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## The Use of Videotape in Child Abuse Cases

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## **Abstract**

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**KEYWORDS:** videotape, child, abuse

# The Use of Videotape in Child Abuse Cases

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Child abuse investigations typically involve a myriad of social and criminal justice agencies, each on an independent fact-gathering mission.<sup>1</sup> All too often the child abuse victim is forced to repeatedly recount the details of the abuse and as a result, further traumatization is risked. A collective interview of the child abuse victim would alleviate some of these concerns. The most possible advantages are likely to be realized if the collective interview is preserved on videotape. The intent of this article is to provide basic guidelines and a systematic approach for the utilization of videotapes in child abuse investigations.

## I. The Benefits and Disadvantages of the Videotaped Interview

The product of a videotaped interview, in appropriate cases, may be viewed by the alleged perpetrator and his attorney. This may motivate plea negotiation if there is a related criminal case. Likewise, if there is a pending dependency proceeding, the alleged abuser may be more likely to stipulate to an adjudication of dependency.<sup>2</sup> The videotape of an investigatory interview is probably subject to discovery in dependency<sup>3</sup> and criminal cases.<sup>4</sup> Moreover, these videotaped interviews would fall within the limited confidentiality exemptions of section 415.51, Florida Statutes, allowing disclosure to parents who are alleged to be the abusers.<sup>5</sup> Accordingly, consideration should be given to

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1. For example, the Department of Health and Rehabilitative Services (HRS), police agencies, guardians ad litem, child protection teams, mental health evaluators, etc.

2. See, Short, Florence & Marsh, *An Assessment of Video Tape in the Criminal Courts*, 1975 B.Y.U.L. REV. 423, 430-37 (1975).

3. FLA. R. JUV. P. 8.070.

4. FLA. R. CRIM. P. 3.220.

5. FLA. STAT. § 415.51 (1983) providing that all records concerning child abuse and neglect and all records generated as a result of such reports are confidential and exempt from the provisions of FLA. STAT. § 119.07(1) (1983) and shall only be disclosed as specifically authorized by FLA. STAT. § 415.51 (1983).

whether videotaping the investigatory interview would increase the ability of opposing counsel to impeach the child abuse victim in the resulting dependency or criminal proceeding.

Videotaping collective investigatory interviews of child abuse victims would enhance the ability of multi-disciplinary child protection teams<sup>6</sup> to evaluate and formulate recommendations in individual cases. Child protection teams consist of pediatricians, psychologists, psychiatrists, lawyers, and case coordinators with nursing and social work backgrounds, each with child abuse expertise within their respective fields. The teams act as consultants and make recommendations to the Department of Health and Rehabilitative Services<sup>7</sup> (HRS) counselors in child abuse cases, as well as providing various other services. When a case is referred to a child protection team, it is assigned to a case coordinator who is responsible for obtaining information from all parties involved, such as law enforcement agencies, the guardian ad litem, HRS, and the school system. Case staffings are held where members of the child protection teams and representatives from the agencies involved in the particular case exchange information, verify facts with one another, and arrive at recommendations as to what course of action should be taken. The availability of the videotaped investigatory interview for viewing at child protection team staffings would provide participants with an enhanced sense of the facts and circumstances involved.

Guardians ad litem must be appointed in all child abuse cases, to protect the child abuse victim's interests.<sup>8</sup> As a practical matter, guardians ad litem are appointed at various stages of dependency proceedings, and very often must become familiar with the facts involved within a short period of time. The ability to view the videotaped collective investigatory interview would greatly facilitate this process. The same logic applies to attorneys who are often appointed by the court to represent child abuse victims.

Due to the many agencies involved in the investigation of child abuse cases it is common for the person assigned to a particular case

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6. FLA. STAT. § 415.51(1)(c) (1983) (authorizes HRS to develop and coordinate one or more multi-disciplinary child protection teams in each of its various districts. This provision also provides that HRS may convene these teams when necessary to assist in its diagnostic, assessment, service, and coordination responsibilities).

7. HRS is primarily responsible for conducting social investigations of allegations of child neglect and abuse. FLA. STAT. § 415.51 (1983).

8. FLA. STAT. § 415.51 (1983) (requiring that a guardian ad litem be appointed by the court to represent the child in any child abuse or neglect judicial proceeding).

within a given agency to change. Accordingly, it is not unusual for a newly assigned case worker or detective to become involved in a case which is well underway. Moreover, as a child abuse case proceeds, responsibility may be transferred among the many units of HRS such as crisis, intake, foster care, protective services, and adoption. As a result of budget reductions these case workers are typically overloaded and hard pressed to find time to meticulously review the multitude of paperwork inherited with a particular case file. The ability to view videotaped collective interviews of the child abuse victim would significantly contribute to a clearer understanding of such newly assigned cases.

