

ALASKA LEGISLATURE COMMITTEE FILES 1987-1988 8672

5344 SJUD HB 322 - HB 323

9/6

RMBCAACCABCA

CHAPTER 11.

11.01	.530, .532, .534,	.375, .378, .381,
	.536, .538, .540	.384
11.02	.530, .532, .534,	.375, .378, .381,
	.536, .538, .540	.384
11.03	.544, .548	.393
11.04	.554, .556, .558	N
11.05	.550, .552	.396, .402
11.06	.560	.405
11.07	.562	.408, .411, .414

CHAPTER 12.

12.01	.566	.435
12.02	.568, .570, .572	.438, .441, .444

CHAPTER 13.

13.02	.574	.417 - .432
		.447 - .462
13.20	.544, .575	N
13.21	.576	N
13.22	.576, .578,	N
13.23	.576,	N
13.24	.576	N
13.25	.578	N
13.28	.578	.423, .453
13.30	.580	.426, .456
13.31	.580	.426, .456

CHAPTER 14.

14.01	.605	.465, .474, .477
14.02	.605	.465, .474, .477
14.03	.608, .618	.468, .474, .480
		.483, .489(3)
14.04	.610, .613	.492 - .504, .507
14.05	.615, .648, .660,	.486, .489, .555
	.665, .668, .670	.558, .561, .564,
	.678	.570, .594
14.06	.648, .653	.555, .558, .579
14.07	.648, .653, .675	.555, .558, .579
14.20	.633	.519
14.21	.633	.519
14.23	.633	.519

RMBCAACCABCA

14.30	.628, .635	.540, .543, .552, .519
14.31	.635, .638, .640 .650	.519, .534, .573, .579, .582, .585
14.32	.643	.576, .567
14.33	.645, .653	.537, .546, .549 .579
14.40	.653, .668	.579

CHAPTER 15.

15.01	.705, .718, .728, .730, .733	.597, .600, .612, .615, .618, .621
15.02	.710, .715	.693, .696
15.04	.713, .738	.690, .657
15.05	.735, .740	.624, .603
15.06	.720, .723, .725	.606, .607, .609
15.07	.753	.627
15.08	.758, .760	.633, .635
15.10	.763	.639
15.20	.778, .780, .785, .788	.660, .663, .669, .672
15.30	.743	.675
15.31	.745, .748, .750	.678, .681, .684

CHAPTER 16.

16.01	.430	.237 - .249
16.02	.430	.237 - .249
16.03	.430	.237 - .249
16.20	.433	N
16.21	.433	N
16.22	.805, .808, .811	.699, .702, .705

CHAPTER 17.

17.01	.955	.816
17.02	.955, .708	.316, .687
17.04	.963	N

PART III.

SOURCE CHART:

ORIGINS AND CORRESPONDING STATUTORY COVERAGE OF EACH SECTION
OF THE PROPOSED ALASKA CORPORATIONS CODE (ACC)

ACC ABCA MBCA GCL NBCL OTHER RMBCA

ARTICLE 1. CORPORATE PURPOSES AND POWERS

.005	P	X				X
.010	X	X				P
.015	P	P	P	P		X
.020			X			
.025			X			

ARTICLE 2. NAME AND SERVICE OF PROCESS

.105	X	X				X
.110	X	X				X
.115	X	X				X
.120	X	X				X
.125	X	X				X
.130	X	X				P
.135	X	X				X
.140	X	X				X
.145	X	X				X
.150	X	X				X
.155	X					
.160	X					
.165	X	X				X
.170	X	X				P
.175	X	X			ORE	P

ARTICLE 3. FORMATION OF CORPORATIONS

.205	X					
.208	X	X	X			
.210	X	X	X		DEL	
.213	X	X				
.215	X	X				
.218	X	X				P
.220	X	X				P
.223	X	X				X
.225			X		DEL	X
.228			X		DEL	P
.230			X			P
.233			X			

ARTICLE 4. CORPORATE FINANCE

.305	X	X	X			X
.308	X	X				X
.310	X	X				P
.313	X	X				P
.315	X	X				P
.318	X	X				P
.320	X	X				P
.323	X	X				P
.325			X			P

ACC	ABC A	MBCA	GCL	NBCL	OTHER	RMBCA
.328	X	X				X
.330	X	X				X
.333	X	X				X
.335	X	X				X
.338	X	X				X
.340	X	X				X
.343		X				P
.345	X	X				P
.348	X	X				P
.350	X	X				P
.353	X	X				
.355	X	X				X
.358			X			P
.360			X			P
.363			X			P
.365			X			P
.368			X			
.370			X			
.373	X	X				X
.375	X					X
.378			X			P
.380			X			
.383			X			
.385			X			P
.388			X			X
.390	X					

ARTICLE 5. MEETINGS OF SHAREHOLDERS

.405		X	P			P
.408		P				X
.410	X	X				X
.413	X	X				X
.415	X	X	P			X
.418			X			X
.420		X	P			P
.423	X	X	P			P
.425	X	X	P			P
.428		X				
.430	X	X				P
.433			X			P
.435		P		P		P
.438	X	X				X

ARTICLE 6. DIRECTORS AND OFFICERS

.450		X				P
.453				P		P
.455		X				P
.458			X			
.460			X			P
.463			X			X
.465			X			P

ACC	ABCA	MBCA	GCL	NBCL	OTHER	RMBCA
.468		X				X
.470			X			X
.473	X	X				X
.475	X	X				X
.478			X			X
.480	X	X				X
.483			X	X		X
.485		X	X			
.488				P		
.490	X	X				X

ARTICLE 7. AMENDMENTS AND CHANGES

.502	X	X	X			X
.504	X	X	X			X
.506	X	X				P
.508			X			X
.510	X					
.512	X					X
.514	X	X				P
.515	X					P
.518	X					P
.520	X					P
.522		X				X
.524		X				X
.526		X				X

ARTICLE 8. ORGANIC CHANGE

.530	X	X				X
.532	X	X				X
.534	X	X				
.536	X	X				X
.538	X	X				X
.540	X	X				X
.542			X			
.544		X				P
.546	X	X				
.548	X	X				X
.550		X				X
.552	X	X				X
.554		X				X
.556		X				X
.558		X				X
.560		X				P
.562		X				X
.564	X					
.566		X				X
.568		X				P
.570	X	X				P
.572	X	X				P
.574	X	X				P
.576				X		X

ACC	ABCA	MBCA	GCL	NBCL	OTHER	RMBCA
.578				X		X
.580	X			X		P
.582		X				

ARTICLE 9. DISSOLUTION

.605	X		X			P
.608	X	X	X			X
.610	X	X	X			P
.613	X	X				P
.615			X			X
.618	X	X	X			P
.620			X			
.623	X	X				
.625	X	X				
.628			X			P
.630			X			
.633	X	X				P
.635	X				ORE	X
.638	X	X				
.640			X			P
.643	X	X	X			
.645			X			
.648			X			X
.650			X			P
.653			X			X
.655			X			
.658	X	X				
.660			X			P
.663			X			
.665			X			
.668			X			
.670			X			
.673			X			
.675			X			X
.678	X	X				X

ARTICLE 10. FOREIGN CORPORATIONS

.705	X	X				X
.708	X	X				X
.710	X	X				X
.713	X	X				X
.715	X					X
.718	X	X				X
.720	X	X				X
.723	X	X				X
.725	X	X				X
.728	X	X				X
.730	X	X				X
.733	X	X				X

ACC	ABCA	MBCA	GCL	NBCL	OTHER	RMBCA
.735	X	X				X
.738	X	X				P
.740	X	X				X
.743	X	X				P
.745	X	X				X
.748	X	X				X
.750	X	X				X
.753	X	X				X
.758	X	X				X
.760	X	X				X
.763	X	X				P
.765	X	X				
.768	X	X				
.770	X	X				
.773	X	X				
.775	X	X				
.778	X	X				X
.780	X	X				P
.783	X	X				
.785	X	X				X
.788	X	X				X

ARTICLE 11. REPORTS, FEES, AND PENALTIES

.805	X	X				P
.808	X	X				P
.811	X	X				X
.813	X					
.815	X	X				
.818	X	X				
.820	X	X				
.823	X	X				
.825	X	X				P
.828	X	X				P
.830	X	X				P
.833	X	X				P
.835	X	X				P
.838	X	X				P
.840	X	X				P
.843	X	X				P
.850	X	X				
.853	X	X				
.855	X	X				
.858	X	X				
.860	X					
.863	X	X				X
.865	X					
.868	X	X				P
.870	X					

ARTICLE 12. MISCELLANEOUS PROVISIONS

ACC	ABCA	MBCA	GCL	NBCL	OTHER	RMBCA
.905			X			
.910	P					X
.915	X	X				P
.920				X		X
.925	P	P		P		P
.930				X		
.935	X	X				X

ARTICLE 13. GENERAL PROVISIONS

.950	X	X				X
.953	X					
.955			P	P		X
.958			X			
.960	X					
.963				X		X
.965	X	X		P		X
.968			X			
.970			X			P
.990	P	P	P			P
.995	P					P

"X" indicates the presence of identical or functionally identical statutory language.

"P" indicates the presence of partial congruence between the ACC and the source code or the RMBCA. The "origin" and "comparison" discussion for each section of the ACC should be consulted in order to determine the differences.

ACC: CSSB 246/HB 343, The Alaska Corporations Code

ABCA: AS 10.05, The Alaska Business Corporations Act

MBCA: Model Business Corporations Act

GCL: California General Corporations Law

NBCL: New York Business Corporations Law

RMBCA: ABA 1984 Final Draft of the Revised Model Business Corporation Act

THE FOLLOWING DOCUMENT HAS
NOT BEEN FILMED BUT IS
AVAILABLE IN THE ORIGINAL
FILE

HOUSE AND SENATE JOINT
JOURNAL SUPPLEMENT

May 15, 1987

No. 9

April 10, 1987

Bill on the Alaska Corporations Code
HB 322/SB 306

"An Act revising the corporations code; amending Alaska Rules of Civil Procedure 4, 10, 11, 19, 20, 23.1, 24, 65, 73, and 82, Alaska Rules of Appellate Procedure 204 and 609, and Alaska Rule of Evidence 803(8); and providing for an effective date."

Identical text in both bills

Letter to Senator Bettye Fahrenkamp: Pages 1 - 9

Sectional Analysis: Pages 1 - 203

HB

323

APR 15 1938

HB 323 is scheduled for a hearing before the Senate Judiciary Committee on THURSDAY APRIL 14.

The enclosed material relates to your consideration of the bill. I would appreciate your consideration of the enclosed material prior to initiating committee action on the bill.

Thanks.

Jeffrey K. Day
10249 Tartan Circle
Anchorage, Alaska 99507
(907) 349-2614

April 12, 1988

Senator Jay Kerttula
Chairman
Senate Judiciary Committee
P.O. Box 4
Juneau, Alaska 99811

Dear Senator Kerttula:

Before the Judiciary Committee is HB 323 relating to testimony of children in court proceedings. Legal proceedings can be traumatic for all involved no matter what age. They are certainly very traumatic for a defendant who finds himself falsely accused of committing a crime. Among the purposes stated in this bill is one "to balance the need for the victim's or witness's testimony against the right of the defendant to confront witnesses." While the goals of this bill may be admirable, I believe the bill skews that balance away from a defendant and has the likelihood of denying a defendant a fair trial. I urge that you oppose the bill on several grounds.

Both the state and U.S. constitutions guarantee that, in all criminal prosecutions, the accused shall have the right to be confronted with witnesses against him. The bill before you calls for the use of closed circuit tv so that a child witness would never have to physically confront a person that child is testifying against.

A June 1985 Minnesota Law Review article discussed the issue of children's testimony. In the article, the issue this committee faces with HB 323 was clearly articulated.

"The state's protective concern for the child's well being, however, conflicts with the state's need to provide reliability in the criminal process. Although the state seeks to shelter the child from the psychological trauma associated with prosecution of the defendant, it requires that the victim's testimony be subjected to the traditional safeguards that assure the accuracy of the fact-finding process. The confrontation clause seeks to insure the accuracy of testimony by subjecting all witnesses to cross examination, jury scrutiny and an oath."

"The purpose of this right is to protect the integrity of the judicial system by ensuring that every defendant will be able to observe and actively participate in his or her defense."

"The Court recognized that these objectives are the fundamental purposes of confrontation:

(1) to insure that the witness will give his statements under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of perjury;

(2) forces the witness to submit to cross examination, the greatest legal engine ever invented for the discovery of truth;

(3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility."

I submit that HB 323 would result in denying achievement of those objectives. A face to face confrontation involves a substantial amount of non-verbal communication which can assist a jury in determining the credibility of a witness or guilt of a defendant. Not only would HB 323 deny the opportunity for a face to face confrontation, it would also allow for a defendant to view the child's testimony outside the jury's view as well. (Page 3 Lines 3-8)

In considering the constitutionality of a closed circuit or one way mirror testimony provision, it is useful to examine rulings which have resulted from video-taped testimony statutes. Similar constitutional issues have been raised. At least 28 states have adopted laws which allow a child's testimony to be given by video tape, thus generally avoiding the need to testify in open court. Most of those require a showing that a child will suffer severe mental or emotional harm if subjected to testifying in open court.

As stated by Assistant Public Advocate, Jay McCarthy, in a February 10, 1988 memo to Rep. Fran Ulmer, Alaska's videotaping statute, AS 12.45.047 has not been employed. It is considered unconstitutional by the State Department of Law as it would violate a defendant's right of confrontation.

A 1981 California Appeals court ruling held that a defendant's right to confrontation was abridged when he was seated so he could hear but not see a five year old girl in a sexual assault prosecution. While this ruling concerned video taping the testimony of the girl, that scenario would be the same in an Alaskan trial if HB 323 were in effect. The California court held that, if the courts did allow video taping in child sexual abuse cases, BOTH the defendant and the defense counsel must be allowed to confront and cross examine the alleged victim at the taping. (Minnesota Law Review, June 1985)

As a 1985 Harvard Law Review article stated:

"The emotional appeal (of video tape statutes) demands that they be closely scrutinized for possible infringements of a defendant's constitutional rights. Political passion often obscures the reality that as the offensiveness of the crime increases, so too do prosecutorial zeal, the ignominy of conviction and the need to guard against wrongful prosecution."

"Courts must also determine the constitutionality of statutes that deny the defendant a face to face encounter with the child during the videotaping session. Moreover, the use of video taped testimony may confer certain advantages on the prosecution that - independent of confrontation clause issues- implicate fundamental fairness and thus warrant scrutiny under the due process clause of the fourteenth amendment."

"Courts should not, of course, tolerate even marginal infringements of the defendant's basic rights in the absence of competing interests."

"Videotaping alters the nature of confrontation and renders it a marginally less effective defensive tool. Videotapes may not faithfully convey the witness's demeanor and may impede the jury's determination of credibility."

Such statutes in Texas and Kentucky have been constitutionally challenged on grounds that they violate confrontation rights of a defendant. As a 1987 House Research Report noted, at least one federal court of appeals has held, in a context other than child sexual abuse cases, the lack of a face to face encounter renders the use of videotaped testimony unconstitutional. HB 323 provisions would relate to ANY case in which a child would testify, not only abuse cases.

I suggest that the use of closed circuit tv or one way mirrors in the courtroom presents the same legal and constitutional problems. Closed circuit television statutes have also been struck down in other states as was noted by Dept. of Public Safety Deputy Commissioner Gayle Horetski in the 1987 House Research Report.

Those that have not been struck down are substantially different than the statute envisioned in HB 323. Both New York and California adopted laws in 1985 authorizing the use of two-way closed circuit tv. Both are intended to be used ONLY in extraordinary circumstances.

