

# INTEGRATING TECHNOLOGY IN CHILD ABUSE CASES: OVERVIEW FOR JUDGES

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CCTV AND RECORDING TECHNOLOGY PROGRAM  
ABA CENTER ON CHILDREN AND THE LAW  
SEPTEMBER 2010



# DISCLAIMER

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This report was prepared under the auspices of the Bureau of Justice Assistance (BJA) Criminal Courts Technical Assistance Project at American University, Washington, D.C. and a subcontract between American University and the American Bar Association. This project was supported by Grant No.2006-MU-BX-K010 awarded to American University by the Bureau of Justice Assistance. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the U.S. Department of Justice.

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# TECHNOLOGY AND THE LAW: INTRODUCTION<sup>♦</sup>

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Technology in the courtroom is not new, and its use to assist child victims of sexual or physical abuse to provide testimony or disclose their abuse has been available for years. Many states allow for or mandate that forensic interviews of child victims be recorded, and many of those statutes address the admissibility of recorded statements in court. In addition, nearly all states have statutes that define how a child victim may testify from a remote location over closed-circuit television (CCTV).

CCTV and recording technology are used for different reasons: interviews or testimony. Recording technology is primarily used to record the child victim's interview to reduce the number of times the abuse must be recounted to various criminal justice officials, and to catalog the abuse for evidence gathering. Recording technology is sometimes also used to record a deposition or other testimony. CCTV technology is used to allow a traumatized victim to provide trial testimony outside the presence of the alleged abuser. Both technologies reduce the opportunity for further emotional harm to victims as they proceed through the criminal justice system.

This document provides information on CCTV and recording technology for judges. It provides judges the legal foundations for employing technology in child abuse cases and presents two examples from jurisdictions that have successfully integrated technology in their courtrooms.

The ABA has been monitoring, assessing, and supporting the use of various recording and CCTV technology programs for child victims in jurisdictions funded by BJA since 1992. Between 1992 and 2000, BJA provided \$4.5 million to 100 state and local entities. Since 2007, the ABA program has provided \$2,870,500 to jurisdictions in 40 states.

Technology changes occur rapidly in the 21<sup>st</sup> Century. Last year's state-of-the-art recording or CCTV equipment may become outdated quickly. The different stakeholders (courts, prosecutors' offices, child advocacy centers, etc.) may upgrade their equipment, resulting in incompatibilities with other agencies' equipment. Assessing of physical

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<sup>♦</sup> For the sake of consistency throughout this Overview, the defendant's gender is assumed to be male, and the victim's to be female.

and legal restrictions or mandates and an overview of the technology employed by all stakeholders becomes extremely valuable, as does working with an experienced equipment vendor who understands criminal court case processing. The vendor can then guide decisions on appropriate technology purchases. For more information, please refer to the Technology Toolkit (<http://new.abanet.org/child/Pages/videotape.aspx>).



# TECHNOLOGY AND THE LAW:

## EXECUTIVE SUMMARY

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The legal basis for using of technology in child sexual abuse cases can be found in state statutes and case law, and in cases handed down by the U.S. Supreme Court regarding protection of the defendant's right to confrontation as set out in the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution.

Technology in child sexual abuse cases is used in three ways:

- To record forensic interviews of the child victim so she is not subjected to multiple interviews by investigators, prosecutors, and others
- To record testimony by the child victim to spare her the need to present live testimony in court
- To present the child victim's testimony via closed-circuit television (CCTV) if she would be significantly traumatized by testifying in the presence of her alleged abuser

In essence, U.S. jurisprudence mandates that a defendant in a criminal child abuse case is entitled to meet his or her accuser "face-to-face." However, the right to face one's accuser can be implemented in ways intended to protect vulnerable minors from experiencing additional distress. State legislatures recognize child sexual assault victims' special circumstances, and have addressed such by allowing the recording of interviews, testimony or depositions, and the use of CCTV through specific statutes.

