

Legal Aspects of CCTV and Recording Technology

Eastern Regional Training Program
ABA Center on Children and the Law
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Today's Focus

- Confrontation Rights of the Defendant
- Advantages and Disadvantages
- Basic Legal Principles
 - Recording pre-trial interviews or statements
 - Recording full-scale depositions or other sworn testimony
 - Use of closed-circuit television during trial
- State Statutory Authority
- Case Law Interpretations

Right to Confrontation

- Guaranteed to defendant under 6th and 14th Amendments to the US Constitution as well as various state constitutions
- “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.”

Confrontation Clause

- Applies in criminal cases, not in civil dependency (child welfare) cases
- Confrontation is essential to fairness
- Secures right to cross-examination
- Moral impact of court atmosphere

Special Courtroom Accommodations

- Courtroom closure
 - Some without showing of necessity
 - Some require trial judge to make finding of necessity
 - Testifying in public would cause serious psychological harm
 - No alternative procedure is available
 - Necessary to protect witness
 - Necessary to ensure a fair trial

Special Accommodations cont'd

- Use of support persons to accompany child during in-court testimony
- Limit the length of in-court testimony
- Request recesses so child can rest and regain composure
- Require developmentally appropriate questions
- Modify courtroom logistics

Special Courtroom Procedures: *Coy v. Iowa*, 487 U.S. 1012 (1988).

- State Case:
 - Defendant charged with sexually assaulting two 13-year-old girls
 - Screen was placed between defendant and child witnesses
 - Trial court rejected confrontation clause argument and Iowa Supreme Court affirmed
- US Supreme Court reversed and remanded:
 - Defendant's right to "face-to-face" confrontation violated
 - Generalized assertion of trauma not firmly rooted in jurisprudence
 - No individualized findings that these witnesses needed special procedures

CCTV or Recording Preference

- Some states require court to consider explicit alternatives to closure (i.e., recorded deposition or CCTV) before closing courtroom or allowing other accommodations
 - State v. Parker, 757 N.W.2d 7 (2008)
 - Screen placed between defendant and child victim not justified by compelling state interest despite interest of protecting child victims and showing of potential trauma to victim when court had other available another equally effective method of protecting victim through use of recorded testimony or CCTV
 - State v. T.E., 775 A.2d 686 (N.J. App. Div. 2001)
 - Before allowing adult support person to sit in close proximity to young witness, defendant should be given opportunity to suggest alternatives such as a recess or CCTV testimony

Advantages of Recording Interviews

- Recording can decrease number of interviews as well as interviewers
- May record spontaneity, emotion or detail missing in later descriptions
- Provides verbatim account as well as facial expressions and gestures if interviewer's conduct or child's exact words become issue later
- More comfortable for child, nonadversarial, therefore presumably child can be more communicative

Advantages of Recording Interviews, cont'd

- May help get guilty pleas
- May be used at grand jury instead of child's testimony
- May be used to support preliminary showings before trial (i.e., need for special procedures to facilitate child's testimony)
- Can refresh child's recollection before trial in same way adult witnesses can review police reports and transcripts

Advantages of Recording Interviews, cont'd

- May be used to impeach victim if she recants on witness stand
- Can be shown to recanting victim to help overcome denial
- May be used, if admissible, to corroborate child's testimony
- Used to convince non-offending parents that abuse really occurred
- Can help in making charging decision if prosecutor has not personally interviewed child

Disadvantages of Recording Interviews

- Nervousness by child or interviewer resulting in distracted interview
- Photography/recording may have been part of abuse
- Several interviews often required to elicit full account
- Single interview can be misleading because records only one point in disclosure process
- Other out-of-court disclosures will receive less consideration because not recorded
- Defense counsel can use ineffective interview to argue improper techniques

Disadvantages of Recording Interviews, cont'd

- If only record selected cases, casts doubt on those cases when recording not used
- Recorded denial or recantation can be replayed for jury, damaging the prosecution's case
- Different standards for adult v. child victims
- May jeopardize privacy rights of child victim
- Reliance on technology – inadvertent destruction of evidence can in some states result in dismissal

Practical Considerations

- When to record
 - Important to establish protocols that guarantee consistency
- Who conducts the interview
 - Examine state confidentiality, privilege, and nondisclosure laws (can be waived)
- Establish protocols
 - Establish in which cases to record interviews
 - Establish procedures to ensure recording fulfills intended function

Policies on Whether to Record Interviews

- Jurisdictions vary on whether to videotape interviews; a few require it
- If you are going to record, best to have professional interview protocol
- Recording not panacea for bad interview protocol
- Example: multi-victim cases
 - Control point
 - Each individual interviewer cannot share information

Other Issues to Consider

- Preserving recordings
- Converting recordings from videotape to DVD
 - Do not destroy originals
 - Must be true and accurate
 - Authentication issues (no editing or alteration)
 - If entered into evidence, property of the court
 - Chain of custody
 - Who is going to do the conversion?
 - Under what circumstance?
 - Who has to be present?