The New York law allows the procedure if by CLEAR AND CONVINCING evidence it is shown that the child witness will suffer severe mental or emotional harm. The procedure would apply to witnesses age 12 and under. California's law applies to children age 10 and younger. The proposal in HB 323 would apply to children under the age of 13. HB 323 does not impose any "clear and convincing" standards.

The New York law differs dramatically from the HB 323 proposal in that the New York law requires the image of both the jury and the defendant to be transmitted on a monitor the child can see.

The California law differs dramatically from the proposed HB 323 statute in that the California procedures can be used only when the impact of one of the following circumstances can be shown by clear and convincing evidence to be so substantial as to make the child unavailable as a witness unless closed circuit procedures are used:

That there have been threats of serious bodily injury to be inflicted upon a minor or family member, or of incarceration or deportation of the minor or a family member or of removal of the minor from the family or dissolution of the family, in order to prevent or dissuade the minor from attending or giving testimony at any trial or court proceeding or to prevent the minor from reporting the alleged sexual offense or from assisting in a criminal prosecution;

That there was use of a firearm or any other deadly weapon during the commission of the crime;

That there was infliction of great bodily injury upon the victim during the commission of the crime;

That conduct on the part of the defendant or defense counsel during the hearing or at trial renders the minor unable to continue his or her testimony.

In making a determination, the California law requires the court to consider the age of the minor, the relationship between the minor and the defendant, any handicap or disability of the minor and the nature of the acts charged. The mere refusal of a minor to testify is not sufficient evidence that the procedure should be employed. HB 323 as proposed is not nearly so specific.

Should you choose to consider the concept embodied in HB 323 I urge you to consider refining the following provisions.

AGE The proposed law would apply to children under the age of 13. It should be substantially lowered to apply to witnesses to whom potential trauma may be the greatest. Children communicate adequately at an early age and these provisions should not be raised except in rare circumstances if at all.

FACTORS In comparison with California law, the factors the court is to consider in making a determination whether to employ procedures are vague. First, I would suggest providing very specific factors to be considered as are listed in California law.

Second, if the factors listed on page 2 lines 6-12 remain as is, there should be a professional determination that testifying in open court will place an emotional or mental strain or an emotional or psychological injury upon the witness. A judge, guardian ad litem or lawyer is not trained to make that decision. Where the psychological or emotional state of a witness is concerned, a psychological evaluation should be mandated to assist the court in its determination. The results of that evaluation should be equally available to the prosecution and defense.

PERSONS IN ATTENDANCE Page 2 Lines 28-29 would allow a "person whose presence, in the opinion of the court, contributes to the well being of the child," to be present in the room with the child during the child's testimony.

I object to that provision. In open court, supportive persons can certainly attend in the audience. But, if the presence of a defendant is going to be denied, then the testimony should be elicited on a level playing field. Only the attorneys for either side should be in the room with the child. One would assume that the prosecutor would have established a close, positive relationship with the child in any event so the presence of another would not be necessary.

Further, without dwelling on the issue at this time, there is substantial literature on how children who are suggestable can be coached to elicit the answers desired by an interviewer or prosecutor. Quoting from a 1987 Washington Law Review article on child witness testimony:

"Research indicates that, to some extent, the younger the child, the greater the suggestability. There is a danger that an interviewer with a preconceived idea of what has happened will unwittingly impose this idea on the child, and suggest answers the interviewer expects. The presence of a third party, especially a person who has some interest in or bias toward certain answers, may put additional suggestive pressure on the child."

To provide the jury with all the facts necessary to determine guilt or innocence, a witness should remain as free of coaching, suggestion or pressure as possible. The elimination of confrontation between witness and defendant is bad enough. The denial of a fair trial is further jeopardized by allowing this additional person in the room who may exert substantial suggestive pressure on the witness.

WHO MAY QUESTION THE WITNESS? Page 3 Lines 1-2. What happens if a person chooses to defend him or herself?

ONE WAY MIRRORS Page 3 lines 14-22

The use of a one way mirror in the courtroom creates a similar constitutional issue and raises a host of other "fairness" issues. In a 1983 publication entitled "Intrafamilial Child Sexual Abuse Cases," prepared by the National Legal Resource Center for Child Advocacy and Protection and the American Bar Association, it was noted that:

"One commentator has proposed the creation of a special child courtroom which would allow the prosecutor, defense counsel and the judge to be present during the child's testimony while the defendant observed the questioning by means of a one way mirror. The defendant would be able to use a monitoring device to communicate with his attorney. Unfortunately, one court has held in a criminal child abuse case that the right to confront witnesses means the right to physical, face to face confrontation, thus making this type of innovation invalid."

The use of a one way mirror also poses prejudicial considerations. Simply the fact that this mirror is in place would imply that the defendant is a dangerous person or that there is some significant reason the witness is afraid of the defendant. That same argument can be made with use of video equipment. A jury is going to question why this procedure is being used and the jury will make some assumptions about a defendant that should not be allowed to play a part in a verdict. For example, great care is usually taken when a defendant is manacled to conceal those manacles from a jury for the express purpose of avoiding prejudice against a defendant. To go out of the way to accomodate a young witness will simply enhance a perception that a defendant must be guilty and deny a defendant a fair trial which should be based solely on the evidence of an alleged crime.

COST

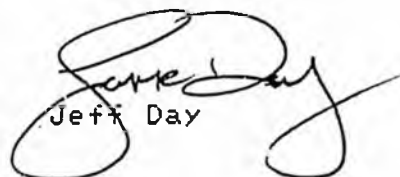
Finally, notwithstanding more serious concerns about this bill, it should be rejected because of the cost to implement the procedures involved and the difficulty inherent in providing the equipment and facilities throughout the state. The fiscal note predicts a \$153,200 cost to hire two full time technicians and equipment and to cover an estimated \$38,500 in air fare and freight costs.

In testimony before the House Judiciary Committee, Court administrator Art Snowden noted that many courts don't have the correct facilities to accomodate the equipment. He noted that each courthouse is different and each setup would be different. How will consistency be guaranteed under the proposed bill so that the equipment will always be used consistently to guarantee a fair trial in all settings?

The goal to reduce potential trauma to young witnesses is laudible, but the goal must not be achieved at the loss of constitutional rights. I suggest the area this bill and others seek to address is very complicated, especially in light of increasing literature regarding the growing number of false accusations of child abuse. The issue is one which needs a balanced approach and perspective. There are many issues regarding children as witnesses in alleged crimes that need to be studied and considered. I would urge this committee to take these issues up as a special focus during the interim rather than approaching it in piecemeal fashion as this bill and many others attempt to do. It is a subject worth considerable attention and well thought out action.

Thank you for consideration of these points. I would be happy to provide any of the documents to which I have referred in this letter upon request. I have included one brief article for your review.

Sincerely,



Jeff Day

TRIAL

*Family Law: Striving
to Calm the Waters*



Innocent Lies, Tragic Consequences

The Manipulation of Child Testimony

By Paul R. Lees-Haley

Surely everyone agrees on the desperate need to help abused children and on the need for vigorous child advocates. But in court, child advocates should not be confused with unbiased independent experts. Child advocates are fighting for the child, and some of them fight with a philosophy of "Damn the defendant, full speed ahead."

Zealous advocacy is for lawyers, not for objective interviewers and researchers. Preconceptions and interviewing styles that shape children's perceptions and reports are reckless and potentially vicious in their impact on persons entitled to due process and on the children themselves. Let us examine a few of these troublesome preconceptions—

Assumption: The methods now used by therapists to interview children are appropriate and sufficient for gathering evidence about alleged child abuse. For example, according to a report by the Child Sexual Abuse Clinical Consultation Group, in conjunction with the Sexual Assault Center, "An informed professional opinion about sexual abuse can be made by evaluation of the child. It is not necessary to interview the accused offender."¹

Paul R. Lees-Haley, Ph.D., is a psychologist and vocational expert practicing in Encino, California.

The author would like to thank Theodore Blau, Ph.D., and William McIver, Ph.D., for the original inspiration for this article. Neither is responsible for its contents or shortcomings.

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Assumption: Children need to be "helped" in special ways to talk about the crime. As James Stewart, Director of the National Institute of Justice, put it, "Innocent children are often reluctant to speak out against those upon whom they depend both emotionally and physically."²

Assumption: Children don't lie. Consider these quotes—

[It is] a maxim among child sexual abuse intervention counselors and investigators that children never fabricate the kinds of explicit sexual manipulations they divulge in complaints or interrogations.³

The child is the best and usually the only reliable reporter of the event(s). The accused individual has a strong motivation to lie.⁴

Very few children . . . have ever been found to exaggerate or to invent claims of sexual molestation.⁵

In other words, there is no reason to doubt a child's report of sexual assault.⁶

Some advocates actually go so far as to say that, unlike adults, whose eyewitness testimony is notoriously unreliable, children probably don't even make errors in their abuse reports: "It is unlikely that a child would lie or be mistaken" (emphasis added).⁷

Assumption: A "special" adult is needed to elicit the child's "true" views—not just any adult can do it. This special adult must be supportive and encouraging of the child and suspicious of adults, believing that the latter are good suspects even if they appear to be normal people.

One physician, for example, says that it is "countertherapeutic and unjust" to use therapists who will not suspect "apparently normal adults" or who are not believers in the possi-

bility of "unilateral sexual victimization" of children by such "apparently normal" adults.⁸

Assumption: Although the children need to be protected during these interviews, no one needs to worry about the needs and rights of the defendants who are alleged to be child abusers.

Some of those who have made these comments begin by reminding us that "when an offender is acquitted . . . it does not mean that the child was not abused." Then these commentators have the callousness to claim that "no binding consequence accrues to the adults who are involved as a result of a mental health opinion that a child is the victim of abuse."⁹

Has their zeal to prosecute blinded them to the consequences of false accusations of child abuse? Have they never noticed that, as *Women's Day*¹⁰ so aptly put it, "On the mere suspicion of mistreatment, social workers have the power to take your child away," with all of the concomitant emotional, social, and financial consequences? Is it "no binding consequence" to have one's career wrecked by false allegations of child abuse?

The Problem

These assumptions and the interviews that are inspired by them are dangerous weapons. If responsible professionals act on false assumptions, are the results any better than the work of irresponsible parties? This question must be addressed to the social workers, psychiatrists, psychologists, and police investigators who conduct these interviews. These groups do not lack confidence in their own importance and abilities. Even the least academically trained of the three licensed professional groups (social workers) tell us that "the values and generic skills of social work make it an obvious and competent profes-

SM

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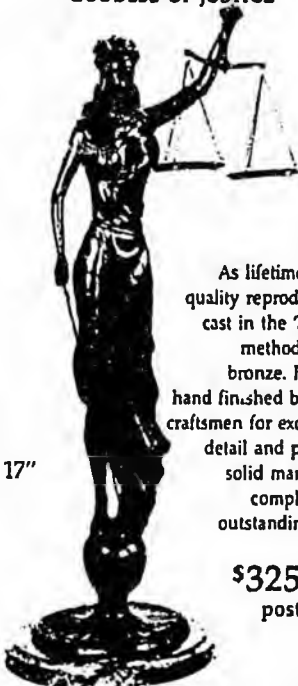
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sion to address the societal and individual problems of child sexual abuse."¹¹

Unqualified "authorities" sometimes jump to breathtaking conclusions: An Abt Associates consultant, writing in a publication of the U.S. Department of Justice, made the remarkable statement that "when a seven-year-old girl spontaneously asks her father . . . about details of erection and ejaculation, there can be little doubt that this child was sexually abused."¹² If that seven year old has been alone with only one male in the recent past, are we then to conclude that there is little doubt that he is guilty of child abuse? Are we also to assume without doubt that a little girl, in the United States, in 1988, has never seen animals mating in a zoo, or overheard a conversation about an X-rated movie, book, or magazine, or the topic of sex, and that she would not ask about such things if she had not been sexually abused?

In the same article the Abt Associates consultant cited, as evidence of the alarming frequency of child abuse, The National Center on Child Abuse and Neglect estimate that approximately 72,000 children were reported sexually maltreated by a parent or household member in 1983. What the same agency also found—and the consultant did not bother to mention—is that "over 65 percent of all reports of suspected child maltreatment proved to be unfounded."¹³

Is Big Bird a Criminal?

In a staged demonstration, interviews were conducted with two girls, ages five and seven, and one boy, age six. The interviewer used assumptions and practices that therapists are using throughout the country, but used the assumptions and practices deliberately to manipulate the children into testifying to patent nonsense. This investigator played the part of a therapist who:

--Has a "gut feeling" (clinical intuition) that the alleged perpetrator is guilty;

--Senses that the child wants to tell but is afraid, or has been told to keep the abuse secret, or finds it difficult to express because it was painful, or for other reasons is reluctant to tell, and therefore;

--Feels that the child needs support and encouragement to "open up"

about this painful topic and to express these hard-to-express truths; and

--Knows that children do not lie or make mistakes.

In these interviews, answers in the desired direction met with smiles and warmth and remarks like "good for you." Answers in the undesired direction were met with facial expressions of skepticism and disappointment, questioning looks, and frowns, along with a matching tone of voice and remarks such as, "It's OK to tell me," "Are you sure?" and "You're safe here." An effective way to induce alarm in a calm child is to say, "Don't worry, this won't hurt. You are safe here." The child has heard it before.

Readers who imagine that such practices are not occurring in real life are referred to McIver's¹⁴ videotaped interview between a child social service worker and a four-and-a-half-year-old child whose testimony led to the conviction of a 38-year-old man for molesting her. In this interview, the social worker led the child to say that the defendant had touched her genital area with his hands and mouth, by smiling and hugging her when she made such allegations and by being cold and nondemonstrative when she did not. McIver cited cases in which interviewers congratulated children for making desired allegations and became perturbed when they did not.

The point is not that therapists are trying to frame anyone. The point is scientific knowledge versus sloppiness: The actions of well-meaning, concerned therapists can lead a child to testify falsely. As McIver pointed out, these interviews are highly stressful experiences for a child, especially a very young one.

Prosecutors are well aware that the nonverbal behavior of adults influences what a child says. Some prosecutors deliberately manipulate nonverbal behavior toward obtaining convictions. In the courtroom, some stand between the defendant and the child during direct examination, so that the child cannot see the defendant. Others instruct children to look at a victim advocate or supportive family member and not to look at the defendant while testifying. According to Whitcomb, "One victim advocate encourages children to tell the judge if the defendant is making faces." How is a falsely accused child-abuse

defendant expected to look? Impartial? Unconcerned? Enthusiastic and supportive?

In the experiment with the three children, no attempt was made to ask reasonable questions or to use concepts and words that children understand. The point of this experiment was to demonstrate that a child's answers are often the result of the interviewer's behavior, not the child's experience. The interviewer paid rapt attention to the answers that he wanted and was inattentive to the wrong answers, which he suspected were innocent fibs inspired by the perpetrator's threats against the child. The findings below are flagrant examples of events that are happening in more subtle ways wherever children are being interviewed.

How Big Bird Was Framed

Each child was sworn in with the following oath, "Do you swear or affirm to tell the truth, the whole truth, and nothing but the truth, so help you God?" After a few minutes of chit chat, each child was presented with an anatomically incorrect paper doll—one with three heads, six arms, and four legs.

Only a few smiles and expectant looks were required to obtain the agreement of both the seven year old and the six year old that their fathers had touched all six of their hands, all four of their feet, and all three of their heads. The five year old, a more independent thinker, flatly denied that her father had ever touched her anywhere at all, in her entire life.

All three children gleefully agreed that Big Bird had repeatedly "behaved in a lewd and lascivious manner" in their presence. Big Bird "presented his genitalia in a lascivious manner" to the five year old and the six year old on Saturn, Mars, and Venus. The seven year old maintained that even though Big Bird did this on earth, he never did it on another planet. Sensing the interviewer's disappointment, however, she volunteered that her dog may have done so.