The CCTV procedures give the child victim the opportunity to provide testimony out of the defendant's presence while offering the defendant and his counsel the opportunity to see and hear the victim via electronic means, thus satisfying the Constitution's confrontation clause. While not used with frequency, CCTV provides traumatized victims the possibility of testifying without incurring additional emotional pain, while upholding the defendants' rights. Likewise, recorded testimony and depositions may be used at trial if the proper procedures are followed. Statements made by the child victim during a recorded forensic interview also may be used during trial under specific circumstances as long as the defendant's rights are preserved, as discussed in the next section.

# TECHNOLOGY AND THE LAW:

## BASIC PRINCIPLES

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**What laws govern the use of closed-circuit television (CCTV) and recording equipment?**

### THE DEFENDANT'S RIGHT TO CONFRONTATION

The fundamental legal concept that frames the use of technology in criminal child abuse cases is the right to confrontation guaranteed to criminal defendants under the Sixth and Fourteenth Amendments to the United States Constitution, as well as individual state constitutions: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."<sup>1</sup>

The underlying principles state confrontation is essential to fairness, otherwise a defendant cannot defend against accusations from unknown and unchallenged sources. The right to confrontation secures the right to cross-examination and carries with it the moral impact of the courtroom (i.e., if a witness must appear in court under oath, he is less likely to make false accusations). As applied in child abuse cases, the defendant's right to confrontation applies in criminal cases, not in civil dependency (or child welfare) cases.

The United States Supreme Court in *Coy v. Iowa*<sup>2</sup> supported the defendant's right to confrontation and overturned a lower court ruling that a screen placed between the defendant and two 13-year-old child witnesses during their testimony did not violate the defendant's rights. The Court held that the defendant's right to "face-to-face" confrontation had been violated because a generalized assertion of trauma is not firmly rooted in jurisprudence. While the case did not address the use of technology in the courtroom, *Coy v. Iowa* established the need for individualized findings that particular child witnesses require special accommodations.<sup>3</sup> Some courts have even established a preference for CCTV and recording technology over other courtroom accommodations.<sup>4</sup>

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<sup>1</sup> U.S. Const. amend. VI. The Fourteenth Amendment guarantees citizens the due process of law. U.S. Const. amend XIV § 1.

<sup>2</sup> 487 U.S. 1012 (1988).

<sup>3</sup> Other types of accommodations include using a support person to accompany the child during in-court testimony, limiting the length of in-court testimony, requesting frequent recesses so the child witness can rest and regain her

The use of CCTV and recording technology is governed by the case law interpretations of the state statutes as applied. Different legal standards apply for the use of recorded statements or interviews in court proceedings, the use of recorded testimony or depositions, or the use of closed-circuit television to present a child's testimony. These standards are discussed in each of the sections below:

### **Closed-Circuit Television (CCTV)**

The United States Supreme Court in *Maryland v. Craig*<sup>5</sup> allowed one-way closed-circuit testimony after determining that the child victim would suffer serious emotional distress and would not be able to reasonably communicate if required to testify in court before the defendant. The Court found that CCTV sufficiently assured reliability of the fact-finding process because the child had to be competent, under oath, cross-examined, and could be observed by the judge, jury, and defendant.

*Craig* established a three-pronged test to determine whether a state's interest in protecting the child victim justifies infringement on the defendant's confrontation rights:

- (1) The presiding court must make a case-specific finding that the use of CCTV is necessary;
- (2) The state has the burden of showing necessity based on emotional trauma related to the presence of the defendant rather than a general fear of the courtroom; and
- (3) The court must find that the emotional distress is more than de minimus (i.e., more than nervousness, excitement, or reluctance).<sup>6</sup>

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composure, requiring developmentally appropriate questions, or modifying the courtroom to accommodate the child.

<sup>4</sup> Several states require the court to consider explicit alternatives to closure (i.e., recorded deposition or CCTV) before closing the courtroom or allowing other accommodations. See *State v. Parker*, 757 N.W.2d 7 (2008) (screen placed between defendant, and child victim during trial not justified when trial court had another available, 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 recess or CCTV testimony).

<sup>5</sup> 497 U.S. 836 (1990).