Recorded Statements: State Statutory Authority

- Majority of states require:
 - Attorney for either party can be present
 - Recording is both visual and aural and is recorded on film or videotape or other electronic means
 - Statement not made in response to leading questions
 - Every voice on recording is identified
 - Interviewer is present at the proceeding and available to testify or be cross-examined by either party
 - Equipment is capable of making accurate recording
 - Recording is accurate and has not been altered
 - Defendant or attorney has opportunity to view it

Recorded Statements: State Statutory Authority cont'd

- Some states also require:
 - Child be available to testify in person or the court make a finding that child is unavailable
 - May also require corroborative evidence
 - A finding that the time, content and circumstances of statement provide sufficient indications of reliability (pre-*Crawford*)

Recorded Testimony:

State Statutory Authority cont'd

- Majority of state require that the recording is:
 - visual and aural
 - on film, videotape or other electronic means
 - accurate
 - not altered
- Every voice on recording must be identified
- Every party is given opportunity to view the recording before it is shown in the courtroom

Advantages of Recorded Testimony

- Less controversial than recording statements
- Can be taken in more informal, less intimidating setting
- If defendant can be excluded from room, child spared anxiety of testifying in defendant's presence
- Pre-trial deposition could be used to refresh child victim's recollection
- Could be used as evidence of prior consistent statement

Advantages of Recorded Testimony, cont'd

- May help get guilty pleas
- May be used to impeach victim if she recants on witness stand
- As substantive evidence if victim recants at trial
- May be used if child unable to testify at trial with defendant present
- Helps when parents or guardians refuse to cooperate unless alternative is used
- Can make the victim real to the jury (facial expressions, gestures, pauses not conveyed by written transcript)

Disadvantages of Recorded Testimony

- Lacks immediacy and persuasive impact of live in-court testimony by victim (“watching TV”)
- Enables defense to prepare its case with prior knowledge of crucial testimony
- If additional evidence comes to light, defendant may have right to cross-examine child victim again (defeating purpose of reduced # of interviews)
- Some states allow presence of defendant; may be even closer than in court
- Parents or guardians may expect use of recorded testimony and become uncooperative if not used

Recorded Testimony: State Statutory Authority

- Victims versus witnesses
- Definition of child varies (<12, <14, <16)
- Who is permitted to be present
 - Judge
 - Defendant
 - Defense attorney
 - State's attorney
 - Equipment operators
 - Support person

Recorded Testimony: State Statutory Authority cont'd

- Most states
 - Require the defendant to be present during child's testimony
 - Some may allow screening of defendant from child's view or excluding defendant if risk of trauma to the child

Legal Issues to Consider

- Federal Rule of Criminal Procedure 15
 - Allows testimony of witness to be taken and preserved whenever exceptional circumstance determine it is in the interest of justice to do so
 - ex. witness' unavailability for trial
- Compliance with confrontation requirement
 - Circumstances approximated typical trial
 - Declarant was under oath
 - Defendant was represented by counsel
 - Defendant had every opportunity to cross-examine declarant
 - Conducted before judicial tribunal equipped to record hearings
- State constitutional provisions
 - Literal interpretations of “face to face” confrontation

Crawford v. Washington, 541 U.S. 36 (2004).

- Defendant's wife's statement to police officers during course of investigation into assault and attempted murder charges was used to convict defendant even though she did not testify
- Out-of-court "testimonial" statements by witnesses are barred by confrontation clause unless:
 - Witness is unavailable AND
 - Defendant had prior opportunity to cross-examine witness
- Irrelevant whether statements deemed reliable by court

Crawford v. Washington cont'd

- Abrogated *Ohio v. Roberts*, 448 U.S. 56 (1980).
 - Out-of-court statement could not be admitted unless declarant unavailable and statement bore “indicia of reliability”
 - Showing that statement fell within “firmly rooted hearsay exception” sufficient to establish reliability and admissibility
 - If not with “firmly rooted” exception then no admissible unless prosecution makes showing of “particularized guarantees of trustworthiness”

Crawford v. Washington cont'd

- “where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is confrontation”
- The confrontation clause “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”

What is a “testimonial” statement?

