

# PROFESSIONAL EXCHANGE: VIDEOTAPING FORENSIC INTERVIEWS: PRO OR CON?

## PRO: THE EXPERIENCE IN SAN DIEGO

—by Catherine Stephenson

A multi-agency approach to videotaping evidentiary interviews of suspected child abuse victims enhances prosecution efforts and serves the best interests of the child by reducing the number of interviews and the number of interviewers to which a child is subjected.

Anyone, anytime, can position a videocamera in an interview room and call that videotaping. This article describes a much more sophisticated process that has evolved over many years and which is employed successfully in several jurisdictions in this country.

*Videotaping gives tremendous advantages to the prosecutor in a child molestation case.*

### The San Diego Experience

Videotaping evidentiary interviews of child abuse victims in San Diego has the support of law enforcement, prosecution,

and social services. Without this broad-based multi-agency support, videotaping would simply be another means by which to preserve an interview. It can be so much more than that if those involved will allow it. In San Diego County there are approximately ten law enforcement agencies which investigate allegations of child physical and sexual abuse. Each of these agencies has agreed to cooperate in sending victims to the Center for Child Protection (hereafter referred to as "Center") at Children's Hospital for a law-enforcement-financed evidentiary interview. The mechanics of this process are relatively simple. Law enforcement, and sometimes social services, will call the Center and schedule an interview for the earliest convenient time (usually within one to two days). The detective assigned to the case, the social worker from the Department of Social Services and, if given advance notice, the prosecutor will all observe the interview.

At the Center are a number of specially trained and experienced masters level or licensed clinical social workers who will conduct the interview after a briefing from

the detective. The interview is conducted in a playroom with toys, and lasts on average 35 minutes. The video equipment is concealed behind a one way mirror; it is not fixed and can swivel to follow the child's movements. The camera is concealed to make it less obtrusive; however, the children are always told they are being taped and if they ask they can tour the observation room and see the equipment. The children are told that the video will not be seen on television or sold in video stores. In fact, in San Diego, a protective order must be signed by a judge before a copy of the videotape may be released to an attorney representing the perpetrator or family members.

When the interview is completed, the original tape is kept at the hospital as part of the child's medical record. A copy of the tape, which has been made simultaneously with the original, is given to law enforcement and becomes part of their investigative packet.

The San Diego approach, like those in other parts of the country, is successful because it focuses on the needs of the child. In

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## CON: VIDEOTAPING INTERFERES WITH THE ACCURATE DETERMINATION OF GUILT

—by Paul Stern

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 the child, is counter-productive to prosecution, and is unnecessary.

That is the reality.

In theory, videotaping is a fine idea. In theory, it best preserves the integrity of the interview process and has the potential of reducing the number of interviews a child must endure. Videotaping can increase the possibility of obtaining a guilty plea. But these potential advantages do not justify a blanket policy of routinely videotaping investigative interviews with children. The claimed advantages of videotaping are more theoretical than real. The cited reasons to videotape do not comport with the way videotapes are actually used in criminal prosecutions.

In reality, videotaping can be detrimental to a true and fair determination of guilt. Whatever advantages might exist to support a policy to videotape, they are substantially outweighed by the disadvantages.

This article discusses why the routine videotaping of investigative interviews of suspected child sexual abuse victims is inappropriate and dangerous. This article is in-

tended to examine only the routine use of videotaping as a part of the law enforcement investigation. While this article specifically discusses videotaping of interviews, the same concerns are equally applicable to audiotaping interviews. The author is equally opposed to the routine audiotaping of investigative interviews with children.

*Whatever advantages might exist to support a policy to videotape, they are substantially outweighed by the disadvantages.*

**Why videotaping is detrimental to an accurate determination of guilt.**

*The in-court use of a single videotaped interview is exceptionally misleading.* For many children, disclosure of sexual abuse is a gradual process that can take weeks or months or years. Many children disclose a little bit at a time, in a process that has been described by experts as "rolling" or "progressive."

The investigative interview with the child is merely one point along this con-

tinuum of disclosure. As such, it represents just a single snapshot in time. It is what the child told one particular person on one particular day in one particular setting. The investigative interview is, usually, neither the first nor the last disclosure.

No matter how skilled the interviewer, there is no reason to believe that this one session will consistently provide the most complete or accurate disclosure of abuse the child will offer. In fact, the very "official" nature of the interview can seem intimidating, making the child more cautious, resulting in incomplete or minimal disclosure.

Yet if this interview is the only disclosure on tape and the only one physically reproducible before a jury, it will be given greater weight than any other out-of-court statement made by the child.