<sup>6</sup> It is clearly established that the trauma suffered by the child must result from the presence of defendant not the courtroom generally. See *State v. Bray*, 535 S.E.2d 636 (S.C. 2000); *U.S. v. Bordeaux*, 400 F.3d 548 (8<sup>th</sup> Cir. 2005) (combined fear of both testifying in court in front of the jury and in front of the defendant is sufficient); *U.S. v. Bear*, 357 F.3d 730 (8<sup>th</sup> Cir. 2004); *U.S. v. Brown*, 528 F.3d 1030 (8<sup>th</sup> Cir. 2008) (defendant representing himself so that victim was subjected to not just his presence in courtroom but also his questioning); *People v. Bryant*,

Trial judges are left with considerable discretion in determining a sufficient level of trauma because *Craig* declined to establish prerequisites for proving necessity.<sup>7</sup> The basis for the finding of necessity, however, need not be expert testimony. Parents of a victim may be competent to render their impressions about whether the victim's ability to relate facts truthfully would be impaired or compromised by the presence of the defendant. Other bases could include a social worker's testimony, testimony of a pediatric psychiatrist that the court setting caused the victim to regress and suffer psychologically, or even the court's own inquiry into the child's age and developmental level.<sup>8</sup>

### Recording Technology

Another line of Supreme Court cases significantly affects the use of recording technology in child abuse cases. When a child victim's statements are recorded during a forensic interview, the use of those statements during trial is governed by the landmark *Crawford v. Washington*<sup>9</sup> decision. Although not a child abuse case, *Crawford* established that out-of-court "testimonial" statements by witnesses are barred by the confrontation clause *unless* the witness is unavailable *and* the defendant had prior opportunity to cross-examine the witness. The Court stated it is irrelevant whether the statements were deemed reliable by the trial court.<sup>10</sup>

In *Crawford*, the defendant's wife's statement to police officers during the course of an investigation into assault and attempted murder charges was used to convict the defendant-husband even though she did not testify. The Supreme Court stated that "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is confrontation."<sup>11</sup> The confrontation clause

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909 N.E.2d 391 (Ill. App. 2009) (trial court's finding that child victim be permitted to testify via CCTV not invalidated by failure to use precise statutory language about emotional distress and adverse effects testifying would cause; brief finding that child victim would suffer serious emotional distress sufficed).

<sup>7</sup> See also *State v. Warford*, 389 N.W.2d (Neb. 1986) (must be a particularized showing on the record that the child witness would be further traumatized or would be intimidated by testifying in court in front of the defendant).

<sup>8</sup> See *State v. Bejarano*, 202 P.3d 39 (Kan. App. 2009) (expert testimony requiring child victim to testify in presence of defendant could be traumatic, coupled with judge's own observations of the child, amply supported trial court's decision to permit CCTV testimony).

<sup>9</sup> 541 U.S. 36 (2004).

<sup>10</sup> *Crawford* abrogated *Ohio v. Roberts*, 448 U.S. 56 (1980), which had long held that an out-of-court statement could not be admitted unless the declarant was unavailable and the statement bore certain "indicia of reliability."

<sup>11</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

“commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>12</sup>

The Court did not, however, provide guidance as to which statements are testimonial in nature. At a minimum, *Crawford* applies to police interrogations as well as prior testimony at a preliminary hearing, before a grand jury, or at a former trial.<sup>13</sup> The federal court in *Bobadilla v. Carlson*<sup>14</sup> addressed the application of *Crawford* to a child abuse prosecution. In this case, a police investigator had direct access to the forensic interviewer during the interview of a three-year-old boy allegedly abused by his uncle, which in the court’s view made the interview part of a police interrogation. The court found that “[n]othing 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.’”<sup>15</sup>

Jurisdictions using recording or CCTV technology must understand the implications of these cases in their response to child victims. For example, if *Crawford* prohibits the use of a child victim’s recorded statements because the victim either is available to testify or the victim is unavailable but the defendant did not have an opportunity to cross-examine her, then the use of CCTV may be possible with the appropriate findings under *Craig*’s three-pronged test.



## STATE STATUTES

Most child sexual abuse cases are tried in state courts, and state statutes provide authority for the use of recording and CCTV technology. For those cases that do fall under federal jurisdiction, federal statutes

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<sup>12</sup> *Id.*

<sup>13</sup> Subsequent decisions have found that hearsay statements made in a 911 call are not “testimonial” (*Davis v. Washington*, 547 U.S. 813 (2006)), while a police statement signed by a wife in a domestic battery case, when the wife refused to testify at trial, was “testimonial” and therefore inadmissible (*Hammon v. Indiana*, decided with *Davis v. Washington*, 547 U.S. 813 (2006)).