- Not defined in *Crawford* opinion
- Some statement “share a common nucleus”
- applies at a minimum to
 - prior testimony at a preliminary hearing, before a grand jury, or at a former trial
 - police interrogations
- Hearsay statements made in 911 call not “testimonial” (*Davis v. Washington*, 547 U.S. 813 (2006)).
- Police statement signed by wife about domestic battery, when wife refused to testify at trial was “testimonial” and therefore inadmissible (*Hammon v. Indiana*, decided with *Davis v. Washington*, 547 U.S. 813 (2006)).

Bobadilla v. Carlson, 570 F.Supp.2d 1098 (2008).

- 3 y.o. boy allegedly abused by uncle
- Interviewed according to “CornerHouse” protocol
- Citing *Crawford*: statements made during police investigation are testimonial
- “Nothing in *Crawford* suggests that statements taken during police interrogations are not “testimonial” if the statements are given by young children. To hold that a young child’s statement during a police interrogation is “non-testimonial” because of the age of the declarant would require carving out an exception to *Crawford*’s repeated and categorical assertion that statements taken in the course of police interrogations are “testimonial.”

Giles v. California, 128 S.Ct. 2678 (2008).

- Does a defendant forfeit his Sixth Amendment right to confront a witness against him when a judge determines that a wrongful act by the defendant made the witness unavailable to testify at trial?
- “Forfeiture by wrongdoing” exception to confrontation: introduction of testimonial statements of witness who was detained or kept away by means or procurement of defendant
- Defendant convicted of first degree murder of his former girlfriend
- Supreme Court held it was not an exception to confrontation requirement
 - Not established at time of founding or in American jurisprudence since

Overcoming Challenges to Use of Recording Technology

- Challenges to interviewing protocols
 - Are they consistently followed?
 - Were they followed in this case?
- Common current attack on state's case for only recording this witness, trying to raise issue that even state has concerns re: veracity of witness
 - Response: provides clear evidence that did not use leading/suggestive questions
- Pre-trial motion to stipulate recording coming in pro-forma: no arguments can be made in front of jury
- Must look to hearsay rules to determine when recorded statements can be introduced
- Know what you are dealing with

Defense Challenges generally

- Any good defense counsel will find something
 - Be prepared to respond to each possibility
- Defense motion to suppress
- Memory
 - Attacks on ability to remember, relate and tell truthfully
- Suggestibility
 - Result of leading questions
 - Who prepped the child?
- Process challenges

Defense Challenges on Process

- Certification of equipment
- Ensure equipment is functioning before trial
- Date/time stamp
- When was the interview stopped?
- When was it interrupted?
- When did it resume?
- Chain of custody: “best evidence” of interview
- Appropriate training of evaluator/interviewer
- Sponsoring the interview: have the person available to be cross-examined

Necessity for Recorded Testimony

- *Young v. Macy*, 21 P.2d 44 (Okla. 2001)
 - Before ordering CCTV or recorded testimony, court must find
 - Use of special procedure is necessary to protect welfare of particular child
 - Child would be traumatized not by courtroom but by presence of defendant
 - Emotional distress more than *de minimus*
- *State v. Alterisi*, 702 A.2d 651 (Conn. 1997)
 - That 5 and 3 y.o. victims had been threatened with violent harm by defendant and were “deathly afraid” of him was clear and convincing evidence of need to videotape testimony outside of defendant’s presence
- *State v. Correll*, 973 P.2d 197 (Kan. 1998)
 - Trial court must make individualized finding that in-court, face-to-face testimony of child victim would so traumatize child as to render child unavailable or would prevent child from reasonably communicating

Advantages of CCTV

- Child can testify in more relaxed environment than courtroom
- Can testify outside physical presence of jury, spectators and defendant
- Disadvantages of recording testimony before trial do not apply (i.e., defense preparation, newly-discovered evidence)
- Enables testimony of child who may be unable to testify with defendant present

Disadvantages of CCTV

- Televised image not as effective
- If defendant's presence required in room, may be more intimidating
- Parent or guardian may have expectations of CCTV use and become uncooperative if not used

CCTV Statutory Authority

- Three basic approaches
 - Defendant is in the room when child testifies
 - Defendant can observe and hear child's testimony but child cannot hear or see defendant
 - Defendant can observe and hear child's testimony and monitor projects defendant's image into the room in which the child is located so that child sees defendant while testifying

Maryland v. Craig, 497 U.S. 836 (1990).

