost, when interviews are poorly conducted, the defense *should* attack. The real challenge is not to hide improper interviewing, but to inform jurors that children have excellent memories,<sup>66</sup> and are not as suggestible as many adults believe.<sup>67</sup> Further, jurors can be informed of the situational and developmental reasons that necessitate cautious use of suggestive and even mildly leading questions during interviews.<sup>68</sup> Equipped with this information,

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63. See FED. R. EVID. 611(a).

64. For cases discussing limits on taking videotapes to the jury room, see MYERS, *supra* note 3, § 8.7.

65. See *id.* § 4.5.

66. See Robyn Fivush, *Developmental Perspectives on Autobiographical Recall*, in CHILD VICTIMS, CHILD WITNESSES: UNDERSTANDING AND IMPROVING TESTIMONY 1 (Gail S. Goodman & Bette L. Bottoms eds., 1993); MYERS, *supra* note 3, § 2.11.

67. See Gail S. Goodman & Alison Clarke-Stewart, *Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations*, in THE SUGGESTIBILITY OF CHILDREN'S RECOLLECTIONS 92 (John Doris ed., 1991).

68. The need for suggestive and even mildly leading questions with some children is discussed in detail in MYERS, *supra* note 3, § 4.5 and in MYERS, *supra* note 50.

which is often provided by an expert, the jury is able to place defense counsel's attack in perspective.

#### D. *Videotaping Everything Children Say Is Impossible*

The Supreme Court has observed that "[o]ut-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances . . . ."<sup>69</sup> Opponents of videotaping emphasize that it is not possible to videotape every contact with a child.<sup>70</sup> Yet, if videotaping becomes the norm, children's statements that are not on tape may be viewed with increasing suspicion.

#### E. *Videotaping Causes Stage Fright*

Videotaping makes some children (and some interviewers) uncomfortable. The video equipment may inhibit children, making it more difficult for them to discuss abuse. Although concern about stage fright is legitimate, the point should not be overdone. Many children quickly forget the camera, and interact as though it were not there. Moreover, in many cases, the video equipment is placed behind a screen or one-way mirror.

#### F. *Poor Tape Quality Casts Doubt on the Child's Disclosure*

Where the quality of the audio or video portion of the tape is poor, doubts arise about the entire interview. The answer here, of course, is high quality video equipment and competent technicians.

#### G. *Tapes May Fall Into the Wrong Hands*

Opponents of videotaping worry about preserving the confidentiality of videotaped interviews. Although there is no way to guarantee confidentiality, the likelihood of misuse can be lowered to tolerable levels with protective orders.<sup>71</sup>

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69. *Idaho v. Wright*, 487 U.S. 805 (1990).

70. See Brief of *Amici Curiae*, American Professional Society on the Abuse of Children, American Academy of Pediatrics, American Medical Association, National Organization for Women, National Association of Counsel for Children, State of Rhode Island Office of the Child Advocate, and Support Center for Child Advocates at 6-8, *Idaho v. Wright*, 487 U.S. 805 (1990) (No. 89-260).

71. For a sample protective order, see MYERS, *supra* note 50, at 186-88.

### H. Summary

Opponents of videotaping argue that videotaping does more harm than good. Taping exaggerates children's inconsistencies and interviewer's errors. Taping encourages defense counsel to shift attention away from evidence that, in many cases, is more compelling than the child's statements on camera. Any benefit of videotaping is outweighed by the damage inflicted on efforts to protect children and punish perpetrators.

### CONCLUSION

In the final analysis, there is no clear winner in the videotape debate. Until we learn more, the only firm conclusion is that it is premature to mandate videotaping.<sup>72</sup> It seems clear, however, that the arguments favoring videotaping are sufficiently strong, and the arguments against sufficiently weak, that experimentation with taping should be encouraged. Experimentation on an ad hoc basis is not enough, however. It is time to move beyond arguments based on anecdotal experience, speculation, and the all too common parade of horrors. What is needed is controlled empirical research on videotaping interviews.<sup>73</sup> The results of such research will shed much needed light on this difficult and controversial issue.

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72. Legislative efforts have been made to require taping of interviews. A bill to this effect died in a committee of the California Legislature. See Cal. Assembly Bill No. 3246 (1989-90 Regular Sess.); see also N.H. Rev. Stat. Ann. § 169-C:38V (Supp. 1990) (requiring videotaping of certain interviews).

73. Such empirical research is underway in California. For information contact the author at (916) 739-7176, University of the Pacific, McGeorge School of Law, 3200 5th Ave., Sacramento, CA 95817.