<sup>14</sup> 570 F.Supp.2d 1098 (2008) (during interview of three-year-old boy allegedly abused by uncle, police investigator had direct access to forensic interviewer).

<sup>15</sup> *Id.* See also *State v. Blue*, 717 N.W.2d 558 (N.D. 2006) (videotape of forensic interview of child victim made in conjunction with police investigation constituted testimonial statements; where child victim found unavailable for trial and defendant had no opportunity to cross-examine her, admission of videotape violated defendant’s right to confrontation).

also provide such authority.<sup>16</sup> However, technology use in child abuse cases must also comply with legal precedents set by the United States Supreme Court and respective state courts through case law interpretations, as discussed above.

### **Recording of Statements or Interviews**

For the recording of a child victim's statements or interviews, the majority of statutes stipulate that:<sup>17</sup>

- An attorney for either party can be present
- The recording is both visual and aural and is recorded on film or videotape or other electronic means
- The statement is not made in response to leading questions
- Every voice on the recording is identified
- The interviewer is present at the court proceeding and available to testify or be cross-examined by either party
- The equipment is capable of making accurate recordings
- The recording is accurate and has not been altered
- The defendant or his attorney has an opportunity to view the recording

In evaluating whether statements can be used in court, prosecutors need to apply the standards set forth in *Crawford v. Washington* and subsequent cases<sup>18</sup> to determine whether the statements are testimonial in nature. In addition, if the child witness is found to be unavailable, *Crawford* requires that the defendant have had a prior opportunity to cross-examine the witness.

### **Recorded Testimony or Depositions**

For recorded testimony (as opposed to recorded interviews or statements), the majority of states require that the recording:<sup>19</sup>

- Is both visual and aural
- Is captured on film, videotape, or other electronic means
- Be accurate

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<sup>16</sup> 18 U.S.C. § 3509.

<sup>17</sup> For examples of state statutes addressing requirements for recording statements or interviews, see the ABA's CCTV and Recording Technology Legal Database at <http://www.abanet.org/abanet/cctv/home.cfm>.

<sup>18</sup> See previous discussion, *supra* notes 13 to 15.

<sup>19</sup> For examples of state statutes addressing requirements for recording testimony, see the ABA's CCTV and Recording Technology Legal Database at <http://www.abanet.org/abanet/cctv/home.cfm>.

- Is not altered
- Assure that every voice is identified
- Provide that every party is given the opportunity to view the recording before it is shown in the courtroom

Some state statutes make distinctions between victims and witnesses, with some allowing recorded testimony by child victim-witnesses.<sup>20</sup> Also, the definition of a child varies by age. The age limit for allowing a child to testify by closed-circuit television or recorded deposition varies from state to state. Ages 12 and 16 are the most common age limits found, with some states allowing use of technology with victims up to age 18.<sup>21</sup>

For recording testimony, states vary on who is permitted to be present. Generally, the judge, defendant, defense attorney, prosecutor, equipment operators, and a support person are permitted. Most states require that the defendant be present during the child's testimony, although some may allow screening of the defendant from the child's view or excluding the defendant if there is a risk of trauma to the child from being in the defendant's presence.<sup>22</sup>

Statutes addressing the use of closed-circuit television have adopted three basic approaches:

- 1) The defendant is in the room when the child testifies but can be screened from the sight and hearing of the child victim or excluded from the room with a sufficient showing of necessity;<sup>23</sup>

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<sup>20</sup> See R.R.S. Neb. § 29-1926 (2010); 42 Pa.C.S. § 5984.1 (2010); Rev. Code Wash. (ARCW) § 9A.44.150 (2010).

<sup>21</sup> See, e.g., Haw. Rev. Stat. Rule 616 (2010).