We live in a video age. Our media culture has replaced news analysis with the 15-second soundbite. A presidential address or campaign speech is reduced to a few quotables, a football game to replays. A war is visualized by strapping video cameras to missiles, which we ride to the strike on Iraqi targets. We forget, of course, about all those missiles that missed their intended targets, all those aspects of the speech or the game that didn't make the videotaped clip on the

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1991 the San Diego Regional Child Victim-Witness Task Force developed a protocol for the investigation of child abuse crimes. Central to the protocol was the use of videotaped evidentiary interviews as a means by which we could reduce the number of times a child is interviewed. In order to achieve this goal someone had to give up his or her "turf" in the investigation. Detectives, social workers, and prosecutors all want to interview the child and the same questions are asked over and over again by different people in different settings.

Most professionals in the area of child abuse recognize that repetitive interviews often further traumatize a child victim of abuse. Younger children in particular sometimes respond to redundant interviews by thinking to themselves—"If they believed me the first time, why are they asking me again? Maybe they didn't like what I said the first time and they want a different answer now." It is difficult for children to understand why so many people need to hear this information.

Law enforcement and prosecutors in San Diego are able to avoid redundant interviewing when the nature and scope of the previous interview has been well documented on videotape. It is also much easier to curtail defense requests for victim interviews when the defendant has had an opportunity to see and hear the victim on tape.

***We can't pretend that bad interviews don't exist just because we don't videotape them.***

Law enforcement, social workers, and prosecutors in San Diego have been willing to coordinate the interviewing process because of the trust they have in the skills of the interviewers at the Center. Each interviewer there has conducted hundreds of interviews according to a written protocol. The interviewers engage in peer review of their work and are very open to suggestions from other agencies.

Videotaping gives tremendous advan-

tages to the prosecutor in a child molest case. Generally, before prosecutors in the Child Abuse Unit meet with victims, they watch the videotape from the Center. This not only gives prosecutors a wealth of information, it also gives a sense of the child's developmental ability, demeanor, and vocabulary. Children are very relieved to hear that the prosecutor will not have to ask all those same questions over again; it may be that just some follow-up questions are necessary.

Critics of videotaping suggest that the tape provides yet another piece of evidence that will be scrutinized by a defense "expert". Every question, every gesture will be taken apart before the jury's eyes, and when it is all over and done with, the prosecutor will wish she had never seen the videotape.

This criticism seems to have as its premise that without videotaping, the interviewer will be free from attack. Of course that is not true. Imagine that you are the interviewer on the witness stand months after the interview. You have only some hand scribbled notes or a summary report to aid you. You are asked these questions on cross-examination: "What was the very first

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evening news. Generally, if it is not on tape, it never happened. Child sexual abuse trials should not be presented in any way that encourages this "Film at 11" mindset.

To have one isolated interview reproducible before a jury is to encourage the jury to place exaggerated and unwarranted importance on that one piece of evidence. All other disclosures, no matter how compelling and how carefully documented, will take a less prominent place in the jury's consideration. The freshness of the child's first disclosure, the anguish of a later, more complete disclosure to a loved one, the pain evident in the history provided by the child to an examining therapist after months of supportive counseling, all are deserving of thorough consideration by the jury. Such testimony is generally the most complete, most accurate, and most probative evidence a jury will hear. But such evidence can only be presented by the traditional, relatively sterile question and answer method of direct examination. Compare that to the active and visual reproduction of a select videotaped interview. The impact of the videotaped presentation is apt to cause it to receive disproportionate attention by the jury. When that occurs, the interests of the child and of the justice system to have a fair and accurate determination of guilt are not properly served.

***Videotaping interviews does not solve any of the existing problems of poor interviewing.*** Perhaps the most significant disadvantage to videotaping is that it doesn't fix any of the problems of bad interviewing. Too often, videotaping is proclaimed to be a "solution." It is not. It may highlight bad

interviewing skills which need to be addressed. But far too often it highlights what an attorney can isolate and label "bad," when in reality, in the proper context, no deficiency exists.

Poor, unprofessional interviewing of children needs to be corrected. If all the money that is poured into the purchase of videocameras, tapes, storage facilities, security, etc. were used instead to hire and train professional interviewers of children, we would accomplish much more to enhance the quality of interviews.

***Videotaped interviews presented to a jury allow the defense to change the focus of the trial away from the child's answers and onto the interviewers' questions.*** Prosecutors need to focus on trying child abuse cases based upon what the child says. When children testify compellingly in court, the defense attorney's obligation is either to defuse the evidence or confuse the jury.