The five and six year old agreed that psychotic psychosexual hermaphroditism was probably the basis for Big Bird's behavior, but when the seven year old was offered this explanation, she ventured, "I don't think so." She found more plausible the theory that it might be fractured yel-

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low feathers or bird measles that caused this outburst of pathological exhibitionism. She also agreed that it could be related to the North Alabama intergalactic religious wars of 1986.

A typical example of one factor that controlled answers in these interviews is the responses the children made to questions about the running speed of "diddle-dees" versus "kubunga kubungas." The children consistently agreed that a diddle-dee (spoken quickly in a higher pitch with a smile) can run faster than a kubun-

ga kubunga (spoken in a low pitch with a slow, ponderous tone and a frown).

It is extremely significant and typical that the children answered "yes" or "no" or the equivalent of "I think so," and *not* "I don't know," when asked completely incomprehensible questions. Beginning in kindergarten, children are taught that questions have answers and that they are supposed to know the answers.¹⁵ In other words, when asked ludicrous questions in terms that they had never heard, the children *guessed*. Children

are not trying to be accurate scientists when they answer questions; they are trying to please adults.

Children's answers cannot only be influenced and slanted, they also can be turned around 180 degrees. In the experiment when an answer was not the desired one, a simple but powerful technique reversed the child's original answers. The interviewer—

—Frowned and looked hurt when the child answered.

—Tilted his head and assumed a stern, somewhat accusing look, while staring at the child's eyes.

—Asked, "Are you sure?"

—Continued staring in complete silence until the child responded.

—As the child began to reverse the answer, began to look relieved.

—Upon reversal, breathed a sigh of relief and smiled warmly.

This technique is effective in reversing answers. A typical example of the result is the reply of one of the girls in this study who had clearly said, "No" to a question, and then, after a moment of the reversal technique, said, "Ah, I mean . . . yes."

The Implications

What does a demonstration like this suggest? That Big Bird must be stopped? A scientific survey would have had adequate samples, controlled procedures, and peer review. This study involved merely three times the number of child witnesses most defendants get, with only as much peer review and control of procedures as is usual in a psychotherapist's office—none. No claim is made that this study has any scientific merits, but is it any less valid than what we are doing to alleged child abusers?

The average five year old cannot tell you his phone number, does not know what day of the week it is, and cannot accurately answer the question, "What is your address?" The average six year old does not know how many units make a dozen, does not know in which direction the sun sets, and cannot name the four seasons. Yet young children are considered to be sufficiently knowledgeable to take an oath and to testify on complex matters that can lead to imprisonment of an innocent defendant.

While this article was being written, it was discovered that a fifteen-year-old girl had been deceiving authorities for six months with fantasies about an

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international white slavery ring. The authorities included local, state, federal, and international experts with many years of experience. In a neighboring state, an eight year old testified as an eyewitness in a capital offense trial and, after the trial, admitted that she had fabricated her entire testimony. In another case, a nine year old had persuaded a four year old to frame her stepfather.

Memories are creations made by people, not videotapes of events. Once told, and then repeated—especially with adult encouragement—a child's fictitious memory becomes more believable to that child. The child can come to believe a new "memory." Children make human errors, they tell fibs, they are overwhelmed by adults, and they act out unconscious motivations. And then if their testimony is accepted in adult court, it becomes a powerful event in the life of the alleged offender.

All of us, having been children, should know that only an expert could believe that children—except, of course, George Washington—do not fib. And as Mark Twain so aptly observed, "George Washington evidently was a backward boy. He lacked skills common to every American child—he couldn't even tell a lie."

Action

The attorney whose client is falsely accused of child abuse can find experienced interviewers in every city who can demonstrate how easily children can be led to testify inaccurately. I recommend using a carefully selected, well-trained interviewer from a background like psychology, medicine, or early education for relevant experience and witness value. However, a bright attorney will not feel limited to these professions. For example, an absolutely spectacular person for demonstration purposes would be a magician with a great deal of experience performing before children. Try it, and see for yourself—and for your client. ■

Notes

1. CHILD SEXUAL ABUSE CLINICAL CONSULTATION GROUP, EVALUATIONS OF CHILDREN (1983) (Seattle, Washington, Harborview Medical Center).
2. Stewart, *Directors Notes*, NII REPORTS, May 1986.
3. Summit, *The Child Abuse Accommo-*

dation Syndrome, 7 CHILD ABUSE AND NEGLECT (1983).

4. CHILD SEXUAL ABUSE CLINICAL CONSULTATION GROUP, *supra* note 1, at 1.

5. Summit, *supra* note 3, at 190.

6. CHILD SEXUAL ABUSE CLINICAL CONSULTATION GROUP, *supra* note 1, at 2.

7. *Id.*

8. Summit, *supra* note 3, at 190.

9. CHILD SEXUAL ABUSE CLINICAL CONSULTATION GROUP, *supra* note 1, at 1.

10. Joyner, *False Accusations of Child Abuse—Could It Happen to You?* WOMEN'S DAY, May 6, 1986, at 30.

11. Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125 (1984).

12. Whitcomb, *Prosecuting Child Sexual Abuse—New Approaches*, NAT'L INST. JUST. REP. (May 1986).

13. Joyner, *supra* note 10, at 30.

14. McIver, *The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation*, THE CHAMPION, Jan.-Feb. 1986, at 11.

15. Blau, *The Credibility of the Child Witness in Sexual Abuse Cases: Workshop for the Expert Witness* (presentation at the Second Annual Symposium of the American College of Forensic Psychology, Sanibel Island, Florida, 1986).

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THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

CSHB 323 (Jud)

CSHB 323 (Jud) INDEX

1. Sectional Analysis
2. Fiscal Notes
3. Position Paper
4. Information & research material

SECTIONAL ANALYSIS

SECTION 1: States the purpose of the act when providing alternative methods for taking testimony from children in certain criminal proceedings. The main purpose is to minimize a child's trauma or emotional stress when facing the defendant in a criminal proceeding under AS 11.41, particularly sexual abuse cases.

SECTION 2: Adds a new section to Title 12 (AS 12.45.046) regarding the testimony of children in criminal proceedings. In criminal proceedings involving the prosecution of an offense committed under AS 11.41 against a child under the age of 13, or witnessed by a child under the age of 13, the court

- (1) may appoint a guardian ad litem for the child;
- (2) on its own motion, the motion of the party presenting the witness or the guardian ad litem may order the testimony of the child be taken by closed circuit television or through one way mirrors if the court determines the child's testimony would result in the child's inability to effectively communicate.

When making a determination whether or not to use closed circuit television testimony, the court must consider relevant factors including

- (1) the age of the child;
- (2) the child's level of development;
- (3) the general physical health and any emotional, physical or psychological injury the child may have experienced; and
- (5) the mental or emotional strain caused by the child having to testify under normal court proceedings.

If the court decides to use closed circuit television, it may order that testimony be taken in a room other than the courtroom and be televised by closed circuit equipment to be viewed by the defendant, the court and the finder of fact in the proceeding. If the court authorizes the use of closed circuit television testimony, only the prosecuting attorney, the defendant's attorney and operators of the closed circuit equipment may be present when the child testifies. In addition, the court may allow a person whose presence contributes to the well being of the child to be in the room when the child testifies.

Only the court and counsel may question the child if closed circuit testimony is used. The persons operating equipment must do so in as unobtrusive manner as possible. The defendant, upon request, will be excused from the courtroom and have the ability to view the child's testimony in another location and have the means to communicate with the defense attorney throughout the proceedings. A recess will be permitted, upon request of the defendant's attorney or the defendant, to allow them to confer. During the questioning of the child, the court will provide a means of communications with the defendant's attorney. Objections made by the attorneys to questions imposed on the child may be resolved in the courtroom if the court finds it necessary.

The court may also authorize the use of one way mirrors while taking the child's testimony. The attorneys may question the child and have visual contact during the questioning but the mirrors will be placed in such a way that a shield is situated so the child does not have visual contact with the defendant.

In the event the court does not allow the use of closed circuit television or one way mirrors, it may supervise the spatial arrangements of the courtroom and the location, movement and deportment of all persons in attendance to safeguard the child from emotional harm or stress. The court may make other appropriate arrangements it deems necessary during the questioning of the child.

SECTION 3: A technical amendment that cross references in Title 44, the use of a guardian ad litem in proceedings under section 2 of the bill.

SECTION 4: Repeals two statutes, AS 12.45.047 and AS 12.45.048, that provided for videotaping of testimony and the exclusion of the public during testimony of young victims of sexual abuse.

SECTION 5: Makes section two retroactive and applies in criminal proceedings involving the prosecution of an offense committed before the effective date of this bill.

SECTION 6: Provides the bill takes effect immediately.

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: "An Act relating to testimony of children in certain criminal proceedings..."
Sponsor: House Judiciary
Requestor: Representative Swackhammer

Agency Affected: Department of Law
BRU: Prosecution
Components: First, Second, Third, and Fourth Judicial Districts

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	82.2	82.2	82.2	82.2	82.2
SUPPLIES						
EQUIPMENT	-0-	58.6	-0-	-0-	-0-	-0-
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	140.8	82.2	82.2	82.2	82.2

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	140.8	82.2	82.2	82.2	82.2
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Richard I. Pegues

Prepared by: Richard I. Pegues, Director
Division: Administrative Services

Phone: 465-3672
Date: March 15, 1988

Approved by Commissioner: Grace Berg Schaible, Atty. Gen.
Agency: Department of Law

Date: March 15, 1988

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CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 323 (Jud.)

This bill adds new sections to AS 12.45 that provide for alternative methods for taking the testimony of a child in certain criminal proceedings (AS 11.41) in which that child was the victim or is to be a witness. The bill provides that closed circuit television, one-way mirrors or other spatial arrangements may be used in these proceedings so that a child's testimony may be viewed by the defendant, the court, and the finder of fact, but which also provides that the child does not have visual contact with the defendant and jurors.

The Department of Law believes that alternative methods for taking the testimony of a child, in those cases where normal court procedures would result in the child's inability to reasonably communicate, can be accomplished in three ways. One, closed circuit television would be used routinely at Anchorage, Fairbanks, and Juneau, when isolation of the child is required. If necessary, a modified closed circuit televised method would be used only occasionally at other locations. Two, a one-way mirror or perforated one-way screen method could be used routinely at most other locations when isolation of the child witness from the defendant or jurors is required. Three, use of child-size furniture for the child witness would be appropriate at all locations when it becomes necessary to schedule the proceeding in a room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to the child's developmental age.

Use of closed circuit television at Anchorage, Fairbanks and Juneau would be contracted out to private vendors. Video/audio communications from the victim/witness to the defendant, the court and the trier of fact would be required. Private audio communication between the defendant and the defendant's counsel would also be required. The department estimates that about four hours of testimony will occur at each pretrial or trial proceeding. The department also estimates that a total of two hours of setup/takedown time will also be required for each proceeding, including vendor's chargeable travel time. It is estimated that contracted costs for operator(s), audio/visual equipment, and cabling will be \$300 per hour, at these three locations.

Occasional use of a modified audio/visual method at other locations, using video recordings of testimony, and involving rental of a video camcorder and monitors, is estimated to \$600 per year at each of the department's other locations. This cost is based upon three days rental, at \$200 per day, of one camcorder, defense audio equipment, and monitors at each location. Operation of the equipment would be handled by existing Department of Law paralegals.

Use of one-way mirrors or some other method that provides one-way sight so that the witness may be viewed by the defendant and the jurors, but which prevents the witness from viewing the defendant and

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 323 (Jud.)

the jurors, will require the manufacture or fabrication of freestanding (or attachable) portable, safe, and easily stored viewing/ screening devices. Thus far, the department has not been able to locate regularly manufactured devices of this nature. However, freestanding partitions providing a 96" x 96" "L" barrier, with two plexiglass 48" x 48" view areas retail for \$1,890. Substitution of a one-way mirror, or other device, would probably cost \$2,000 at a minimum. Devices of this type are not easily nor safely transported between locations by air carrier. For this reason, the cost for one-way screening devices at each of our district attorney office locations is included in this fiscal note request.

The cost of child furniture, at \$150 for a table and chair, is included for each location, except Anchorage costs are for three sets, and Fairbanks costs are for two sets.

During FY 1987, 346 child sexual assault cases were referred to the department. Of this number, 125 cases, or 36% of the total number of cases referred, were declined. It is estimated that about 40% of the declined cases, or 51 complaints, would have been accepted for prosecution had the alternative child testimony methods, contained in this bill, been available to prosecutors. Moreover, due to the obvious trauma experienced by some child witnesses, it would have been appropriate to use the bill's alternate testimony methods on twenty or more occasions in cases that were accepted for prosecution.

A schedule is attached that details the cost of contractual services and equipment that will be necessary for the department to implement this bill.

Fiscal Note Analysis CSHB 323 (Jud.)

Court Room Class Circuit/Screening
Criminal Division

---One-Time---

Office	Type	#cases	Screen Jury	Screen Defendant	Furniture	Rental/ Contractual	Annual cost	73000 Contractual	75000 Equipment
Juneau DAO	CC	6	2000	2000	150	10800	14950		
Ketchikan DAO	SC	2	2000	2000	150	600	4750		
Sitka DAO	SC	2	2000	2000	150	600	4750		
First Judicial:		10	6000	6000	450	12000	24450	12000	12450
Barrow DAO	SC	3	2000	2000	150	600	4750		
Kotzebue DAO	SC	1	2000	2000	150	600	4750		
Nome DAO	SC	2	2000	2000	150	600	4750		
Second Judicial:		6	6000	6000	450	1800	14250	1800	12450
Anchorage DAO	CC	24	2000	2000	450	43200	47650		
Bethel DAO	SC	3	2000	2000	150	600	4750		
Dillingham DAO	SC	2	2000	2000	150	600	4750		
Kenai DAO	SC	4	2000	2000	150	600	4750		
Kodiak DAO	SC	3	2000	2000	150	600	4750		
Palmer DAO	SC	5	2000	2000	150	600	4750		
Valdez DAO	SC	2	2000	2000	150	600	4750		
Third Judicial:		43	14000	14000	1350	46800	76150	46800	29350
Fairbanks DAO/4th	CC	12	2000	2000	300	21600	25900	21600	4300
Grand Total:		71	28000	28000	2550	82200	140750	92200	58550

CC = Closed circuit: 1800 Per case
 SC = Screen: 2000 One-Time
 Rental \$ 200 per day 600 based on three day average
 Furniture/set 150 Children size

FISCAL NOTE

REQUEST:

Revision Date: _____ Agency Affected: Public Safety
 Title: An Act relating to testimony of children in certain...proceedings... BRU: Council on Domestic Violence and Sexual Assault
 Sponsor: Swackhammer Components: _____
 Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Prepared by: Barbara Miklos, Executive Director Phone: 465-4356
 Division: Council on Domestic Violence and Sexual Assault Date: 3/9/88

Approved by Commissioner: David A. Hootchi, Dep. Comm. Date: 3-10-88
 Agency: Public Safety

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management and Budget
 - Impacted Agency(ies)

STATE OF ALASKA 1988 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: CSHB 323
 Publish Date:
 Agency Affected: Alaska Court System
 BRU: Trial Courts
 Components:

Revision Date: 03/14/88
 Title: An act relating to testimony
 of children in certain criminal cases
 Sponsor: Swackhammer
 Requestor:

EXPENDITURES/REVENUES:	(Thousands of Dollars)					
OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
Personal Services
Travel
Contractual
Supplies
Equipment
Land & Structures
Grants & Claims
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL

REVENUE

FUNDING:	(Thousands of Dollars)					
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	.	.	.	.	.	.
Other	.	.	.	.	.	.
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:						
Full-time	.	.	.	.	.	.
Part-time	.	.	.	.	.	.
Temporary	.	.	.	.	.	.