Similarly, the legal management of child abuse cases would be enhanced by the ability to view the videotaped collective investigatory interview. In dependency proceedings, attorneys participating in the adjudicatory phase of the case are often not the same attorneys providing representation at review hearings.<sup>9</sup> Videotaped collective interviews would assist in providing continuity in legal management of these particular cases as well as impressing upon the newly assigned attorney the severity of the abuse originally perpetrated. This should minimize the scenario which occurs all too often in which the state is successful in a hotly contested adjudicatory proceeding but loses much of the protections obtained at a later review hearing. This is partially due to the fact that the case workers change, the lawyers change, and few of their replacements fully realize the severity of the original abuse from the mounds of papers and records they inherit. Additionally, prosecutors may view the videotaped collective interview of the child abuse victim to assist them in determining whether a particular case should be prosecuted, or in determining an appropriate plea to offer an alleged perpetrator. This would also assist the state attorney in determining whether to bring a case to the grand jury.

Child abuse cases typically involve psychiatric or psychological evaluation and treatment of child abuse victims. Counselors, therapists, psychologists, psychiatrists and the like should have access to the videotaped interview of the child abuse victim for purposes of assisting in

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9. Legal representation in dependency cases is provided to the state under various arrangements depending on the particular district of HRS throughout the state of Florida. In some districts the state attorney's office provides representation at contested adjudicatory hearings only, and HRS contracts with its own attorney for representation at contested review hearings. In some instances, HRS provides its own attorneys in both phases.

their evaluations and treatment plans. Training and educational uses of videotaped collective investigatory interviews would also be beneficial in teaching techniques for interviewing child abuse victims although use for this purpose would be limited by confidentiality restrictions.<sup>10</sup>

## II. The Mechanics of the Videotaped Interview

All involved agencies should be consulted and agreement sought as to the uniform procedures to be used in videotaping collective investigatory interviews of child abuse victims. Additionally, agreement should be sought so that wherever possible repeated individual interviews of the child abuse victim will be minimized and participation in a collective investigatory interview will be encouraged. This typically will occur after a child has been removed to shelter care. This collective investigatory interview, however, is not intended to eliminate or replace the initial crisis interview.<sup>11</sup>

Physically, the room for such a collective investigatory interview should be conveniently accessible for all involved and decorated to create a comfortable non-threatening atmosphere for young children. Anatomically correct dolls should be available as well as other accepted interviewing aids. The decor should be that of a child's playroom. Cameras and microphones should not be visible or identifiable by the child. A one-way mirror should be provided so that the child does not observe any activity other than that within the video room. Immediately in front of the one-way mirror outside the video room, a desk or table-like area should be constructed for comfortable note-taking by observers and participants. A loudspeaker and microphones should be located nearby this table area.

A neutral non-threatening person with whom the child is most likely to feel at ease should be designated to pose questions to the child directly. This neutral person may be the child's therapist, guardian ad litem or some similar individual. When possible, questions should be written in advance and provided to the neutral questioner. As the neutral questioner poses questions, involved parties should have the opportunity to ask additional and follow-up questions. This is accomplished by communicating with the neutral questioner through headphones au-

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10. FLA. STAT. § 415.51(1)(a) (1983).

11. FLA. STAT. § 415.505(a)(a) (1983) (requiring HRS to commence a child protective investigation within 24 hours of receipt of a report of child abuse or neglect).

dible only to the neutral questioner.<sup>12</sup> It is recommended that there be two exit doors to avoid the child seeing the great number of people participating in the interview.

Special care must be given to the skill of the camera operator, the quality of the camera, the film itself, and appropriate lighting. Consideration must also be given whether to videotape in color or black and white, and with one camera or several so as to be able to project all images at once to the viewer, using a split screen technique.<sup>13</sup> The important concern, of course, is whether the tape ultimately gives an accurate representation of what actually occurs at the interview.<sup>14</sup>

Sites which should be considered for such a videotape room include a local sexual assault treatment center, child protection team offices, state attorney's offices, the local courthouse, a court reporter's office, HRS offices and local law enforcement offices. In order to truly realize the benefit of videotaping collective investigatory interviews of child abuse victims, it is imperative that participants have the ability to view the videotaped product as conveniently as possible. Accordingly, videotape viewing facilities should be provided by all agencies involved in child abuse investigations. Moreover, it may be necessary to make several copies of the videotaped collective interview to maximize its use.