Research supports the concern that damage can be done by inappropriate leading or suggestive questions asked by an interviewer. Prosecutors need constantly to examine that possibility. However, research also supports the conclusion that the responses elicited by leading questions are not always unreliable. There is a big gap between unartful interviews and interviews so poor they taint all future disclosures.

A defense attorney is going to use these videotapes to identify every unartful question asked, each "inappropriate" facial gesture made by the interviewer. If defense counsel miraculously finds none, the attorney will point out all the questions that were

not asked. There is no perfect interview, no agreement on a specific protocol for investigative interviews. Anyone can look at a videotape and find fault with some questions asked. A defense attorney, however, will seek to make counsel's own protocol the jury's protocol, and will measure the videotaped interview against it.

By replaying a videotape to a jury, the defendant has the adversarial advantage to concentrate the jury's attention on the questions asked instead of on the answers given. When that occurs, the entire focus of the trial has been skewed away from the defendant's guilt and onto the interviewer's skill. This does not serve the interests of justice.

***The knowledge that a particular interview is being videotaped can increase the pressure on the child and decrease the fluidity of disclosure.*** If a child is to be videotaped, ethical standards (and in some states, law) dictate that the child must be so advised. Such knowledge can act as an inhibitor, adding to the child's pressure and discomfort. Aware that a camera is rolling, an adolescent is likely to feel intimidated. Place a microphone in front of an adult and ask a non-personal question, and the adult is likely to lose some of his or her composure, become stiff, and speak with more caution and hesitancy. Then ask the adult to describe, in detail, his or her last sexual encounter. Envision the open response you are likely to obtain. Yet videotape advocates seek a relaxed, fluid, and complete disclosure by a child being asked invasive and traumatic questions by a stranger before a microphone and camera.

question you asked the child? What were the exact words the child used to describe the act? Did the child demonstrate with any hand motions? What was the child's facial expression? What was the second question you asked? Did you hug the child? Did the child cry? And so on. The videotape can speak for itself, in essence, and is the best evidence of the non-suggestive nature of the interview. At the very least, it allows the interviewer to refresh his or her recollection without having to rely on incomplete notes.

Additionally, the videotape of the evidentiary interview is a legitimate means by which to refresh the child's recollection before trial. Children will be asked on the stand about what they have said to others in the past. Prosecutors routinely show adult witnesses transcripts of prior testimony or police reports to refresh their recollection prior to trial. In San Diego, prosecutors tell children that they may be asked about their interview at the Center and that they may watch the video if they need help remembering what questions were asked. This is no different from offering a witness the chance to review transcripts, and is very helpful

with children too young to read. Finally, the prosecutor certainly doesn't want to be put in the extremely vulnerable position of refreshing the child's recollection with the prosecutor's interpretation of what was or was not said in the interview.

Experienced child abuse investigators and prosecutors know that children have their own unique vocabulary when describing incidents of molestation. The metaphors and analogies of children are unlike those of adults, and it is imperative that they be reported accurately. Further, in the several months or years between initial disclosure and trial, tremendous developmental changes can occur with the child. It is extremely helpful for the jury to see and hear the child, through videotape, closer in time to the disclosure—closer in time to the abuse. Also, a well-documented evidentiary interview can compliment other statements made by the child that were not captured on videotape. Spontaneous declarations to a teacher, parent or friend can be extremely powerful evidence, as is the disclosure to the physician during the medical examination.

During seminars and conferences throughout the country, I am privately told,

"I'd be scared to death to videotape the interviews we do back home—they're just so bad." My response: "That is not a problem with videotaping, that is a problem with the interviewer."

If in your jurisdiction you have interviewers who are inarticulate, overbearing, intimidating, manipulative or insensitive, I suggest you have the courage to do something about that. Retrain them or stop using them. We can't pretend that bad interviews don't exist just because we don't videotape them. Videotaping can be your best tool in maintaining quality control of interviews.

I suggest that in evaluating when to use videotaping in your community, you do not save videotaping for the big case—the multi-victim, multi-perpetrator media attraction. That is a little like saying you'll start practicing the piano after you get invited to Carnegie Hall. Those jurisdictions which are successful with videotaping are successful because its done every day—on little cases, on big cases, and on cases that eventually go nowhere. It is experience and consistency that will give credibility to your program.