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact. See attached analysis.

Prepared by: *Jan Strandberg* General Counsel
 Division: Alaska Court System

Phone: 264-8228
 Date: 03/14/88

Approved by: *Stephanie Cole, for* Arthur H. Snowden, II, Administrative Director
 Agency: Alaska Court System

Date: 03/14/88

- Distribution (by preparer):
- Legislative Finance
 - Legislative Sponsor
 - Requestor
 - Office of Management & Budget
 - Impacted Agency(ies)
 - Senate Secretary

ALASKA COURT SYSTEM
CSHB 323 - FISCAL ANALYSIS

Because the video equipment and operators necessary to implement this bill are to be provided by the Department of Law, the court system's fiscal note for this committee substitute is zero.

BILL NO: CS for HB323 (Judiciary)

DATE:

March 15, 1988

TITLE: An Act relating to testimony of children in certain criminal proceedings; and providing for an effective date.

CONTACT:

Barbara Miklos
Executive Director
Council on Domestic
Violence and
Sexual Assault

DEPARTMENT OF
PUBLIC SAFETY

POSTMASTER /

CS for HB323 (Judiciary) has a very important purpose: to provide alternative methods for taking the testimony of child victims or witnesses in certain criminal proceedings. It is recognized that testifying in court can be very traumatic for a child unless modifications are made to current court procedures.

The 3/11/88 draft of this bill has addressed the concerns the Council on Domestic Violence and Sexual Assault had about earlier versions of this bill. Therefore, The Council on Domestic Violence and Sexual Assault supports CS for HB323 (Judiciary).



Arthur English
Commissioner

EVIDENTIARY AND PROCEDURAL TRENDS IN STATE LEGISLATION AND OTHER EMERGING LEGAL ISSUES IN CHILD SEXUAL ABUSE CASES

A paper by the
**National Legal Resource Center
for Child Advocacy and Protection**

**Child Sexual Abuse
Law Reform Project**



**American Bar Association
Young Lawyers Division
Washington, D.C. - April, 1985**

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Evidentiary and Procedural Trends in State
Legislation and Other Emerging
Legal Issues in Child Sexual Abuse Cases

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Project Director
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for Child Advocacy and Protection
American Bar Association

General Discussion of Trends

Since the early 1980's, a number of states have undertaken statutory reform efforts to improve the handling of child sexual abuse cases in the legal system. Legislative reform in a few areas had begun earlier, including a trend to abolish the corroboration requirement and to abolish competency tests for children.¹ For example, in 1981, a dozen states had eliminated competency qualifications of child witnesses; by 1985, almost half of the states had made this change, nearly twice the number of states in a four year period. The reasons motivating the recent reform movement seem to be the greater awareness and reports of child sexual abuse, the increasing number of cases being prosecuted and children who must be witnesses in court, and wide circulation of the ABA's Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases with a range of suggestions regarding state legislative action and other innovations in legal intervention. An additional reason for some of the reforms relates to changes in attitudes regarding children and their abilities.

The new legislation is designed to serve three basic purposes - to modify legal procedures to be more sensitive to child victims, to improve prosecution and conviction rates, and to provide treatment in special programs for the offender, child and family. The literature is replete with documentation by mental health clinicians, child welfare professionals, prosecutors, children's attorneys, and other legal experts that children suffer additional psychological harm by insensitive legal procedures.² Moreover, until recent years, criminal proceedings often were not initiated (particularly in incest cases) due to a variety of reasons, including lack of eyewitnesses or physical evidence and perceptions that children were not credible witnesses.³ Finally, since the 1970's a number of specialized incest treatment programs have developed around the country, some of which were funded for several years

by the National Center on Child Abuse and Neglect to provide training to professionals in other jurisdictions. These programs vary in terms of treatment philosophy and their involvement with the legal system. Although the effectiveness of programs that provide alternative dispositions for offenders and their families should be explored, this paper only deals with reforms to minimize trauma and improve prosecutions.

This paper will deal with two areas that have generated a significant amount of legislative activity -- special hearsay exceptions for complaints of sexual abuse by child victims and videotaping or closed-circuit television procedures for taking a child's testimony outside the courtroom. Legislative efforts in other areas, such as videotaped interviews, competency, expert testimony, civil protective orders or many other ideas outlined in the ABA's Recommendations are not examined here. There and other areas will be analyzed at the ABA's March, 1985 National Policy Conference on Legal Reforms in Child Sexual Abuse Cases and in the Conference report. Appendix A, however, contains a list of states that have adopted statutes in the following areas: videotaped testimony, closed-circuit television testimony, videotaped interviews, special hearsay exceptions, and abolishment of competency requirements.

As some researchers suggest, new research relating to children in the legal system would be helpful in a number of areas.⁴ These include the effects of pretrial investigation and the trial itself on the child's performance as a witness; determining what factors may make some children more vulnerable, e.g., age, type of abuse, relationship of child to perpetrator, threats, young age, sex; determining what aspects of the legal process (such as repeated pretrial questioning, delays, testifying in open court, or in front of the defendant) cause greatest trauma, inhibit reporting, or contribute to a child's retraction or refusal to testify; and what if any are the long term effects of legal intervention on children. Nevertheless, the experience of numerous professionals throughout the country who have frequent contact with children is sufficient to justify the recent legislative reform movement.

In 1981, the National Center on Child Abuse and Neglect (NCCAN) reported that the average age of a child victim of sexual abuse was between 11 and 14 years of age; however, it also was noted that more recent program information showed a higher percentage of children under age 12, and one program showed that 1/3 of the victims were under age six.⁵ Recent revelations about sexual abuse of pre-school age children in child care forces us to accept the fact that very young children are at risk. Further, it must now be acknowledged that in addition to parental sexual abuse, a significant amount of sexual abuse is committed by adults outside of the home.

These new problems also raise new legal concerns. In cases involving offenders who are not parents, such as teachers, day care providers, or babysitters, the criminal justice system is more likely to be involved than when the offender is a parent. Although more incest cases also are being prosecuted in many jurisdictions, a juvenile court child protection proceeding sometimes is the only legal intervention in an incest case. Even if criminal prosecution occurs in an incest case, a special program may exist for offenders who plead guilty, where they may obtain specialized treatment along with the child and family under a sentence of work-release or probation.⁶ The child in a non-incest case therefore probably has a greater chance of having to testify in a criminal proceeding, since more prosecutions and fewer guilty pleas are likely. Further, in cases with young victims, there may be greater problems in proving the abuse and greater trauma to the child.

Although one may accept the need to reform laws and legal procedures, the assumptions and purposes underlying proposals need to be examined, and the legal and practical consequences should be analyzed thoroughly before states adopt innovative approaches. It is wise to proceed with caution in order to protect against reversals of convictions by appeals courts based on a statute's unconstitutionality, to prevent backlash and failure of legislatures to enact reforms for fear they will be found unconstitutional by the judiciary, and to ensure that reforms are narrowly drawn to apply only in cases where it has been shown that a particular child would be injured by a particular legal procedure.

Generally speaking, therefore, a state may want to consider adopting a range of legislative alternatives that permit a court to "decide" on a case-by-case basis whether the state's legitimate concern for the well-being of the minor victim necessitates⁷ the use of a particular approach. As the U.S. Supreme Court stated in Globe Newspaper Co. v. Superior Court, a case-by-case determination "ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest."⁸ In addition to avoiding constitutional challenges, whether they involve the first amendment or the rights of a defendant in criminal trials, a statute that provides "a narrowly tailored means of accommodating the state's asserted interest"⁹ also assures that an approach is used only when clearly necessary. In Globe Newspaper, mandatory closure of the courtroom during the testimony of child sexual abuse victims in a criminal trial was held to be overly broad, since it would apply whether or not the victim sought to have closure and even if the victim would not suffer injury if the proceeding was open to the press or public.

Indeed, research and clinical evidence suggests that children, like adults, react differently to being victimized and react differently to the aftermath and the judicial process.¹⁰ In addition, mandating an approach for all children could be interpreted as degrading. Although efforts should be made to protect children, efforts also should be directed to treating them equally as adults, where appropriate. For example, reform laws abolishing competency requirements for children reflect such an attitude.

Another issue relating to the development of reforms for child sexual abuse victims is whether it might be wiser to enact them as part of a broader package of special procedures for any victim of crime who is shown to have specific vulnerabilities or who is likely to be psychologically harmed by particular legal procedures. On the one hand, concern for safeguarding the well-being of young victims may justify special treatment; on the other hand, many other potentially vulnerable populations, such as elderly persons, adult persons who have a history of psychiatric problems, or adult persons who were victimized in an extremely traumatic crime also may deserve special procedures to reduce the trauma they experience in the criminal justice system.

Although it might be better for states to develop a comprehensive legislative scheme for all vulnerable crime victims, this approach seems unlikely to happen. First, legislatures tend to deal with single issues and to consider laws that address a specific current problem. Second, it seems improbable that the reforms proposed in child sexual abuse cases could be justified for a much larger category of all vulnerable crime victims. Still, the idea of developing special procedures by statute only for young victims may lead other groups to lobby for similar reforms.

Moreover, perhaps a more significant issue for research involves the need to study and compare the effects of victimization and legal intervention on a variety of crime victims. One risk with establishing special approaches for child witnesses without procedures available for other witnesses is that a social policy of special treatment for a particular group necessarily excludes other potentially eligible groups in society. If children do not suffer greater harm than certain other crime victims, or if other criminal cases are equally difficult to prove, it seems unwise to develop approaches solely for children. Thus, for example, in the area of special hearsay exceptions, it may be questioned whether initial statements of young victims should receive special evidentiary status more than statements of other victims in cases which are difficult to prove.

A final suggestion for future development of innovations is to consider limiting their use to young victims, such as children under ten years of age. Many statutes that provide for testimony by videotape or television cover children up to 16, 17 or 18 years of age.¹¹ This would eliminate a lot of children who may be traumatized, but it may be one method of ensuring that special approaches are used only in the most serious cases or extraordinary circumstances.

State Legislation Creating a Special Hearsay Exception for a Child's Complaint of Sexual Abuse

One evidentiary reform attracting attention by state legislatures is the creation of a special exception to the hearsay rule to permit a child victim's complaint of sexual abuse to be admitted into evidence. Traditionally, such a statement is hearsay and may not be admitted to prove the truth of the assertion unless it falls within an existing hearsay exception. State codes include a variety of exceptions for admitting these statements, including the following: (1) excited utterances or res gestae; (2) statements to physicians; (3) statements of present bodily feelings or symptoms or present sense impressions; (4) necessity exception; (5) prior consistent statements (if the child is available to testify); and (6) residual exception.¹² A child's prompt complaint also may be admitted not as proof of the truth of the statements but to corroborate the child's in-court testimony to rebut an inference of silence inconsistent with the abusive act.¹³ Nevertheless, some states have not adopted all the above exceptions¹⁴, and even with a range of traditional exceptions, a child's statement may not meet the strict requirements of a particular exception.

Because of the need for such statements as evidence, since direct evidence or other circumstantial evidence may be minimal, and because a statement may not fit within an existing exception, ten states have adopted by statute a special hearsay exception. (See Appendix A for list of States). Although the language and organization of the provisions vary, most statutes allow a child victim's statement to be admitted if: (1) either the child testifies or is found to be unavailable; and (2) the court finds the statement to be reliable. Illinois only allows such statements to corroborate the child's in-court testimony. Iowa allows statements to be admitted only in juvenile court child abuse adjudication proceedings and does not require unavailability or reliability.

Four statutes (Indiana, Minnesota, South Dakota, and Washington) require corroboration or other evidence of the act, in addition to requiring unavailability of the child and reliability of the

statement before the statement may be admitted. The purpose of requiring other evidence in addition to the statement when the child victim's testimony is not available is to prevent a conviction based upon evidence of the child's statement's alone. The appropriate statutory language should be that after a court finds both unavailability and reliability, and admits the statement into evidence, there may not be a conviction unless other evidence exists in addition to the child's statement. As discussed below, this may not be necessary, since a prosecution is unlikely to be commenced with only the child's statement. On the other hand, a state may want to include this requirement to ensure that defendants receive a fair trial.

Under the new exceptions, if the child testifies at trial, the prior statement can be admitted as substantive evidence; however, the child's testimony is sufficient to convict without the statement, and the statement merely serves to corroborate the in-court testimony. In cases where the child cannot testify, the necessity for these statements is much greater. Situations where the child may not be able to testify include cases involving extremely young victims (such as two or three-year olds) who may not be able to communicate or remember what happened to them, or other children who would be highly traumatized emotionally from testifying or intimidated by the defendant into not testifying.¹⁵ As noted above, the problem with these cases, is that if the child does not testify and the sole evidence is the victim's out-of-court statement, it is unlikely that the state would bring a case. But where circumstantial evidence in addition to the statement is available, a prosecutor could decide that there is sufficient evidence to convict the defendant beyond a reasonable doubt.

Despite the hope that these new exceptions bring toward increasing the number of prosecutions and convictions, in cases where the child does not testify and is not subject to cross-examination, admissibility of statements under the new exceptions may be jeopardized under the confrontation clause of the sixth amendment. The confrontation clause has been interpreted as a rule of preference for "face-to-face confrontation at trial," requiring the "personal presence of the witness at trial, enabling the trier to observe his demeanor as an aid in evaluating his credibility and making false accusation more unlikely because of the presence of the accused and the solemnity of the occasion."¹⁶ If, however, the declarant's live testimony in court cannot be obtained, principles of necessity and public policy have been invoked to admit some hearsay statements.¹⁷

It would be not enough, however, for the prosecutor simply not to call or produce the child victim to testify at trial. Indeed, the U.S. Supreme Court in the 1980 decision of Ohio v. Roberts held that to satisfy the confrontation clause, the "prosecution must

either produce, or demonstrate the unavailability, of the declarant whose statement it wishes to use against the defendant."¹⁸ Thus as noted earlier, if the child is available and testifies at trial, the statement may be admitted under a special exception as a prior consistent statement with no further inquiry. When the child is not produced as a witness, however, two requirements must be met under Ohio v. Roberts. In addition to unavailability the statement must possess indicia of reliability, which is discussed in greater detail later.

Most of the new hearsay exceptions require a showing of the declarant's unavailability before the statement may be admitted. Traditional categories of unavailability include death, absence, physical disability, mental infirmity or insanity, failure of memory, refusal to testify, privilege, or supervening disqualification.¹⁹ Unavailability of the witness at trial also is a requirement for admitting hearsay under certain traditional exceptions, including dying declarations, statements against interest, and former testimony. (Most exceptions allow hearsay to be admitted even if the declarant does not testify at trial).

There is, however, a higher standard of unavailability for constitutional purposes. The Supreme Court has addressed the issue only in the context of a declarant's absence from the jurisdiction, holding that the prosecution must make a "good faith effort" to obtain the presence of the witness at trial.²⁰ The Court also has indicated that the "lengths to which the prosecution must go to produce the witness is a question of reasonableness."²¹ Until the Supreme Court decides the issue, this is the only guide for courts in deciding what is a sufficient showing of unavailability to satisfy the confrontation clause.