- Court allowed one-way closed-circuit testimony after determining child victim:
 - would suffer serious emotional distress and
 - would not be able to reasonably communicate if required to testify in court
- Defendant argued violation of confrontation clause:
 - barred from room
 - child could not see or hear him
 - had to watch testimony on monitor in courtroom

Maryland v. Craig cont'd

- Right of confrontation “must give way occasionally to considerations of public policy and the necessities of the case”
- States’ interest in safeguarding “physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying” was sufficient to permit use of CCTV
- Procedure sufficiently assured reliability of fact-finding process because:
 - child had to be competent,
 - under oath,
 - cross-examined, and
 - could be observed by judge, jury and defendant

Maryland v. Craig cont'd

- Three-prong test whether state's interest in protecting child justifies infringement on defendant's confrontation rights:
 - Must make case-specific finding that procedure is necessary
 - State has burden of showing procedure is necessary because of emotional trauma related to presence of defendant rather than general fear of courtroom
 - Must find emotional distress more than *de minimus* (more than nervousness, excitement, reluctance)

Sufficient Level of Trauma

- Trial judges have considerable discretion
- *Craig* declined to establish prerequisites for proving necessity
- Court must make case-specific findings
- *State v. Warford*, 389 N.W.2d (Neb. 1986)
 - Must be particularized showing on the record that child witness would be further traumatized or would be intimidated by testifying in court in front of defendant

Sufficient Level of Trauma cont'd

- Basis for finding
 - Expert testimony not necessary
 - Parents of victims competent to render impressions whether victim's ability to relate facts truthfully would be impaired or compromised by presence of defendant
 - Social worker's testimony
 - Testimony of pediatric psychiatrist that court setting caused victim to regress and would suffer psychologically
 - Court's own inquiry: can consider age, developmental level

Sufficient Trauma cont'd

- Trauma must result from presence of defendant not courtroom generally, *State v. Bray*, 535 S.E.2d 636 (S.C. 2000)
- Combined fear of both testifying in court in front of jury and in front of defendant is sufficient, *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005); *U.S. v. Bear*, 357 F.3d 730 (8th Cir. 2004).
- *U.S. v. Brown*, 528 F.3d 1030 (8th Cir. 2008)
 - Defendant representing himself so that victim subjected not just to his presence in courtroom but also to his questioning about traumatic effects
 - Therapist testified about psychological harm from personal contact with defendant

State Law Interpretations

- Some state CCTV statutes ruled unconstitutional: literal face to face confrontation required
- Others do not interpret confrontation literally: Commonwealth v. Willis, 716 S.W.2d 224
 - No authority under traditional courtroom procedures that specifically require witness to look at the defendant
 - Witness has never been disqualified because refused to look at accused
 - Testimony of blind victim not invalid
 - Analogous to young victim so intimidated by defendants' presence that cannot testify unless unable to see or hear him

Overcoming Challenges to CCTV

- Not necessary procedure in this case
- Prejudicial to defendant
- In violation of confrontation clause
- File motions in limine to craft conduct of defense attorney
 - Not use inappropriate questions
 - Use age/developmentally appropriate language
 - Language/questions that are not designed to “trick” the child

Minimal standards for CCTV

- As minimally intrusive as possible
- Defendant able to privately communicate with his attorney
- Camera is focused in such a way to provide jury with clear image of the witness, examiner, and any other person present within examination room
 - *U.S. v. Etimani*, 328 F.3d 493 (9th Cir. 2003)
 - Placement of monitor behind and to left of victim instead of directly in line of sight acceptable when monitor was large, positioned so that victim could see it and its presence was called to her attention, and jury could see whether she looked at monitor during testimony

CCTV Minimal Standards

- Must be capable to providing opportunity to observe witness' demeanor by providing clear and accurate sounds and images to defendant, judge, jury and public
- Manner in which transmitted instilled in witness sense of seriousness of testimony
 - Not required to see and hear defendant
 - *State v. Manley*, N.W.2d 275 (Minn. 2003)
 - Court may order that CCTV testimony be taken so that defendant can see and hear child in person and communicate with attorney but child cannot see or hear defendant

Other applications

- Use of CCTV upheld in other contexts:
 - Civil dependency court to ensure truthfulness of child's testimony
 - Other witnesses allowing child victim's siblings to testify with CCTV when psychologist testified defendant's presence would be so traumatic for child that ability to testify truthfully in question
 - Juvenile delinquency proceeding

Importance of Vertical Prosecution

- What is vertical prosecution?
- Why is it important?
 - Enhances child's trust in the process
 - Decreases child's confusion
 - Ensures prosecutor's fullest knowledge
 - Increases prosecutor's effectiveness
 - Reduces number of interviewers
- What if you cannot use it?
 - Find some other way to ensure continuity for the child

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