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**A technical or administrative error can have devastating results.** In some states, destruction of evidence, even if unintentional, can require dismissal of a charge (see, e.g., *State v. Wright*, 87 Wn.2d 783, 557 P.2d 1 [1976]). Surely a videocamera sometimes malfunctions. Sometimes voices are too soft to be audible on tape; sometimes the camera is out of focus or shoots blackness; sometimes a tape will be accidentally erased or lost. The risk of dismissal of charges if any of these accidents occurs is too great to warrant routine videotaping.

In addition, the responsibility of maintaining the integrity and confidentiality of the videotapes is an enormous administrative burden to the State. Where are the tapes stored? For how long? Where does the money come from for cameras, tapes, storage, etc.? Who gets access to the tapes? Are defendants entitled to review them as evidence against them? If so, is it appropriate to endorse a procedure whereby pedophiles can watch (and savor?) their victims recounting their abuse? How do we justify invading the child's right of privacy when we make these videotapes available to her abuser, her abuser's attorney, her abuser's attorney's experts? What remedy is there if they are not returned, or are given to unauthorized persons? Videotapes of child disclosures have ended up in the hands of the media. These problems are too great to support a system of dubious merit. The advantages of videotaping are based in theory, not in reality.

**Theory:** Having the interview on videotape will most accurately record what is said.

**No competent prosecutor would take a child victim into court without first personally interviewing the child. Is a defense attorney going to concede that viewing the videotape is sufficient preparation and not seek to interview the child?**

**Reality:** That is true of any interview. Why record only interviews with children? Why not videotape all forensic interviews, with adult victims as well as children? The argument that we should videotape only child interviews implies that children, or their interviewers, are less credible and trustworthy than are adults and their interviewers. Much current research contradicts the preconception that children are less credible witnesses than adults. There is certainly no reason to believe that those who conduct forensic interviews with children will mislead a court about what is said. Are police trustworthy when they talk with adults, but liars when reporting what children say? By mandating videotaping, don't we create that impression? It is inappropriate to create a separate class of citizens law enforcement can talk with only if a video camera is on.

**Theory:** Videotaping investigative interviews may reduce the need for additional interviews.

**Reality:** It would seem so, but experience shows it does not. Several prosecutors' offices that utilize videotaping anticipated a reduction in the number of interviews. What many have found, however, is that in cases that go to trial, there have been virtually no reduction in the number of interviews with the child.

Common sense dictates that in those cases a videotape is not going to eliminate additional interviews. No competent prosecutor would take a child victim into court without first personally interviewing the child. Is a defense attorney going to concede that viewing the videotape is sufficient preparation and not seek to interview the child?

**Theory:** A videotape may assist the child in preparing for court.

**Reality:** Children can be and are successfully prepared for court by prosecutors. Prosecutors do not need to have children view themselves on tape to recall what occurred. If the child needs to look at a prior tape, that should raise a huge red flag for the prosecution. Trial preparation means knowing what to expect in court: What the prosecutor will ask, how the defense attorney might try to confuse or attack the child. It does not mean cueing up a tape to encourage repetition. An appropriate court school program is a more beneficial way to prepare a child for court.

**Theory:** Videotaping is an important form of ongoing training for the interviewer.

**Reality:** Videotaping selected interviews for training may be an appropriate educational tool. Having an experienced professional review the interviewer's work

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is fine, but setting a blanket protocol around such a concern is inappropriate.

**Theory:** An expert witness could use the videotape to help form an opinion about whether the child was abused.

**Reality:** No ethical expert would. Yet, the defendant will find his hired gun to so opine. Some self-proclaimed experts claim they can look at a videotape and determine whether the child is truthful or not. As a prosecutor, one would never hire someone who claims this expertise. Such an opinion should not ordinarily be admissible at trial. Why would a prosecutor want to encourage such a practice and help create that cottage industry?

**Theory:** Videotaping may be used as a therapeutic tool, or be used to confront potential parental disbelief or denial.

**Reality:** Videotaping disclosures may have an important therapeutic role. If so, the therapist should decide whether to videotape clinical interviews. Investigative interviews have a distinctly different purpose. An investigative interview should not be treated as a clinical or therapeutic device.

**Theory:** A good videotaped interview may convince the defendant that the child will be a powerful witness and that, therefore, he should plead.

**Reality:** I believe this is the greatest advantage to videotaping. However, a confession or guilty plea is also likely to be obtained when a child's statements are clear, well-documented, and made to a professional child interviewer. There are an insufficient number of cases in which a guilty plea has been obtained only through a videotaped statement to justify routine videotaping of investigative interviews. Besides, this is a sword that can cut both ways: If the videotaped interview is poor, a defendant who might otherwise plead guilty might decide to go to trial.