In child sexual abuse cases, a child is likely to be unavailable under the categories of mental infirmity (psychological harm),²² failure of memory²³, refusal to testify (based on threats of harm to the child by the defendant)²⁴, and incompetency.²⁵ Courts also sometimes have established a special type of unavailability for very young child sexual abuse victims who cannot be meaningfully cross-examined although they are present at trial and take the witness stand.²⁶ Thus, prosecutors may be able to obtain admission of statements both in cases where the child does not take the witness stand at all, or where the child "freezes up" on the stand, and becomes unavailable because of failure of memory, inability to continue testifying, or inability to communicate. Showing unavailability, however, may not always be easy. One court held that the evidence established that the witnesses' mental, emotional, and physical condition rendered her ability to testify merely inconvenient and not relatively impossible.²⁷

One special exception statute in Indiana specifically defines unavailability of a child sexual abuse victim, providing that a child is unavailable if:

(i) A psychiatrist has certified that the child's participation in the trial would be a traumatic experience; (ii) a physician has certified that the child cannot participate in the trial for medical reasons; or (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

States that have adopted or are considering special exceptions should include definitions or refer to other sections of their code regarding unavailability.²⁸ How unavailability should be shown also should be specified, including the requirement of a hearing on the issue and the making of trial record. A hearing should be held, for example, on a child's incompetency if that is the basis of unavailability alleged by the prosecutor. Holding a hearing ensures factual support for the trial court's finding and for an appeals court to uphold the trial court's determination.

In one state, California, courts also have held that unavailability due to psychological harm can be established only by an expert, not a lay witness.²⁹ Thus, when seeking to admit statements when the child is alleged to be unavailable due to severe psychological harm from testifying, a mental health professional who has had direct experience with the child should testify to emotional problems of the child and that such problems would be seriously exacerbated by testifying in court. Indiana's statute is a good example of specifying a requirement for expert testimony, although California has added a category of unavailability that defines an expert as "a physician, surgeon, psychiatrist, licensed psychologist, licensed clinical social worker, or licensed marriage family or child counselor."³⁰

As noted previously, in order to protect an accused's constitutional right to confront witnesses, a second requirement also must be met before a child's statement may be admitted under the new exceptions. In Ohio v. Roberts, the U.S. Supreme Court indicated that after a witness is shown to be unavailable, a statement may be admitted only if it has "sufficient indicia of reliability"; such reliability "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."³¹ (emphasis added). This requirement means that a court may not admit a statement under a special exception unless the statement is shown to possess particularized guarantees of trustworthiness, since the statement would not fall within a "firmly rooted exception."

As with the showing of unavailability, factors showing trustworthiness may not be easy to establish. Indeed, it is preferable for prosecutors to seek admissibility of hearsay statements of child sexual abuse victims under one or more of the long-standing or accepted exceptions, as well as the new exception. A court would be likely to admit a statement under a traditional exception in order to avoid making particularized findings of trustworthiness. South Dakota's statute makes a statement admissible under the new exception only if it is not admissible under any other statute.

In seeking admissibility under the new exception, a prosecutor first should attempt to show that the statement satisfies one or more criteria cited in the U.S. Supreme Court's decision in Dutton v. Evans.³² The Dutton criteria are: (1) The statement contains no express assertion of past fact; (2) Cross-examination could not show the declarant's lack of knowledge; (3) The possibility of declarant's faulty recollection is remote; and (4) The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

Courts have held that all four Dutton factors need not be shown in order to admit a statement over confrontation objections, and in fact, if other factors indicate reliability, a statement may not be required to satisfy any of the elements.³³ Prosecutors also should marshal facts to satisfy criteria cited by other courts as indicating a statement's trustworthiness, including the following:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were spontaneous or directly responsive to questions;
- (5) the timing of the declaration;
- (6) the relationship of speaker and declarant;
- (7) the child's young age makes it unlikely the child fabricated where the statement represents a graphic account beyond the child's experience;
- (8) the nature and duration of abuse;
- (9) the relationship of declarant and defendant;
- (10) the statement has a "ring of verity" and terminology appropriate to the child's age;
- (11) the child was suffering pain or distress when making statement; and
- (12) extrinsic evidence exists to show defendant's opportunity to commit the act complained of in child's statement.³⁴

Alternative Approaches for Avoiding the Child Victim's Testimony in Open Court Where Necessary to Prevent Severe Emotional Trauma or When the Child is Otherwise Not Available as a Witness

The ABA Recommendations state the following regarding the testimony of child sexual abuse victims:

1.4.4. Child's Testimony

In criminal cases, a child sexual abuse victim should testify at preliminary hearings or grand jury proceedings only if needed. Where necessary to prevent trauma to the child, procedures should be developed to avoid the need for the child's testimony in open court in criminal and civil trials, taking into account any constitutional limitations.

Testifying in a formal courtroom at a criminal trial in front of the defendant, jury, judge and an audience of spectators, and being subjected to direct and cross-examination often is cited as one of the most intimidating and stressful aspects of the legal process for children.³⁵ Although such an experience also may be anxiety-producing for adults, adults generally have developed coping mechanisms to deal with such situations. Further, adults also have a general understanding of the purpose and operation of our legal system and should be better able to withstand and deal with a defense attorney's efforts to discredit their testimony.

The choice of alternatives for taking a child's testimony should depend upon the needs and problems of a particular child. For some children, testifying in front of the defendant may not be as traumatic as sitting on the witness stand in a formal courtroom with an audience full of strangers and the press or with the jury present. A videotaped deposition with the defendant present may be the proper mechanism for such a child. In juvenile court child protection cases, children may be interviewed in the judge's chambers (generally with the parent alleged to have committed the abuse present), providing a less formal setting in which the child may be examined and cross-examined. Other children may not be disturbed by testifying in the presence of the public or the jury, but terrified of facing the defendant. Still other children may only require an advocate, close friend or relative in order to feel less traumatized. Finally, some children may find testifying a helpful experience in dealing with the abuse and may not be traumatized at all.

For the above reasons, legislatures adopting innovative approaches should not mandate a particular approach for all child victims, such as excusing all children from testifying, closing the courtroom in all cases when a child testifies, or preventing the child from seeing the defendant in all cases during the child's testimony. Indeed, the U.S. Supreme Court in Globe Newspaper Co. v. Superior Court held that mandatory exclusion of the press during the testimony of a child sexual abuse victim was violative of the first amendment.

A number of states have enacted or are considering legislation allowing alternatives for taking the testimony of a child sexual abuse victim in order to prevent the child from having to testify in open court at trial, including testimony by videotape or closed-circuit television. Indeed, it is advisable for states to adopt legislation allowing the use of such alternatives. A California appeals court skirted the constitutional issues and disallowed the use of closed-circuit television for taking a child's trial testimony because specific authorization for such a procedure had not been granted by state statute, a necessity given the serious constitutional issues raised by the procedures.³⁶

Other courts, however, have allowed such alternatives without legislative authority, or at least have addressed the constitutional issue despite the absence of legislation.³⁷ For example, where no legislative authority existed, some courts have allowed a child sexual abuse victim to testify in court with the defendant hidden from the child's view, although others have held such a procedure to be violative of the defendant's right of confrontation.³⁸ Thus, although states should enact legislation authorizing various methods, prosecutors still should request a court to allow the use of videotaping, closed-circuit television, or other means where necessary to lessen the trauma of testifying even if their state has no statute.

Videotaped Testimony or Deposition

States seem to be most interested in statutes to allow videotaping of a child's testimony. In 1982, the ABA's Child Sexual Abuse Project found that four (4) states allowed videotaped testimony. By 1985, fourteen (14) states had statutes permitting videotaped trial or preliminary hearing testimony. (See Appendix A for states) Six (6) of the 14 statutes permit the videotape to be made or admitted into evidence at trial only if the court finds that the child's testimony in open court would cause severe emotional trauma.³⁹ Three (3) of these statutes allow either the videotape to be made or to be admitted at trial if the court

finds the child to be "medically unavailable" because testimony would cause emotional trauma, or otherwise "unavailable" as defined in a state's evidence code sections relating to the admissibility of hearsay or prior testimony.⁴⁰ The remaining statutes simply give the court discretion to order the making of the videotape. Thirteen (13) specifically allow cross-examination or questioning of the child by the defendant or his lawyer.

Twelve (12) statutes require the physical presence of the defendant in the room where the videotaping takes place; the statutes in Kentucky and Texas mandate that the defendant be hidden from the child's view, although the defendant must be able to see and hear the child. The age of the child varies by statute, although all provisions allow videotaping of children under 12 years of age.

Live Testimony of the Child by Closed-Circuit Television

Three (3) states, Kentucky, Louisiana, and Texas, have statutes permitting closed-circuit television of a child's testimony. (See Appendix A) During the trial, the child is questioned by the prosecutor and defense attorney (with a support person allowed to be present) in a room outside the courtroom, which is televised to the judge, jury and public in the courtroom. The defendant must be able to "observe and hear the testimony of the child in person," but the child may not see or hear the defendant. Only Louisiana conditions the use of this procedure "when justice so requires."

A bill in California, which has passed the state senate, proposes two-way television of the child's testimony, which may be utilized if psychological harm to the child from testimony in open court is shown. Under this bill, the child would be in a room outside the courtroom, and the judge, jury, defendant, and both attorneys would be in the courtroom. The child would be able to see the courtroom by television, and the people in the courtroom can see the child by television. The attorneys would question the child from the courtroom, and only a support person would be permitted with the child. This proposal thus differs from the other laws by allowing the child to see the courtroom and the jury, judge, public and defendant, but permits the questioning to occur by television rather than in the child's presence.

Potential Constitutional And Other Problems With Alternative Procedures for Taking a Child's Testimony

The above statutory alternatives may raise a number of constitutional violations, many of which are to be examined for the first time at the American Bar Association's National

Policy Conference on Legal Reforms in Child Sexual Abuse Cases or have been analyzed by various law journal articles.⁴¹ As noted earlier, careful consideration of those issues is advised in order to avoid reversals of convictions and to prevent retrials. Once a significant number of states have passed legislation dealing with an area of great concern to the public such as child sexual abuse, tremendous interest in following the trend should be tempered by evaluating the issue in terms of both its constitutionality as well as its practicality.

The constitutional issues raised by the new videotaping and closed-circuit television statutes include the defendant's right to a fair trial under the due process clause of the fourteenth amendment, the defendant's sixth amendment right to a public trial and to a trial by jury, the defendant's sixth amendment right to confront witnesses, and the public's (and press') first amendment right to attend criminal trials. Commentators have suggested that the defendant's jury trial right may be infringed, even if the videotaping is shown to the jury later, because it interferes with the jury's decisionmaking function by distorting or not fully conveying evidence, especially a witness' demeanor; it denies the jury's power at common law to question witnesses; and "it compromises the integrity of the court."⁴²

The defendant's right to a fair trial under the 14th amendment due process clause "traditionally has required judge and jury to be unbiased and evidence to be trustworthy."⁴³ The use of videotaping may prevent the jury from making an accurate and unbiased decision if the videotaping medium prejudicially alters or does not convey evidence. Moreover, the truth-eliciting aspects of the jury trial are removed when videotaping is used, enhancing the possibility of unfairness or perjury.⁴⁴

As with the jury trial right, the defendant's right to a public trial and the right of the press and public to attend criminal trials may be infringed even if the videotape is shown later to the public. Commentators have cited a number of reasons to support this contention, such as the fact that witnesses "may speak more truthfully if placed before the scrutiny of their peers," and that confidence in judicial remedies may lead to public skepticism of judicial processes if the videotaping is done privately.⁴⁵

The first amendment right of access to criminal trials by the press and public has been analyzed in depth elsewhere.⁴⁶ The issue has reached the U.S. Supreme Court, which held in Globe Newspaper that mandatory closure of the courtroom during the victim's testimony violated the first amendment. Statutes

in many states allow closure within the discretion of the court, which should pass constitutional muster. Videotaped testimony shown later to the press and public also should not be violative of the first amendment as long as they are not mandated by statute.

The defendant's sixth amendment right to confront witnesses in a criminal trial also may be violated unless certain requirements are met before using videotaped testimony or closed circuit television. Generally, closed circuit television or videotaping of the child's testimony is sought where it is believed that if the child testifies, she will suffer serious emotional harm or will be so terrified that she will refuse to talk or will freeze up because of the courtroom setting or personal threats by the defendant. Therefore, although the child is in fact available to testify, she would be unavailable to testify in a formal courtroom setting. Depositions frequently have been used in situations where it is impossible to obtain the witness' personal presence at trial. One commentator notes three types of unavailability: the witness is not available for legal process (e.g. death, absence); available for process, but not available for actual attendance (e.g., illness); or available for process and attendance but not available for testifying. It is the third category that justifies videotaping or television for taking the child's testimony.⁴⁷

Necessity is the basic principle for the use of depositions and former testimony at trial, and for the use of closed circuit television. If the witness's testimony in court cannot be had, "it will be lost entirely for the purpose of doing justice if it is not received in the form in which it survives and can be had. The only inquiry then, need be: Is his testimony in court unavailable?"⁴⁸ Thus, in order to admit videotaped testimony in lieu of the child's testimony in court, the requirement of unavailability first must be met. As with special hearsay exceptions, unavailability categories include death, absence, physical or mental disability, incompetency at trial, failure of memory, and refusal to testify. As some statutes provide, severe psychological trauma to the child from testifying also may be a proper ground, although the three statutes that allow a videotaped deposition to be admitted based on any ground of unavailability are preferable.

In addition to unavailability, Ohio v. Roberts also requires statements to possess indicia of reliability, either by falling within an existing hearsay exception or having particularized guarantees of trustworthiness. In analyzing the videotaping legislation, both requirements of Ohio v. Roberts must be considered. First, the eight (8) videotaping statutes that do not require unavailability to be demonstrated probably violate the confrontation clause. Those statutes that require a finding of the child's unavailability, and require

the testimony to be taken in accordance with the state's hearsay exception for former testimony should be constitutional. Or, statutes requiring an unavailability showing and cross-examination in the defendant's presence also should satisfy confrontation requirements. Cross-examination and the defendant's presence clearly fulfill the trustworthiness requirement, and courts have allowed videotaped depositions in other cases where a witness was unable to attend the trial where these elements were present.⁴⁹ As discussed later, however, statutes that attempt to hide the defendant from the child's view may not be constitutional under the confrontation clause of the U.S. Constitution or under state constitutions if the defendant's right to be confronted with the witnesses against him is considered a right to physical, face-to-face confrontation with the witness.

The closed-circuit television laws in Kentucky and Texas also do not require a showing similar to unavailability. Louisiana allows the procedure "when justice so requires." Since testimony by television should not be considered hearsay, unavailability may not be the test. Nevertheless, courts may require a showing of necessity or "extraordinary" or other circumstances similar to unavailability to justify restriction of a constitutional right⁵⁰. The California Supreme Court recently upheld the Hochheiser decision which borrowed language from the Globe case and stated that "a compelling state interest" must be shown to permit two-way television.

The videotaping and closed-circuit television statutes in Kentucky, Louisiana, and Texas also do not permit the child to see the defendant, although the defendant must be in the room and be able to see the child. As noted before, the second requirement of Ohio v. Roberts is that a statement must fall within a traditional hearsay exception or possess particularized guarantees of trustworthiness. The issue is whether cross-examination without physical confrontation of the child is sufficient to satisfy the trustworthiness requirement. If confrontation is interpreted to mean that the witness and defendant must face each other physically, as some courts have held,⁵¹ these statutes would be unconstitutional.