It should be emphasized that videotaped investigatory interviews will, in all likelihood, not be admissible evidence at the criminal trial of the perpetrator and probably not at the adjudicatory stage of a dependency proceeding because they would be subject to a hearsay objection.<sup>15</sup> The videotape of the collective investigatory interview may, how-

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12. In the case of *U.S. v. Benfield*, 593 F.2d 815 (8th Cir. 1979), the defendant was excluded from the room while a deposition took place. However, he was able to observe the proceedings on a monitor and halt the questioning by sounding a buzzer at which time the deposition would be interrupted and his counsel would leave the room to confer with the defendant. In that particular case the court held that the scheme was constitutionally infirm considering the purpose for which the deposition was utilized. *Id.*

13. See *Dee, Videotape as a Tool in the Florida Legal Process*, 5 NOVA L.J. 243, 246 (1981) (citing Vermont Chapel, Crockett, Jacobovitch, & McGuire, *Juror Responses to Pre-recorded Videotape Trial Presentations in California and Ohio*, 26 HASTINGS L.J. 975, 984 (1975)).

14. The accepted test today regarding the type of equipment acceptable by the court is whether the tape gives an accurate representation of what actually occurred. *Paramore v. Florida*, 229 So. 2d 855, 859 (Fla. 1969).

15. Video tapes of collective or investigatory interviews as suggested in this article would be subject to hearsay objection under FLA. STAT. §§ 90.801-02 (1983).

ever, be used for the purposes discussed in Part I of this article.<sup>16</sup> When utilized as such there is no requirement that the alleged perpetrator be present or even notified that a collective investigatory interview is being undertaken or videotaped. In this sense the child abuse victim is merely a witness, albeit with special needs. The collective investigatory interview is akin to taking a statement of a witness under oath. Accordingly, there are no constitutional barriers at this phase of the process such as the accused perpetrator's right to confrontation.<sup>17</sup>

### III. Procedural Hurdles in the Use of Videotaped Interviews

The use of videotapes in child abuse cases can be expanded beyond those discussed in this article. Use of videotape as evidence in the court room is not new to Florida. However with such expanded use of videotape as evidence in these cases comes additional procedural hurdles. In dependency cases, a discovery deposition of a child abuse victim is permitted and all parties of record in the proceeding must be duly noticed and permitted to attend.<sup>18</sup> If the alleged abuser is a natural parent or legal guardian of the child abuse victim and therefore a party in interest in the dependency case, the issue arises as to whether the alleged abuser must have the opportunity to be present and cross-examine the child abuse victim at a discovery deposition in a dependency case. Although there are no specific Florida cases addressing the right of the alleged perpetrator-parent or legal guardian to be present at a discovery deposition related to a dependency case, it has been held that the alleged abuser need not be present at a discovery deposition in a child abuse criminal case so long as the child will be available for trial.<sup>19</sup> Defendant's counsel however, should have the opportunity to attend the deposition and cross-examine the child abuse victim. In any event, duly noticed discovery depositions in dependency cases are available for use

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16. See *supra* text accompanying notes 2-6. There is no statutory, constitutional or case law prohibition against the collective investigatory interview being conducted as suggested herein, assuming it is used for the specific purposes described.

17. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right. . .to be confronted with witnesses against him. . . ."

18. FLA. R. JUV. P. 8.070(d)(2)(i): "The party taking the deposition shall give written notice to each other party. The notice shall state the time and place the deposition is to be taken and the name of each person to be examined." *Id.*

19. *State v. Dolen*, 390 So. 2d 407 (Fla. 5th Dist. Ct. App. 1980); See FLA. R. CRIM. P. 3.220

at trial for purposes of impeaching the child abuse victim.<sup>20</sup>

Additionally, in dependency cases, a discovery deposition may be utilized in limited circumstances at trial in lieu of live testimony.<sup>21</sup> The Florida Rules of Juvenile Procedure provide in pertinent part the following:

(3) Any deposition taken pursuant hereto may be used at any hearing covered by these rules by a party for the following purposes; . . .

(ii) In dependency proceedings for testimonial evidence when the deponent, whether or not a party, is unavailable to testify because: . . .

(d) He is unable to attend or testify because of his age, illness, infirmity, or imprisonment.