### Conclusion

In theory, there are many advantages to routinely videotaping investigative interviews with children. Experience to date suggests, however, that in reality those advantages have not been realized. The disadvantages are substantial. Videotapes give too much power to the defendant to dictate the focus of the trial and to mislead and confuse the fact-finder.

Child abuse prosecution should be based on a system that promotes full and fair review of all the evidence available. The videotaping of selected interviews with children presents instead a piece of evidence which can too easily be distorted and misused. When that occurs, the interests of prosecution, of justice, and of the child, are ill-served.

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## LAW

### ADMISSIBILITY OF CHILDREN'S STATEMENTS OF ABUSE UNDER THE CONFRONTATION CLAUSE AND RECENT SUPREME COURT CASES

—by Josephine Bulkeley and

Debra Whitcomb

#### Introduction

Child victims of sexual abuse often make convincing disclosures to parents, doctors, teachers, or other people they trust. When, for example, a seven-year-old girl casually asks her father, "Daddy, does milk come out of your wiener? It comes out of Uncle Bob's, and it tastes yukky" (Berliner and Barbieri, 1984), there can be little doubt that the child has been sexually abused. Similarly, during the course of an investigation, children frequently offer detailed descriptions of abusive acts to social workers, law enforcement officers, or mental health professionals. Statements like these are extremely valuable to investigators as they seek to complete the puzzle of what happened to the child. Moreover, these statements may be the most compelling evidence available to the prosecution—save for the child's testimony in court. Indeed, a child's statements may be the only evidence available, since other witnesses or physical trauma to the child are rarely found, and the child may be ruled incompetent or otherwise unavailable as a witness.

When the prosecution offers such "out-of-court" statements at trial as evidence that a child was abused, however, such statements are considered "hearsay," and under the hearsay rule cannot be admitted to prove the truth of the statement. Hearsay statements are not admissible because it is difficult to determine whether they are trustworthy: they are not made under oath, there is no opportunity to cross-examine the child, and the jury is unable to observe the child's demeanor. Numerous exceptions to the hearsay rule have been adopted, however, to allow certain statements into evidence because the declarant (the person who made the statement) is considered likely to have been telling the truth at the time.

Thus, when the prosecution wants a witness to testify about what an alleged child sexual abuse victim told him or her, the witness's testimony may only be admitted if the child's statement satisfies an exception to the hearsay rule. Hearsay exceptions commonly used for children's statements of abuse include excited utterances (also called spontaneous declarations) statements made for purposes of medical diagnosis or treatment, residual (or "catch-all") exceptions, and special child abuse exceptions.

### Hearsay exceptions for children's statements of abuse

**Excited utterances.** The excited utterances exception to the hearsay rule often applies in child sexual abuse cases. The three essential requirements of an excited utterance are: (1) a sufficiently startling experience suspending reflective thought; (2) a spontaneous reaction, not one resulting from reflection or fabrication; and (3) a statement relating to the startling experience. Traditionally, the statement must have been made contemporaneously with the event, but the modern trend is to consider whether any delay between the event and the statement provided an opportunity to fabricate the statement.

Under the excited utterances exception, some courts have allowed in a child victim's spontaneous statements made days, weeks, or even months after the abusive incident, provided there is a plausible explanation for the delay. Reasons for a child's reticence to disclose may include threats made by the defendant, fears of not being believed, feelings of confusion and guilt, and efforts to forget. Many courts have admitted as excited utterances statements made in response to limited questioning (*Commonwealth v. Fuller*, *State v. Mateer*, *State v. Wagner*).

*From a practical standpoint, the primary effect of White will be to relieve the state from proving that a child who is unable to testify is "unavailable."*

**Statements made for purposes of medical diagnosis or treatment.** Under this exception, statements to doctors relating to bodily feelings, conditions, pains or symptoms are admissible if made in order to obtain treatment. The underlying assumption is that people do not lie when seeking medical attention because they believe the effectiveness of treatment depends largely on what they tell the examining clinician. Courts have even allowed in statements identifying the perpetrator under this exception, reasoning that the perpetrator's identity is important to the child's treatment, particularly if the child is diagnosed with a sexually transmitted disease or if the perpetrator shares the child's household (*State v. Robinson*; *State v. Olesen*).

Some courts have also applied this exception to statements made by children to nonmedical personnel, such as psychologists or social workers regarding psychological feelings, although others have excluded such statements where the child does not clearly or subjectively appreciate the need to provide accurate information for