The purpose underlying the face-to-face requirement is that the witness is less likely to make a false accusation while looking at the accused. This purpose clearly is not met if the child cannot see the defendant, even though the defendant can see the child. Moreover, almost half the state constitutions give the defendant a right to meet witnesses against him "face-to-face," which may be literally interpreted by courts; indeed, a trial court in Kentucky recently struck down the state's videotaping statute because it does not permit face-to-face confrontation of the child witness and the defendant as required by the Kentucky constitution.⁵²

The above closed circuit television or videotaping provisions may have guarantees of trustworthiness, by providing an opportunity for cross-examination, permitting the defendant to see the child, and showing the videotape or televising the testimony to the jury and public, despite the fact that the child cannot see the accused. A trial court in New Jersey upheld an approach where the defendant was in the courtroom with the judge, jury and public, who could view the child by a television monitor, although the child had no view into the courtroom.⁵³ Further, in a child sexual abuse prosecution, the Iowa Supreme Court allowed the defendant to be hidden from the view of the child witness during the child's testimony and rejected a confrontation challenge because there was cross-examination and the jury could observe the demeanor of the witness while testifying.⁵⁴ With the above videotaping and television laws, however, the child is not testifying in open court in the presence of the judge and jury. The jury does not have the opportunity to observe the child's demeanor during the videotaped deposition or preliminary hearing, although they may view it later. Although the jury may see the child testifying on television with the closed-circuit television approach, the problems cited earlier with distorted or excluded evidence are still present. As the Hochheiser decision noted, ". . . use of closed circuit television may affect the jurors' impressions of the witness demeanor and credibility".

It is possible that a court may hold that cross-examination alone fulfills the trustworthiness requirement, and satisfies the confrontation clause without the defendant's physical presence. One commentator notes:

If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation.⁵⁵

Professor Wigmore further states that requiring the witness' personal appearance enables the jury and judge to observe the demeanor of the witness while testifying; it does not mean the opponent and witness must be confronted, but that the witness must be present before the tribunal.

If however, a court considers face-to-face confrontation indispensable, two-way closed-circuit television may be valid as long as confrontation is interpreted to mean that the defendant and witness only must see each other. The Supreme Court of Missouri allowed two-way closed circuit television for an expert's testimony, holding that while the witness was not physically present in the courtroom, "his image and voice were there . . . for the defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the

witness."⁵⁶ In a 1979 case, moreover, a videotaped deposition was held to be unconstitutional where physical face-to-face confrontation was absent, although the court noted: "Today's decision should not be regarded as prohibiting the development of electronic video technology in litigation. ... [W]here the procedure more nearly approximates the traditional courtroom setting, our approval might be forthcoming."⁵⁷ The court went on to say, "It is possible that face-to-face confrontation through two-way closed circuit television might be adequate," although concern was expressed that no showing of "extraordinary circumstances" was made in the Missouri decision.⁵⁸ Although at least one Florida trial court is known to have allowed two-way television in a child sexual abuse proceeding,⁵⁹ the recent Hochheiser California Supreme Court decision noted serious constitutional problems with two-way television, including violations of the defendant's right to a jury trial and a fair trial, as well as of the right of confrontation.

Another potential problem is that some statutes do not require a finding of unavailability at the time of trial when the videotape is sought to be admitted in lieu of the personal appearance of the child, but only require a finding of unavailability to make the videotape. To satisfy the confrontation clause, it may be that unavailability must be established not just at the time of the taking of the videotape, but at trial, particularly if the witness' condition may have changed.⁶⁰ Colorado requires a showing both to make and to admit the videotape. Many state criminal procedure rules require two showings.⁶¹

Finally, most statutes that allow pre-trial depositions or videotaping of preliminary hearing testimony do not permit an additional deposition if new evidence is discovered between the original videotape and the trial. (South Dakota allows a second tape). Unless the videotaping occurs during the trial, an additional deposition frequently may be necessary, which would result in one more time a child must be questioned. Thus, states may want to consider requiring the videotaping after the trial has begun, as is required in Florida's statute.

Conclusion and Emerging Issues

A number of areas relating to child victims in the legal system remain to be explored. This paper addresses a few issues designed to help improve prosecutions of child sexual abuse and to prevent psychological trauma to a child from testifying. Additionally, this paper initially raised issues about how the legal system will handle the increasing number of cases, particularly those involving very young children, as well as cases of abuse committed by adults outside the home. Another category of cases entering the criminal

justice system that also should create new challenges are those involving multiple perpetrators and multiple victims.

Cases of child sexual abuse are being litigated in other judicial forums as well. In addition to civil child protection actions which may be filed in cases involving a parent, other possible legal actions include civil protective order proceedings, custody and divorce actions, and civil tort suits seeking money damages against perpetrators or against institutions, such as school systems, for negligence in hiring or maintaining an employee for sexually abusing multiple children. These suits are becoming more prevalent, and many of them have resulted in settlements of hundreds of thousands of dollars for the victims.⁶² Several attorneys have developed law practices or reputations in handling these cases.⁶³

When child sexual abuse is an issue in a custody case, significant problems are presented. Conflicts between the parents must be considered when examining an allegation of sexual abuse. In some cases, it has been alleged that courts believe that the mother is vindictive by alleging sexual abuse, and award custody or generous visitation privileges to the father, who in fact may have sexually abused the child. On the other hand, cases now are coming to light in which it is believed that some parents have manipulated their child into claiming sexual abuse to prevent the other parent from having contact with or custody of the child. Moreover, when an allegation is made, how it is handled in the family court in a custody proceeding may be problematic, since judges may not be as knowledgeable about sexual abuse of children as their counterparts in juvenile or criminal court. In many custody cases, whether the parent sexually abused the child often is not separately proven or determined. Thus, in Maryland, a bill was enacted into law in 1984 requiring the court in a divorce or custody case to make a finding by a preponderance of the evidence regarding a sexual abuse allegation before it makes a custody award to either parent.⁶⁴ A survey of practices as well as legal research and analysis in this area would be helpful to domestic relations lawyers and family court judges.

Although much has been learned and many changes made during the last five to ten years, reforms are still needed. New methods to protect children nevertheless must be considered in the context of our constitutional system that values liberty and assumes an individual innocent until proven guilty by the state. Another important idea to keep in mind is that the current media attention focusing on the problems involving child witnesses eventually will die down. Hopefully, at that time, there may be greater objectivity and recognition that the current reform movement contributed to more effective handling of cases, more guilty persons prosecuted and convicted and, hopefully fewer children traumatized. It also must be expected

that greater awareness and prosecutions mean that statistically more children may retract their stories (although actually may be false retractions). This should result in more careful and thorough investigations before cases are filed. Further, as with any other crime, there will be some false reports or child witnesses who lie. However, as one commentator noted in discussing the corroboration requirement for child sex offense prosecutions (now abolished in all but one jurisdiction, Nebraska):

... It is estimated that most sexual offenses are never reported to the authorities. Those authorities who support the assumption cite only isolated examples of false complaints, many of which were by persons suffering from severe psychiatric disturbances. Existing statistics indicate that the frequency of "false" reports for sex offenses approximates the frequency of false reports for other crimes.⁶⁵

Another researcher also notes that "there is little correlation between age and honesty," and that "children are no more prone to lying than adults."⁶⁶

Footnotes

¹J. Bulkley, Recommendations for Improving Legal Intervention in Child Sexual Abuse Cases, Recommendations 4.1 and 4.2 and Commentary, American Bar Association, Washington, D.C. (1982).

²L. Berliner & D. Stevens, Advocating for Sexually Abused Children in the Criminal Justice System, in Sexual Abuse of Children: Selected Readings, National Center on Child Abuse and Neglect (1980); V. De Francis, Protecting the Child Victim of Sex Crimes, American Humane Association (1969); S. Sgroi, Introduction: A National Needs Assessment for Protecting Child Victims of Sexual Assault, in Sexual Assault of Children and Adolescents xv (A. Burgess et al. eds. 1978); K. MacFarlane, Sexual Abuse of Children, in The Victimization of Women 81 (J. Chapman and M. Gates eds. 1978); Child Sexual Abuse and the Law, American Bar Association (J. Bulkley ed. 1981).

³K. MacFarlane & J. Bulkley, Treating Child Sexual Abuse: An Overview of Current Program Models, in Social Work and Child Sexual Abuse 69, Jo. of Soc. Work & Hum. Sexuality, Vol. 1 No. 2 (1982).

⁴See G. Melton, Child Witnesses And the First Amendment: A Psychological Dilemma, in The Child Witness 109, J. Social Issues Vol. 40 No. 2 (G. Goodman ed. 1984); G. Melton, Testimony on the Subject of Child Sexual Abuse Victims in the Courtroom before the U.S. Senate Subcommittee on Juvenile Justice, Committee on the Judiciary, May 22, 1984.

⁵Child Sexual Abuse: Incest, Assault and Sexual Exploitation, at 3, National Center on Child Abuse and Neglect (Rev. Apr. 1981).

⁶See Innovations in the Prosecution of Child Sexual Abuse Cases, American Bar Association (J. Bulkley ed. 1981); K. MacFarlane & J. Bulkley, supra note 3.

⁷Globe Newspaper Co. v. Superior Court, 102 S. Ct. 2613, 2621 (1982).

⁸Id.

⁹Id.

¹⁰G. Melton, Child Witnesses and the First Amendment, supra note 4; Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1015 (1969); L. Berliner & M. K. Barbieri, The Testimony of the Child Victim of Sexual Assault, in the Child Witness 125, 135, supra note 3.

¹¹Alaska, Arkansas, California, Montana, New Mexico, South Dakota, Wisconsin.

¹²J. Bulkley, Evidentiary Theories for Admitting a Child's Out-of-Court Statement of Sexual Abuse at Trial, in Child Sexual Abuse and the Law 153 (ed. J. Bulkley, 1981).

¹³Id. For more in-depth discussion of the new special exceptions, see Skoler, New Hearsay Exceptions for a Child's Statement of Sexual Abuse, 18 John Marshall L. Rev. 1 (1984); Sexual Abuse of Children - Washington's New Hearsay Exception, 58 Wash. L. Rev. 813 (1983); A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 93 Colum. L. Rev. 1745 (1983); J. Pierron, The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements, J. Kan. Bar Assn. 88 (Summer, 1983). See also Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, American Bar Association (forthcoming Summer 1985).

¹⁴See, e.g., Kan. Stat. Ann. § 60-460 (1982) with an exhaustive array of statutory hearsay exceptions.

¹⁵See L. Berliner & M.K. Barbieri, supra note 10; U.S. v. Carlson, 547 F.2d 1346 (8th Cir. 1976); State v. Sheppard, #1 0822-12-83 (N.J. Super. Ct. Sept. 27, 1984).

¹⁶McCormick, Evidence § 252, at 606 (1972).

¹⁷Mattox v. U.S., 156 U.S. 237 (1895).

- ¹⁸Ohio v. Roberts, 448 U.S. 55, 65 (1979).
- ¹⁹McCormick, Evidence § 253, at 608 (1972).
- ²⁰Barber v. Page, 390 U.S. 719 (1968).
- ²¹Ohio v. Roberts, 448 U.S. at 74.
- ²²See People v. Gomez, 103 Cal. Rptr. 80 (Cal. Ct. App. 1972); People v. Stritzinger, 668 P.2d 738 (Cal. 1983); Hochhauser v. Superior Court, No. 5005940 (Cal. Ct. App. Nov. 9, 1984) (affirmed during week of Feb. 11, 1985 by California Supreme Court); Warren v. U.S., 436 A.2d 821, 826-30 (D.C. Ct. App. 1981).
- ²³See U.S. v. Iron Shell, 633 F.2d 77 (8th Cir. 1980); State v. McCafferty, #14350 (S.D. S. Ct. Oct. 3, 1984); State v. Slider, No. 12888-4-I (Wash. Ct. App. Sept. 24, 1984).
- ²⁴See, e.g., Rice v. Marshall, 709 F.2d 1100 (6th Cir. 1983); U.S. v. Carlson, 547 F.2d 1346 (8th Cir. 1976); State v. Sheppard, #0822-12-83 (N.J. Super. Ct. Sept. 27, 1984).
- ²⁵See Indiana statute; State v. Ryan, No. 50216-1 (Wash. S. Ct. Nov. 26, 1984).
- ²⁶State v. McCafferty, #14350; U.S. v. Nick, 604 F.2d 1199 (9th Cir. 1979); U.S. v. Iron Shell, 633 F.2d 77.
- ²⁷People v. Williams, 155 Cal. Rptr. 414 (1979).
- ²⁸Warren v. U.S., 436 A.2d 821. This case notes that 19 states have statutes with mental infirmity as a category of unavailability and includes an excellent discussion on psychological harm from testifying as an unavailability basis for admitting prior testimony.
- ²⁹See, e.g., People v. Stritzinger, 668 P.2d 738 .
- ³⁰Cal. Evid. Code § 240 (amended and effective Jan., 1985, Assem. Bill No. 3840, Stats. 1984, ch. 401).
- ³¹Ohio v. Roberts, 448 U.S. at 66.

³²Dutton v. Evans, 400 U.S. 74 (1970).

³³U.S. v. Perez, 658 F.2d 654 (8th Cir. 1981).

³⁴See U.S. v. Nick, 604 F.2d 1199; U.S. v. Iron Shell, 633 F.2d at 87; State v. Ryan, No. 50216-1; State v. McCafferty, #14350; Bertrang v. State, 184 N.W.2d 867 (Wis. 1971); U.S. v. Perez, 658 F.2d at 661 n. 6.

³⁵See supra note 2.

³⁶Hochheiser v. Superior Court, No. 5005940.

³⁷See State v. Sheppard #I0822-12-83 (closed-circuit television); State v. Hutchins, 286 So. 2d 244 (Fla. 1973) (videotaped deposition); U.S. v. Benfield, 593 F.2d 815 (8th Cir. 1979) (videotaped deposition with defendant in a different room and not seen by witness). See also Washington Post, Nov. 14, 1984 "Judge Says Girl, 4 Must Face Father in Sex Abuse Trial" disallowing closed circuit television as a violation of the defendant's right to confront witnesses.

³⁸See State v. Strable, 313 N.W. 2d 497 (Iowa 1981) (upheld); Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. Ct. App. 1981) (struck down).

³⁹California, Colorado, Florida, Maine, South Dakota, and Wisconsin (Florida and Wisconsin only require a finding by the court when the videotape is made).

⁴⁰California, Colorado and South Dakota.

⁴¹Comments, The Criminal Videotape Trial: Serious Constitutional Questions, 55 Ore. L. Rev. 567 (1976); S. Brakel, Videotape in Trial Proceedings: A Technological Obsession, 61 ABA J. 956 (Aug. 1975); An Evaluation of Video-Tape Trials, 26 Stan. L. Rev. 619 (1974); Doret, Trial by Videotape - Can Justice Be Seen to be Done?, 47 Temp. L.Q. 228 (1973-74); Comment, Libai's Child Courtroom: Is It Constitutional?, 7 J. Juv. Law 31 (1983).

4255 Ore. L. Rev. at 578.

43 Id. at 582.

44 Id. at 583.

45 Id. at 573.

46 See Parker, The Child Witness Versus the Press: A Proposed Legislative Response to Globe v. Superior Court, 47 Alb. L. Rev. 408 (1983); G. Melton, supra note 4.

475 Wigmore, Evidence § 1402, at 204 (1974).

48 Id. at 203.

49 State v. Hewett, 545 P. 2d 1201, 1204 (Wa. 1976); State v. Hutchins, 286 So. 2d at 246; U.S. v. Singleton, 460 F. 2d 1148, 1153 (2d Cir. 1972). See 5 Wigmore, Evidence § 1387 (1974) for a list of state statutes regarding depositions.

50 U.S. v. Benfield, 593 F.2d at 822; Hochheiser v. Superior Court, No. B005940, at 28.

51 Herbert v. Superior Court, 172 Cal. Rptr. 850 (Cal. Ct. App. 1981); U.S. v. Benfield, 593 F.2d at 822.

52 Commonwealth v. Willis, No. 84CR346 (Ky. Cir. Ct. Feb. 20, 1985); See 5 Wigmore, Evidence § 1397, at 155 for a list of state constitution confrontation clauses.

53 State v. Sheppard, #I0822-12-83.

54 State v. Strable, 313 N.W. 2d 497.

555 Wigmore, Evidence § 1396, at 154.

56 Kansas City v. McCoy, 525 S.W. 2d 336 (Mo. 1975).

⁵⁷U.S. v. Benfield, 593 F.2d at 821-22.