(e) It has been shown on application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice, and with due regard to the importance of presenting the testimony of witnesses orally in open court to allow the deposition to be used.<sup>22</sup>

The argument can be made that pursuant to Rule 8.070(d)(3)(ii)(d), Florida Rules of Juvenile Procedure, a child abuse victim is unable to attend or testify at a dependency proceeding because of his or her age. Neither the rule nor the committee note specifies whether old age or youth is intended as the basis for the inability to attend or testify. Thus, this rule could be interpreted as including a child abuse victim being unable to testify because of his young age. The court would then be required to make a specific finding that the child is unable to attend or testify.

Further, pursuant to Rule 8.070(d)(3)(ii)(e), Florida Rules of Juvenile Procedure, it can be argued "exceptional circumstances exist as to make it desirable in the interest of justice"<sup>23</sup> to present the testimony of a child abuse victim by videotape deposition. The alleged perpetrator, assuming he or she is the parent or natural guardian of the child abuse victim, would have to be given the opportunity to be present at

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20. FLA. R. JUV. P. 8.070(d)(3)(i): "Any deposition taken pursuant hereto may be used at any hearing covered by these rules by any party for the following purposes:

(1) For the purpose of impeaching the testimony of the deponent as a witness. . . ." *Id.*

21. FLA. R. JUV. P. 8.070(d)(3).

22. *Id.* (emphasis added).

23. *Id.*

such a deposition face-to-face with the child victim with the opportunity to cross examine, since the child would not be available at trial.<sup>24</sup> In criminal cases, depositions of child abuse victims for the most part are treated and entitled to be used as other depositions in criminal cases. Moreover, the defendant is entitled to be present, face-to-face with the witness, and to have an opportunity to cross-examine.<sup>25</sup>

Recognizing the unique sensitivity of the child abuse victim witness, the Florida Legislature has attempted to balance the needs of such children for special protection against the rights of defendants.<sup>26</sup> Florida law currently permits the use of videotaped testimony of child abuse victims in lieu of the child's live testimony in open court in the prosecution of sexual battery and aggravated child abuse cases.<sup>27</sup> The statute provides that, upon application to the court and reasonable notice to the defendant, the state may apply for an order to videotape, out of open court, the testimony of certain children who have been the victims of sexual batteries or aggravated child abuse.<sup>28</sup> The court is required to make certain findings, including that the child is eleven years of age or younger and that there is a substantial likelihood that the child will suffer severe emotional or mental strain if required to testify

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24. State v. Dolen, 390 So. 2d at 407.

25. U.S. v. Benfield, 593 F.2d 815 (8th Cir. 1979); FLA. R. CRIM. PR. 3.180; Simmons v. State, 344 So. 2d 265 (Fla. 3d Dist. Ct. App. 1976).

26. FLA. STAT. § 918.17 (1983), provides the following:

(1) Upon application to the court and reasonable notice to defendant, the state may apply for an order to videotape out of open court the testimony of a child eleven (11) years of age or younger who has been the victim of a sexual battery under § 794.011, or to videotape the testimony of a child 11 years of age or under, who has been the victim of aggravated child abuse under § 827.03 or child abuse under § 827.04. The court may grant an order to videotape testimony as provided here only if it finds that:

(a) The victim of the offense is a child eleven (11) years of age or younger; and

(b) There is a substantial likelihood that such child will suffer severe emotional or mental strain if required to testify in open court.

(2) The trial judge shall preside at such proceeding and shall rule on all questions as if at trial.

(3) The application referred to in Subsection (1) shall be made prior to trial, and the videotaping of the testimony shall be made only after the trial has commenced. The videotaped testimony shall be admissible as evidence in the trial of the cause.

*Id.*

27. FLA. STAT. § 918.17(1) (1983).

28. *Id.*

in open court.<sup>29</sup> Moreover, the application by the state to videotape the child's testimony must be made prior to trial, but the actual videotaping of the testimony is not permitted to take place until after the trial has commenced.<sup>30</sup> The trial judge must preside at the videotaping proceeding and rule on all questions as if at trial.<sup>31</sup> As a practical matter it is recommended that a videotape filming room be available in close proximity to the judge's chambers so as to facilitate full utilization of this statute.

There is no legal obstacle to videotaping collective investigatory interviews in child abuse cases and to do so has a great many beneficial uses. The use of videotaped depositions for discovery purposes and in lieu of live testimony at trial, however, requires much closer procedural scrutiny in order to assure that it will pass constitutional muster.

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29. FLA. STAT. § 918.17(1)(2)(b) (1983).

30. FLA. STAT. § 918.17(3) (1983).

31. FLA. STAT. § 918.17(2) (1983).