<sup>22</sup> See *Young v. Macy*, 21 P.2d 44 (Okla. 2001) (before allowing CCTV or recorded testimony court must find use of special procedure necessary to protect welfare of that particular child); *State v. Alterisi*, 702 A.2d 651 (Conn. 1997) (showing that five- and three-year-old 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 defendant's presence); *State v. Correll*, 973 P.2d 197 (Kan. 1998) (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 prevent child from reasonably communicating).

<sup>23</sup> See, e.g., Conn. Gen. Stat. § 54-86g (2010) ("Only the judge, the defendant, the attorneys for the defendant and for the state, persons necessary to operate the equipment and any person who would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony, except that the court may order the defendant excluded from the room or screened from the sight and hearing of the child only if the state proves, by clear and convincing evidence, that the child would be so intimidated, or otherwise inhibited, by the physical presence of the defendant that a compelling need exists to take the testimony of the child outside the physical presence of the defendant in order to insure the reliability of such testimony.")

- 2) The defendant can observe and hear the child's testimony but the child cannot hear or see the defendant (one-way closed-circuit television);
- 3) The defendant can observe and hear the child's testimony and the monitor projects the defendant's image into the room in which the child is located so that the child sees the defendant while testifying (two-way closed-circuit television).

Courts have interpreted the requirements of state statutes to provide for basic standards for use of CCTV:

- The procedure must be as minimally intrusive as possible.
- The defendant must be able to privately communicate with his attorney.
- The camera should be focused in such a way to provide the jury with a clear image of the witness, examiner, and any other person present within the examination room.
- The procedure must be capable of providing an opportunity to observe the witness' demeanor by providing clear and accurate sounds and images to the defendant, judge, jury, and public.<sup>24</sup>



### STATES THAT ALLOW CCTV OR RECORDING TECHNOLOGY BY STATUTE OR CASE LAW

State	CCTV	Recording
Alabama	Yes	Yes
Alaska	Yes	No
Arizona	Yes	Yes
Arkansas	Yes	Yes
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes
Delaware	Yes	Yes
District of Columbia	Yes	Yes
Florida	Yes	Yes
Georgia	Yes	No
Hawaii	Yes	No
Idaho	No	Yes
Illinois	Yes	No

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<sup>24</sup> See generally *U.S. v. Etimani*, 328 F.3d 493 (9<sup>th</sup> Cir. 2003) (placement of monitor behind and to left of victim-witness instead of directly in line of sight was acceptable when monitor was large, positioned so victim could see it, its presence was called to her attention, and jury could see whether she looked at monitor during testimony).



Indiana	Yes	Yes
Iowa	Yes	Yes
Kansas	Yes	Yes
Kentucky	Yes	Yes
Louisiana	Yes	No
Maine	No	No
Maryland	Yes	No
Massachusetts	Yes	Yes
Michigan	Yes	Yes
Minnesota	Yes	Yes
Mississippi	Yes	Yes
Missouri	No	Yes
Montana	Yes	No
Nebraska	Yes	Yes
Nevada	No	Yes
New Hampshire	No	Yes
New Jersey	Yes	Yes
New Mexico	No	Yes
New York	Yes	No
North Carolina	Yes	No
North Dakota	No	No
Ohio	Yes	Yes
Oklahoma	Yes	No
Oregon	Yes	No
Pennsylvania	Yes	Yes
Rhode Island	Yes	Yes
South Carolina	No	No
South Dakota	Yes	Yes
Tennessee	Yes	Yes
Texas	Yes	Yes
Utah	Yes	Yes
Vermont	Yes	Yes
Virginia	Yes	No
Washington	Yes	No
West Virginia	Yes	No
Wisconsin	No	Yes
Wyoming	No	Yes

# TECHNOLOGY AND THE LAW:

## SAMPLE STATUTES

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### CLOSED-CIRCUIT TELEVISION STATUTE

Del. Code Ann. tit. 11, § 3514 (2010)

§ 3514. Testimony of victim or witness in child abuse case by means of closed circuit television

- (a) (1) In any prosecution involving any offense set forth in § 3513(a) of this title, a court may order that the testimony of a child victim or witness less than 11 years of age be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
  - a. The testimony is taken during the proceeding; and
  - b. The judge determines that testimony by the child victim or witness in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
- (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.
- (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
- (b) (1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
  - a. The prosecuting attorney;
  - b. The attorney for the defendant;
  - c. The operators of the closed circuit television equipment; and
  - d. Any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
- (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
- (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

- (c) The provisions of this section do not apply if the defendant is an attorney pro se.
- (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.