⁵⁸Id. at 822 n. 11.

⁵⁹See Papers from A National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, supra note 13.

⁶⁰McCormick, Evidence § 253, at 612-13 (1972). Indeed, U.S. v. Benfield noted its concern that only a marginal showing of unavailability was made at trial and no new evidence was presented. The court said "an additional showing of the witness' mental condition and availability on the trial date would have been a much better practice." 593 F.2d at 817 n. 4.

⁶¹See, e.g., McCormick, Evidence § 253, at 612 n. 55, § 613 n. 56; 5 Wigmore, Evidence § 411.

⁶²The ABA's Child Sexual Abuse Law Reform Project has a file with pleadings from a substantial lawsuit in Louisiana, as well as newspaper articles of a major lawsuit settled in Virginia and several others around the U.S.

⁶³L. A. Times, May 21, 1982, "Incest: The Victim Fights Back, Some File Suits for Damages."

⁶⁴Md. Code Ann. § 9-101 Family Law Article (Oct. 1, 1984).

⁶⁵D. Lloyd, The Corroboration of Sexual Victimization of Children, in Child Sexual Abuse and the Law 103, American Bar Association (J. Bulkley ed. 1981).

⁶⁶G. Melton, J. Bulkley & D. Wulkan, Competency of Children as Witnesses, id. at 125, 136-38.

APPENDIX A**

States With Statutes For Videotaping
And Closed-Circuit Television Of A Child's Testimony*

(1) Videotaped Testimony

15 States³

<u>State</u>	<u>Citation</u>
Alaska	Alaska Stat. § 12.45.047 (1982)
Arizona	Ariz. Rev. Stat. Ann. § 12-2311 (1978)
Arkansas	Ark Stat. Ann. §§ 43-2035 to 2037 (1981, 1983)
California ^{1/}	Cal. Penal Code § 1346 (1983)
Colorado	Colo. Rev. Stat. § 18-3-413
Florida	Fla. Stat. § 918.17 (1984)
Kentucky	Ky. Rev. Stat. § 421.350 (1984)
Maine	Me. Rev. Stat. Ann. tit. 15, §1205 (1983)
Montana	Mont. Code Ann. §§ 46-15-401 to 403 (1977)
New Mexico	N.M. Stat. Ann. § 30-9-17 and N.M. R. Cr. P.R. 29.1 (1980)
New York ^{2/}	(Recently enacted - No cite yet)
Oklahoma ^{3/}	Okla. Stat. Ann. tit. 22, § 753.
South Dakota ^{1/}	S.D. Codified Laws Ann. § 23A-12-9 (1983)
Texas	Tex. Crim. Proc. Code Ann. § 38.071 (1983)
Wisconsin	Wis. Stat. § 967.04(7) (1983)

Bills Pending

^{1/}Videotaped preliminary hearing testimony for use at trial.

^{2/}Videotaped testimony for use at Grand Jury proceeding.

^{3/}Oklahoma's statute found after text finalized.

Delaware
District of Columbia
Kansas
Massachusetts
Michigan
Missouri
Ohio
South Carolina
Utah
Vermont

(2) Closed Circuit T.V. 3 States

<u>State</u>	<u>Citation</u>
Kentucky	Ky. Rev. Stat. § 421.350(3) (1984)
Louisiana	La. Rev. Stat. 15:260 (1984)
Texas	Tex. Code Crim. Proc. Ann. art. 38.071(3) (1983)

Bills Pending

California (passed State Senate)	
Maryland	House Bill No. 1346, Feb. 1, 1985 (amending § 9-102)

States With A Special Hearsay Exception for a Child's
Statements of Sexual Abuse - 11 States

<u>State</u>	<u>Citation</u>
Arizona	Ariz. Rev. Stat. Ann. § 13-1416 (1984-85)
Colorado	Colo. Rev. Stat. § 18-3-411(3)
Illinois	Ill. 83rd Gen. Assem. P.A. 83-1067 Sec. 115-10 and Ill. Stat. Ann. Ch. 37, § 704-6(4)(c)
Indiana	Ind. Code § 35-37-4-6 (1984)
Iowa (Juvenile Court Only)	Iowa Code Ann. § 232.96(6)(1984-85)
Kansas	Kan. Stat. Ann. § 60-460(dd) (1982)
Minnesota	Minn. Stat. § 595.02(3) (1984)
South Dakota	S.D. Codified Laws Ann. § 19-16-38 (1984)
Utah	Utah Code Ann. § 76-5-411 (1983)
Vermont	Vt. R. Evid. 803 (24) (1985)
Washington	Wash. Rev. Code § 9A.44.120 (1982)

Special Exception for Videotaped
Interviews of Child Sexual Abuse
Victims 4 States

<u>State</u>	<u>Citation</u>
Iowa (Juvenile Court Only)	Iowa Code 232.96(6) (Supp. 1984)
Kentucky	Ky. Rev. Stat. § 421.350(1)(2) (1984)
Louisiana	La. Rev. Stat. 15:440.1-.6 (1984)
Texas	Tex. Code Crim. Proc. Ann. art. 38.071(1), (2) (1983)

States With Statutes or Rules Eliminating Competency
Qualification of Children - 22 States

<u>State</u>	<u>Citation</u>
Arizona	Ariz. Rev. Stat. Ann. § 12-2202
Arkansas	Ark. Stat. Ann. § 28-1001
Colorado ¹	Colo. Rev. Stat. § 13-90-106(1)(b)
Delaware	R. Evid. 601
Florida	Fla. Stat. § 90.601
Maryland	Md. Cts. & Jud. Proc. Code Ann. § 9-101
Michigan	Mich. Stat. Ann. § 27A.2163
Mississippi	Miss. Code Ann. § 13-1-3
Missouri ¹	Mo. Rev. Stat. § 491.060(2)
Nebraska	Neb. Rev. Stat. § 27-601
Nevada	Nev. Rev. Stat. § 50.015
New Jersey	N.J. Rev. Stat. § 2A:81-1
New Mexico	R. Evid. 601
North Dakota	R. Evid. 601
Oklahoma	Okla. Stat. § 12-2601
Oregon	Or. Rev. Stat. § 40.310
Pennsylvania	Pa. Stat. Ann. § 42-5911 (purdon)
South Dakota	S.D. Codified Laws Ann. § 19-14-1
Utah ¹	Utah Code Ann. §§ 78-24-2; 76-5-410
Washington	Wash. Rev. Code § 5.60.050
Wisconsin	Wis. Stat. § 906.01
Wyoming	Wyo. Stat. § 1-138

¹Child sexual abuse victims only

*Some apply in both criminal and civil cases, and some in all child abuse cases, but most cover criminal child sex offense cases only.

**Information for this chart was obtained through research by the ABA's Child Sexual Abuse Law Reform Project (including the help of the project's law clerk, Carl Jenkins) and from legislative survey prepared for a final report of a recent project on child victim legal reforms by Abt Associates, Inc., Cambridge, Massachusetts (the final report will be available in the spring, 1985).

About...

The ABA Public Services Division

The National Legal Resource Center for Child Advocacy and Protection is one of a dozen American Bar Association units operating within the ABA's Public Services Division. The Public Services Division applies the knowledge and experience of the legal profession to public concerns through programs addressing the rights of the disadvantaged, including minorities, the elderly, mentally disabled, and children; substantive issues of broad national concern such as housing and the environment; and improvement of the judicial process by reducing court costs and delay and offering dispute resolution alternatives. Volunteers, largely lawyers, work with ABA staff in running Division programs. They prepare model legal codes and documents, conduct training sessions and other public education initiatives, sponsor working conferences, and produce subscription and one-time publications. Based in the Washington, DC offices of the Association, the Public Services Division has a staff of over forty persons and an annual budget of more than \$3 million.

About...

The ABA Young Lawyers Division

Within the overall structure of the American Bar Association, the Young Lawyers Division (YLD) occupies a unique position. Unlike the other organizational components of the ABA, YLD activities are not limited to any one substantive area of the law. Instead, YLD interests cut across all of the Association's professional and public interest programs. In effect, the YLD functions as a complete bar association with its own national leadership structure for the younger members of the bar [defined as all attorney members of the ABA under the age of 36 or those who have been admitted to the bar for less than three years], while at the same time functioning as a full participant in the work of the Association's overall Section, Division and Committee structure. With more than 155,000 member attorneys drawn from all fields of practice, the YLD is the largest single membership group within the ABA.

Young lawyers have traditionally been the most dedicated volunteers in the public service and pro bono work of the organized bar, and the national leadership of the YLD has sought to harness this idealism and commitment in coordinated efforts to address major issues and problems. The Division sponsors an active Affiliate Activation and Outreach Program which provides technical assistance and on-site consultation to affiliates [Young Lawyers groups at the State or Local Bar level] seeking to undertake local public service action programs. Nearly one hundred new affiliate programs are generated each year.

The Young Lawyers Section of the Philadelphia Bar Association has, since 1971, sponsored a volunteer child representation program in Philadelphia. The efforts of this group inspired the creation of the National Legal Resource Center for Child Advocacy and Protection.



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3100
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May 27, 1987

MEMORANDUM

TO: Representative C.E. Swackhammer

ATTN: Tom Wright

FROM: Penelope Weyhrauch
Legislative Analyst

RE: Sexual Assault: Television Testimony by Minor Victims of Sexual Assault
Research Request 87.308

You asked us to address the constitutionality of legislation which allows a child's testimony to be videotaped or shown on closed-circuit television for use in court. You asked us to discuss how videotape or closed-circuit television legislation could avoid constitutional challenges.

Child Sexual Abuse Legislation

A statute which allows the videotaping or closed-circuit televising of a minor in a sexual abuse case may be constitutionally challenged on the ground that it deprives a defendant of the opportunity to confront his accuser face to face. A defendant's right of confrontation is established in the U.S. and Alaska Constitutions. These articles state that "...in all criminal prosecutions...the accused shall enjoy [have] the right...to be confronted with the witnesses against him."¹ The confrontation clause generally requires that witnesses be present at trial and that the defendant be allowed to cross examine them.

¹U.S. Constitution, Sixth Amendment; Alaska Constitution Article 1, Section 11. These provisions are attached to this memorandum.

The use of videotaped testimony at trial may face another legal challenge--as hearsay--which is not admissible in court unless the statement falls within a hearsay exception.² When faced with a hearsay issue, the U.S. Supreme Court has placed major emphasis on the "reliability" of the statement. Three indicators are considered in regard to reliability: 1) whether or not a statement was made under oath; 2) whether the declarant of the statement was subjected to prior cross-examination; and 3) whether the jury had the opportunity to view the witness's demeanor.³ A videotaped testimony may or may not meet the requirements of reliability.

Some cases have also required that the declarant of the statement be deemed "unavailable" for trial as a prerequisite to admissibility of the statement.⁴ It is unclear how unavailability would apply to the videotaping of a child's testimony to avoid facing the defendant in a courtroom situation.⁵

Videotape Statutes. At least twelve states have enacted videotaping statutes since 1977, six of them since 1983.⁶ The statutes treat videotaped testimony as the functional equivalent of testimony at trial. Some statutes explicitly demand that the defendant be present and that cross-examination be allowed at the videotaping session; three states--Kentucky, Texas and Wisconsin--allow, in certain circumstances, the admission of videotapes made without the benefit of cross-examination.

A separate provision of the Texas and Kentucky statutes raises another confrontation clause issue. It provides that a videotape made in the presence of both prosecution and defense attorney and put to the test of cross-examination may be admitted in lieu of a child's testimony. It also states that during the videotaping session the court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant. At least one federal court of appeals has held, in a context other than child sexual

²David Wise, "Criminal procedure--child witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," 7 Whittier Law Review 639, 649, 1985.

³Ibid., p. 650.

⁴Ibid.

⁵Ibid., p. 654.

⁶Note, "The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations," 98 Harvard Law Review 813, (1985). The following three paragraphs are taken in large part from this article. We have limited our discussion to Arizona, Kentucky, Texas, and Oklahoma--the states mentioned in your request.

abuse cases, that the lack of a face-to-face encounter renders the use of videotaped testimony unconstitutional.

In 1982, an **Arizona** appellate court affirmed a conviction obtained with the videotaped statement of a sexually abused six-year-old girl.⁷ The defendant and his counsel had been present at the taping, and cross-examined had been allowed. In reaching its decision, the court weighed the state's interest in presenting the videotaped testimony against possible infringements of the defendant's right of confrontation. The determinative factor in admitting the tape was the threat of the child becoming uncommunicative if placed on the witness stand.⁸

Penny Warren, Assistant Attorney General for Kentucky, said that a recent (1986) state Supreme Court decision upheld the use of a videotape deposition in a child sexual abuse case.⁹ The court rejected the defendant's constitutional challenge in finding that the defendant's right of confrontation was satisfied through the mechanisms used to conduct the videotaping.

The court found that: "The statute requires that the defendant be present in person so that he may see and hear the witness but he shall not be seen by the child. The...procedure permits the testimony to be taken prior to trial and preserved by videotape. The availability of procedures permits the defendant to fully participate in cross-examination and to adequately see and hear the witness. The reproduced testimony must be of adequate quality for the jurors to assess the demeanor of the witness and to evaluate credibility. The trial judge paraphrased the issue as to whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face-to-face confrontation. We believe that it is. The legislative authorization of videotape or closed-circuit trial testimony by certain child victims...does not violate a defendant's right to confrontation."¹⁰

Ms. Warren believes that if a child is required to be administered an oath and if the competency of the child has been established prior to the videotaping, a state statute allowing videotaping may pass constitutional muster.

⁷State v. Melendez, 661 P.2d 654 (1982).

⁸"Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 639.

⁹Commonwealth v. Willis, 716 S.W.2d 224 (1986).

¹⁰Willis, p. 228.

State district courts in Texas have differed on whether the state's videotape statute meets the constitutional right-to-confront mandate. At least one Texas appellate court has upheld a conviction based on videotaped statements, ruling that the procedure does not violate the confrontation clause since the defendant retains the opportunity to cross-examine the declarant at trial. Several cases involving videotaped testimony in Texas are currently facing a constitutional challenge in the Texas Supreme Court. According to Steve Lamirand, Assistant Attorney General for Oklahoma, a constitutional challenge has not been made on the state's videotaping or closed-circuit television statutes.

The Alaska videotaping statute--AS 12.45.047--has not been constitutionally challenged, according to Gayle Horetski, Assistant Attorney General. She said this is probably because the procedure established by the statute has not been used by the State because it believes it to be unconstitutional--as a violation of a defendant's right of confrontation. In addition, she believes that the procedure authorized by the statute creates a more frightening situation for a child than a courtroom does. The statute requires that testimony by the child be taken in front of the defendant in a room other than a courtroom. Ms. Horetski said that this may bring the child and the defendant into much closer contact--in a small room--than would occur in a courtroom setting.

Closed-circuit Television Statutes. The states of Kentucky and Texas have legislation which allows a child's testimony to be given at trial from a room other than the courtroom by closed-circuit television.¹¹ Neither of these states have addressed the constitutionality of this legislation. Ms. Warren, with the Attorney General's office in Kentucky, believes that because Kentucky's videotape statute has been found to be constitutional, their closed-circuit television statute will also be found to be constitutional. Ms. Horetski said that closed-circuit television statutes have been both upheld and struck down in other states under constitutional challenges. She believes that closed-circuit television statutes are less constitutionally vulnerable than videotape statutes because a child's testimony occurs at trial; providing the defendant and the jury the opportunity to witness testimony that is contemporaneous with the trial.