## **RECORDING OF DEPOSITION STATUTE**

### **Mo. Rev. Stat. § 491.680 (2010)**

§ 491.680. Court may order video recording of alleged child victim, when –procedure – transcript – exclusion of defendant from proceedings, opportunity to review – cross-examination

1. In any criminal prosecution under the provisions of chapter 565, 566 or 568, RSMo, involving an alleged child victim, upon the motion of the prosecuting attorney, the court may order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at preliminary hearings and at trial.
2. If the court finds, at a hearing, that significant emotional or psychological trauma to the child which would result from testifying in the personal presence of the defendant exists, which makes the child unavailable as a witness at the time of the preliminary hearing or trial, the court shall order that an in-camera videotaped deposition of the testimony of the alleged child victim be made for use as substantive evidence at the preliminary hearings and at trial. Such recording shall be retained by the prosecuting attorney and shall be admissible in lieu of the child's personal appearance and testimony at preliminary hearings and at trial, conflicting provisions of section 544.270, RSMo, notwithstanding. A transcript of such testimony shall be made as soon as possible after the completion of such deposition and shall be provided to the defendant together with all other discoverable materials.
3. Upon a finding of trauma as provided for in subsection 2 of this statute, the court may also exclude the defendant from the videotape deposition proceedings in which the child is to testify. Where any such order of exclusion is entered, the child shall not be excused as a witness until the defendant has had a reasonable opportunity to review the videotape deposition in private with his counsel and to consult with his counsel; and until his counsel has been afforded the opportunity to cross-examine the child following such review and consultation.
4. The court shall preside over the depositions, which shall be conducted in accordance with the rules of evidence applicable to criminal cases.

5. The attorney for the defendant shall have at least two opportunities to cross-examine the deposed alleged child victim: once prior to the preliminary hearing and at least one additional time prior to the trial.
6. Prior to the taking of the deposition which is to be used as substantive evidence at the trial pursuant to sections 491.675 to 491.693, the defendant's attorney shall be provided with such discoverable materials and information as the court may, on motion, direct; shall be afforded a reasonable time to examine such materials; and shall be permitted to cross-examine the child during the deposition.
7. If the defendant is not represented by counsel and if, upon inquiry, it appears to the court that the defendant will be unable to obtain counsel within a reasonable period of time, the court shall appoint the public defender or other counsel to represent the defendant at the deposition.



**RECORDED STATEMENT STATUTE**  
**Ariz. Rev. Stat. § 13-4252 (2010)**

§ 13-4252. Recording of testimony [statements]

- A. The recording of an oral statement of a minor made before a proceeding begins is admissible into evidence if all of the following are true:
  1. No attorney for either party was present when the statement was made.
  2. The recording is both visual and aural and is recorded on film or videotape or by other electronic means.
  3. Every voice on the recording is identified.
  4. The person conducting the interview of the minor in the recording is present at the proceeding and available to testify or be cross-examined by either party.
  5. The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence.
  6. The minor is available to testify.
  7. The recording equipment was capable of making an accurate recording, the operator of the equipment was competent and the recording is accurate and has not been altered.
  8. The statement was not made in response to questioning calculated to lead the minor to make a particular statement.
- B. If the electronic recording of the oral statement of a minor is admitted into evidence under this section, either party may call the minor to testify and the opposing party may cross-examine the minor.

# TECHNOLOGY IN THE COURTROOM: HELP OR HINDRANCE?

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## What are the advantages and disadvantages of recording technology and CCTV?

The **advantages of recording interviews** include, but are not limited to, that recording:<sup>25</sup>

- Can decrease the number of interviews a child victim must experience, as well as the number of interviewers.
- May record spontaneity, emotion, or detail that may be missing in later descriptions after time has passed.
- Provides a verbatim account of the interview as well as displays facial expressions and gestures if the interviewer's conduct or the child's exact words later become an issue at trial.
- Is more comfortable and non-adversarial for the child witness, and therefore presumably the child can be more communicative.
- May help obtain guilty pleas when shown to the defendant and his counsel and thereby eliminate the need for the victim to testify.
- May be used at grand jury instead of the child victim's testimony, depending on the jurisdiction.
- May be used to support preliminary showings before trial (i.e., when showing the need for special procedures to facilitate the child victim's testimony).
- Can refresh the child victim's recollection before trial in the same way that adult witnesses can review police reports and transcripts.
- May be used to impeach the child victim if she recants on the witness stand.
- Can be shown to a recanting victim to help her overcome her denial.
- May be used, if admissible, to corroborate the child's testimony

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<sup>25</sup> Many of the advantages and disadvantages listed here are found in *Investigation and Prosecution of Child Abuse*, 2d. ed., American Prosecutors Research Institute, Alexandria, VA: 1995.

- Can be used to convince non-offending parents that the abuse really occurred.
- Can help in making the charging decision if the prosecutor has not personally interviewed the child, thereby eliminating the need for an additional victim interview, in those jurisdictions that do not use vertical prosecution.

At the same time, **recording of interviews may have some disadvantages** as well, such as:

- Nervousness by the child victim or interviewer may result in a distracted interview.
- Photography/recording may have been part of the abuse and may traumatize the child victim.
- Several interviews are often required to elicit a full account of the abuse.
- A single interview may be misleading because it records only one point in the disclosure process.
- Other out-of-court disclosures may receive less consideration because they were not recorded.
- Defense counsel can use an ineffective interview to argue that improper techniques were used.
- If the jurisdiction only records in selected cases, the selection process casts doubt on those cases when recording is not used.
- A recorded denial or recantation can be replayed for the jury, damaging the prosecution's case.
- The defense can argue that different standards are applied to adult versus child victims.
- The recording may jeopardize the privacy rights of the child victim.
- Inadvertent destruction of the recorded evidence can in some states result in dismissal of the charges.



There are three primary **advantages to recorded testimony**:

- It is less controversial than recording statements or interviews and can be taken in more informal, less intimidating settings than in-court testimony.
- If the defendant can be excluded from the room, the child victim-witness is spared the anxiety of testifying in the defendant's presence.

- It can make the victim “real” to the jury through facial expressions, gestures, and pauses that cannot be sufficiently conveyed through a written transcript.

**Disadvantages to the use of recorded testimony** include:

- They lack the immediacy and persuasive impact of live, in-court testimony by the victim – it may seem to the jury as if they are just “watching TV”
- May enable the defense to prepare its case with prior knowledge of crucial testimony, and if additional evidence comes to light, the defendant may have the right to cross-examine the child victim again, defeating the intent to reduce the number of interviews
- Some states allow the presence of the defendant, who may be in even closer proximity in a small room than he would in a courtroom
- If recorded testimony is commonplace, non-offending parents or guardians may expect or demand the use of this technology even when in-person or CCTV testimony may be preferable



**Advantages of using closed-circuit television** for a child victim’s testimony include that:

- The child can testify in a more relaxed environment than a courtroom and outside the physical presence of the jury, spectators, and defendant
- Using CCTV over recorded testimony negates some of the disadvantages of recording (e.g., the ability of the defense to use the recorded testimony in preparation for trial, the possibility of newly discovered evidence during recording of the child’s testimony)
- It enables the testimony of a child who may be unable to testify with the defendant present

**CCTV’s disadvantages**, however, include:

- The possibly diminished effectiveness at trial of a televised image over a live witness
- In those jurisdictions where a defendant’s presence is required in the room in which the child witness is testifying, the experience may end up being more intimidating than a courtroom setting

# TECHNOLOGY AND THE COURT: OTHER CONSIDERATIONS

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## What practical considerations does the Court need to take into account?

Jurisdictions should establish protocols within state statutory guidance that guarantee consistency: in which cases will interviews be recorded; who conducts the interview; what state confidentiality, privilege, or nondisclosure laws apply; and does the procedure ensure the recording fulfills its intended function. For example, multi-victim cases present particular challenges – there needs to be a control point and each individual interviewer cannot share the information with other interviewers. If interviews will be recorded, it is best to use a professional interview protocol.