Other legal scholars are divided on whether a closed-circuit television statute will meet constitutional muster. One constitutional concern expressed about the use of closed-circuit television is that the defendant is deprived of the opportunity of physically confronting his accuser. No case law requires eye contact, but "this procedure could be deemed constitutional only if cross-examination alone is preserved in such a way to fully satisfy the strict constraints of the sixth amendment."¹²

¹¹Other states may also have closed-circuit testimony statutes. I was unable to find a compilation of these statutes for the fifty states. Thus, I limited my search to states in which you were interested.

¹²"Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 659.

Another writer stated that "...The United States Supreme Court has not literally construed the confrontation clause. In the 1980 case of Ohio v. Roberts, the court said that the clause merely states a preference for face-to-face confrontation at trial but that the 'primary interest secured by the provision is the right of cross-examination'.¹³ Competing interests when closely examined may justify dispensing with confrontation at trial. Adequate opportunity for cross-examination might meet the requirements of the clause without actual confrontation."¹⁴

Alaska does not currently have a closed-circuit television statute.

Developing Constitutionally Sound Statutes

In a paper presented at the National Policy Conference on Legal Reforms in Child Sexual Abuse Cases, Professor Michael Graham outlined his suggestions for enacting constitutionally sound child sexual abuse legislation:¹⁵

- provide specifically for unavailability of witness based upon the presence of, or potential for, severe psychological injury to a child witness if forced to face the defendant in open court;
- provide for the use of closed-circuit television or a children's courtroom for eliciting testimony in child sexual abuse prosecutions where the child witness is unavailable for live face to face confrontation, but is available to give testimony in an alternative setting.¹⁶ The statutes should provide for projection to the jury of the demeanor of both child witness and defendant. Statutes should also provide for projection of the image of the defendant before the child witness where the witness is willing and able to testify under such circumstances; and
- provide that testimony of an unavailable child witness taken outside the physical presence of the accused--but subject to cross-examination--is admissible as an exception to the hearsay rule. The child's testimony may be presented to the jury by either

¹³-----
Ohio v. Roberts, 448 U.S. 56 (1980).

¹⁴Comment, "Use of Videotaping to Avoid Traumatization of Child Sexual Abuse Victim-Witnesses," 21 Land and Water Law Review 565, 574, 1986.

¹⁵Michael H. Graham, "Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions," 40 University of Miami Law Review 19, 92, 1985.

¹⁶A children's courtroom is a room set up for the comfort and security of children where a minor's testimony is heard.

closed-circuit television, use of a children's courtroom, or a videotape of the child's testimony given at a prior trial, hearing, or other proceeding. Admissibility should be conditioned upon a showing that the child's testimony possesses a guarantee of trustworthiness equivalent to those required of statements that are admitted under a traditional hearsay exception.

Mr. Graham also stated that "It is...very likely that oath, demeanor, whether live, via closed-circuit television, or videotaped, and cross-examination, if combined with [the] projection of the defendant's image before the child witness, alone create adequate [the]...reliability to be admissible."¹⁷

Another legal scholar stated that "Videotaping statutes should permit the child to testify on videotape and out of the presence of the defendant if the trial court finds that testimony in open court or a face-to-face confrontation with the defendant would cause the child substantial emotional trauma. The court should defer the taking of videotaped testimony until after the trial has commenced unless substantial delay would thereby result. Once the child has testified on videotape, the court should generally bar both parties from calling the child at trial. Finally, videotaping statutes should prescribe standards regulating taping procedures and the technical quality of the videotaping equipment."¹⁸

A third opinion rendered by a legal scholar stated that "The interests of the [sexually abused] child are countered by the defendant's sixth amendment rights which guarantee him the opportunity to confront and cross examine...witnesses who testify against him. The Supreme Court has stated, however, 'that competing interests, if closely examined, may warrant

¹⁷Ibid., p. 94.

¹⁸Note, "The testimony of child victims in sex abuse prosecutions: two legislative innovations," 98 Harvard Law Review 806, 826, 827, 1985.

Representative Swackhammer
May 27, 1987
Page 7

dispensing with confrontation at trial."¹⁹ The writer went on to say that if the videotaping procedure includes confrontation by the defendant and cross-examination of the child by the defendant's attorney, the defendant is not denied his constitutional rights.²⁰

* * * *

I hope this information is useful to you. The state statutes discussed in this memorandum are attached. If you have any questions or would like additional information, please contact our agency.

Attachments

¹⁹Ohio v. Roberts, p. 64.

²⁰"Criminal Procedure--Child Witnesses--the constitutionality of admitting the videotape testimony at trial of sexually abused children," p. 660.

THE PRECEDING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

HB 323

Prosecutors Perspective

SUPPORTED BY THE NATIONAL INSTITUTE OF JUSTICE

Volume II, Issue 1

FEB 17 1988

January 1988

DEPT. OF LAW
CRIMINAL DIVISION

Prosecuting
Child
Abuse



A review of research of interest to prosecutors. Published in cooperation with
The American Prosecutors Research Institute.

Editor's Note:

Ten years ago it was practically unheard of for a young child to testify in a criminal case. In recent years, however, children have become a regular source of information for police and prosecutors and an increasingly common sight on the witness stand. Prosecutors are called on daily to determine whether to pursue criminal charges when children relate accounts of physical or sexual abuse.

As a result of rising numbers of reports, serious concerns are being voiced by the public and professionals alike:

- How widespread are false allegations of child abuse?
- Are false allegations prevalent in situations involving divorce and custody disputes?
- How reliable are children's memories?
- Are children more suggestible than adults?
- Are children necessarily harmed by involvement in the criminal justice system?
- What medical findings are indicative of sexual abuse?

- Is it advisable to use anatomical dolls when interviewing a child about abuse?
- How much significance can be attached to a child's behavior with anatomical dolls?
- How many victims and what frequency of abusive acts are typical for child molesters?

Our colleagues in the medical, mental health and social services fields are conducting a variety of research projects involving these and other important issues. Many of the findings to date contradict current popular opinion shaped by negative publicity surrounding cases such as those in Jordan, Minnesota, and the McMartin case in California. Though we are a long way from conclusive answers, awareness of existing information can prove to be of substantial benefit to prosecutors dealing with child abuse cases.

This issue of *Prosecutors Perspective* includes reviews of the latest research addressing areas relevant to child abuse investigation and prosecution. Child abuse is not a passing phenomenon. It will remain a significant challenge and responsibility for the nation's prosecutors.

Editor: Stephen Goldsmith, Prosecuting Attorney, Indianapolis, Indiana

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Norm Maleng, Prosecuting Attorney, Seattle, Washington
Edwin L. Miller, Jr., District Attorney, San Diego, California

Prosecutors Perspective

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Anatomically Correct Dolls: Assessment of Children's Behavior Interviewing Sexual Abuse Victims Use in Reporting an Event

Summaries of:

Jampole, Lois;
Weber, M. Kathie.
**An Assessment of the Behavior
of Sexually Abused and Nonsexually
Abused Children with
Anatomically Correct Dolls.**
Child Abuse and Neglect,
Vol. 11, No. 2 (1987).

and

White, Sue;
Strom, Gerald A.;
Santilli, Gail;
Halpin, Bruce M.
**Interviewing Young Sexual
Abuse Victims with
Anatomically Correct Dolls.**
Child Abuse and Neglect,
Vol. 10, No. 4 (1986).

and

Goodman, Gail S.;
Aman, Christine.
**Children's Use of Anatomically
Correct Dolls to Report an Event.**
In M. Steward (Chair), *Evaluation of
Suspected Child Abuse: Develop-
mental, Clinical, and Legal Perspec-
tives on the Use of Anatomically
Correct Dolls*. Symposium presented
at the Society for Research in Child
Development Convention, Baltimore,
April 1987.

**An Assessment of the Behavior of
Sexually Abused and Nonsexually
Abused Children with Anatomically
Correct Dolls** reports on a study of the
behaviors of two groups of children in
their play with anatomically correct
dolls. One group had been determined
to have been sexually abused and the
other group had not been determined to
have been sexually abused. Ten children
were in each group.

Results showed that there was a
significant difference between the two
groups of children as evidenced by the
presence or absence of sexual behaviors
in their play with the dolls. Of the
children who had been sexually abused,
9 (90 percent) demonstrated sexual
behavior with the dolls; 1 (10 percent)
did not. Of the children who had not
been sexually abused, 8 (80 percent) did
not demonstrate sexual behavior with
the dolls; 2 (20 percent) did. The
authors conclude that anatomically cor-
rect dolls are a useful instrument in sex-
ual abuse investigations.

In *Interviewing Young Sexual
Abuse Victims with Anatomically
Correct Dolls*, two groups of children
were interviewed to elicit their reactions
to sexually anatomically correct dolls.
Significant differences were found be-
tween the reactions of children who had
not been referred for suspected sexual
abuse and those who had. Nonreferred
children (n=25) revealed very few
behaviors indicative of abuse whereas
referred children (n=25) demonstrated

*"Nine out of ten
sexually abused children
brought sexual behavior
into their play. Eight
out of ten of those who
were not sexually
abused did not."*

significantly more sexually related
behaviors when presented with the
dolls. Of the age groups studied (2-6
years), 3-year-olds were the most
responsive to the dolls, while older
children tended either to reveal their ex-
periences or to become very nonresponsive.

**Children's Use of Anatomically
Correct Dolls to Report an Event**
questions whether anatomically correct
dolls facilitate children's abilities to
report events accurately or whether they
lead to false reports of abuse. Three and
5-year-old children participated in an
experiment in which they were question-
ed after participating in a game. The

children were interviewed after a delay of one week.

The questioning occurred under three conditions or sets of circumstances. In one condition (the anatomically correct doll condition), children were questioned with the use of four anatomically correct dolls. In the second condition (the regular doll condition), the children were questioned with dolls that looked exactly like the anatomically correct ones except they did not possess secondary sex characteristics. In the third condition, the children were interviewed without any dolls.

Analysis revealed a significant age effect, with 5-year-olds answering the abuse questions more accurately than the 3-year-olds. However, there were no significant differences in the children's interactions with or without the dolls. The authors also found that children's suggestibility (by asking misleading questions) did not significantly differ with use of the dolls.

The authors conclude that anatomically correct dolls do not lead to false reports of sexual abuse in children. ■

Review

by
Michael D. Bradbury
District Attorney
Ventura, California

McMartin! Just the mention of the name, perhaps the most famous child abuse case in recent history, makes a prosecutor's knees go weak. Certainly, it will give rise to an encyclopedia of what can go wrong in an investigation of allegations of mass child molestation. One of the most frequently mentioned criticisms of the investigation is that law enforcement abandoned its proper role by turning over the interviews of suspected victims to

other "professionals." Because those interviews relied heavily upon the use of what we have come to call "anatomically correct dolls," the use of such dolls has come under intense scrutiny.

Although anatomically correct dolls have been used to facilitate the interviews of children for a number of years, there have been no significant studies of the dolls' effectiveness in eliciting accurate records. *An Assessment of the Behavior of Sexually Abused and Nonsexually Abused Children with Anatomically Correct Dolls, Interviewing Young Sexual Abuse Victims with Anatomically Correct Dolls, and Children's Use of Anatomically Correct Dolls to Report An Event* appear to be the first serious efforts to address these questions.

The first study revealed significant differences between the behavior of abused and nonabused children in their play with the dolls. Nine out of ten sexually abused children brought sexual behavior into their play. Eight out of ten of those who were not sexually abused did not.

The second study resulted in similar findings. Here, two groups of children, one suspected of having been sexually abused and one that was not, were interviewed in a structured format using the dolls. Again, significant differences were found between the two groups. Those children believed to have been molested demonstrated much more sexually related behavior when the dolls were used.

The third study, perhaps the most significant, concerned whether the use of the dolls affects the accuracy of a child's report of a molestation. Conducted under three different sets of circumstances, the study determined that the use of the dolls did not lead to false reports of molestation. Although more research is necessary before any final conclusions can be drawn, these studies should provide substantial comfort to prosecutors who rely on this investigative technique.

The studies also provide guidance for those entrusted with the important responsibility of interviewing suspected victims of child molestation. For example, the dolls should

"...the dolls should be used only by those who have been trained in their use. Their use should be governed by written guidelines."

be used only by those who have been trained in their use. Their use should be governed by written guidelines. Careful notes should be maintained regarding their use in individual cases.

The reason for these precautions is clear. Prosecutors may be called upon to defend their use of anatomically correct dolls, not only before the courts, but in an attorney general or state bar association inquiry. (Such inquiries have already taken place in several states.)

These studies are short, readable and concise. I recommend them to any prosecutor handling crimes against children. ■

Children's Testimony: Age-Related Patterns of Memory Errors

Summary of:

Saywitz, Karen J.
**Children's Testimony:
Age-Related Patterns
of Memory Errors.**

In Ceci, S.J.; Toglia, M.P.;
and Ross, D. F. (eds.)

Children's Eyewitness Memory.
New York: Springer-Verlag, 1987.

In this study, third, sixth, and ninth-graders were tested on their ability to recall the description of a crime, in an effort to assess age-related patterns of memory errors that might have implications for the legal setting. The study examined the quality of what was recalled, specifically (a) whether younger children distort more of what they freely recall than older subjects and (b) whether they fill in gaps in memory by adding more extraneous (made-up) material to their accounts than older subjects.

The study found there was a lack of significant grade-related differences in (a) percent correct recognition, (b) the ratio of distorted to accurate recall, (c) the various types of distortions made in free recall, and (d) intrusions of suggested misleading information. Although 8 to 9-year-olds did not exhibit a greater proportion of distorted to accurate recall, they did add significantly more extraneous information to their recall than older subjects. In this study, younger children were particularly likely, at both immediate and delayed testings, to produce recall errors by adding information not in the original stimuli.

The authors suggest that there may be ways to prepare children for testimony and to educate judges and jurors so that the memory errors that are more frequent in the reports of younger children will interfere less with the course of justice. For example, if third-graders add more extraneous information to their recall because they assume that "more" means "better", then they could be cautioned against this tendency with prequestioning instructions. The child could be warned that the investigator does not want more information, but rather accurate information. ■

Review

Peter S. Gilchrist, III
District Attorney
Charlotte, North Carolina

The author's research permits several conclusions that are of importance to individuals concerned with children as witnesses.

- (1) Third graders can provide accurate information.
- (2) Their ability to relate in a narrative form "what-happened" is less than that of an adult.
- (3) If properly questioned by being asked leading questions or being provided cues, i.e. "Can you remember anything about the man's clothes?", young children have the ability to provide additional accurate information.
- (4) The accuracy of information provided by a third grade witness may depend upon whether or not they were interviewed by a trained interviewer. A trained interviewer is one who knows how to extract accurate information using techniques that direct the child's recall to areas that the child would not realize were relevant.
- (5) Third graders have a greater tendency to "add-to" or embellish recall if asked to "tell more" by adults. This tendency of children to add extraneous information when asked to "tell more" might be effectively used in cross-examination as a method of causing a child to embellish testimony and thus be presented as not credible.

In spite of containing some important research conclusions, the article has flaws. The language used is technical and that of a social scientist, not a lawyer. Even with a dictionary at hand it is difficult to

understand technical terms. Of more significance is the fact that the research is sandwiched between opening statements about the roles of judges that are fallacious and questionable conclusions about future research. The conclusions reflect a total lack of understanding of the theories and practices of direct and cross-examination used in trials. These inaccuracies concerning the legal process which precede and follow the research portion of the

"A trained interviewer is one who knows how to extract accurate information using techniques that direct the child's recall to areas that the child would not realize were relevant."

article will undermine a lawyer's confidence in the research. If the author had the article critically reviewed by a knowledgeable trial judge or attorney, these flaws could easily have been identified and this article and its research would have been of significantly more value.

The author inadvertently made an important point. Experts in one aspect of dealing with children often possess very little or even erroneous information about the roles of other experts. ■