Other legal issues include technical details and logistics that may give rise to legal challenges, thereby endangering a fair trial. The protocol should include procedures for preserving recordings and converting previous recordings from videotape to DVD or other digital formats, and a prohibition against destroying originals, as well as who will perform the conversion, under what circumstances, and who should be present. It must ensure that recordings are true and accurate and resolve authentication issues (no editing or alteration). The protocol must also address chain-of-custody issues so that evidence is not lost or compromised. If the recording is entered into evidence, it becomes the property of the court and additional procedures must be followed.

## Is there application for this technology in other types of cases?

The use of CCTV is primarily centered on criminal child sexual abuse cases. Many states define the scope of their statute with the umbrella term “sexual offense,” or “sexual act committed on a child.”<sup>26</sup> Some states include other sexual crimes against minors in their statutes, such as: incest, sexual exploitation, and indecent exposure, rape and sodomy, kidnapping and confinement, promoting a sexual performance by a minor, lascivious and lewd behavior, endangering children, and murder and manslaughter.<sup>27</sup>

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<sup>26</sup> See, e.g., Conn. Gen. Stat. § 54-86g (2010).

<sup>27</sup> See, e.g., Burns Ind. Code Ann. § 35-37-4-6 (2010); Tex. Code Crim. Proc. art. 38.071 (2010).



The use of CCTV, however, has been upheld in other contexts beyond criminal prosecution. In *In re Amber S.*<sup>28</sup> the Court upheld use of CCTV in a civil dependency case in which the parent did not claim a violation of confrontation rights. The Court reasoned that because the case was not a criminal prosecution, it did not involve the express right of confrontation guaranteed by federal and state constitutions to criminal defendants. Although a parent in a civil dependency case does have a constitutional due process right to confront and examine witnesses, the parent here did not claim a violation of that right.

Similarly, witnesses other than the child victim have been allowed to testify via CCTV when a psychologist testified that the defendant's presence would be so traumatic for the child witness that her ability to testify truthfully would be in question.<sup>29</sup> CCTV has successfully been used in juvenile delinquency proceedings as well.<sup>30</sup>

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<sup>28</sup> 15 Cal. App. 4th 1260 (1st Dist. 1993).

<sup>29</sup> *State v. Rupe*, 534 NW2d 442 (1995) (victims' brother allowed to testify via CCTV).

<sup>30</sup> *State in interest of R.C.*, 514 So.2d 759, cert. den'd, 516 So.2d 128 (1987) (CCTV testimony of child victim permitted in prosecution of juvenile).

# TECHNOLOGY AND THE LAW:

## SUPPORTIVE INFORMATION

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### Where can I get more information on using technology in child abuse cases?

The ABA Center on Children and the Law's web page <http://new.abanet.org/child/Pages/videotape.aspx> provides a comprehensive look at CCTV and Recording Technology.

- [CCTV and Recording Resource Map](#)

The Closed-Circuit Television and Recording Technology Legal Database is a resource for jurisdictions and individuals working to improve the use of such technology in child abuse cases. Organized by state and topic, the database provides information on state statutes and case law and lists contact information for ABA CCTV and Recording Technology program grantees, technology vendors, and others. This on-line resource is intended to provide up-to-date information on statutes and case law, and facilitate the exchange of information among those working with CCTV and recording technology. The intended audience includes prosecutors, judges, child advocates, forensic interviewers, ABA CCTV and Recording Technology program grantees, and other interested parties.

Under each state on the map, there is an option to review the state statutes, the state case law, state-based contacts, or all information for that state. A user can also review each of the categories to obtain all state statutes, all state case law, or all the state contacts. The information database is regularly updated to include the latest information.

The Database contains the following:

- **State Statutes** – the most current state statutes addressing use of closed-circuit television and recording technology in child abuse cases,
- **State Case Law** – a synopsis of state cases addressing the use of CCTV and recording technology in criminal child abuse cases,
- **Contacts** – a list of contacts for ABA grantees within the states, including vendors that local jurisdictions have used to implement their programs.

- [Technology Toolkit](#)

The Technology Toolkit gives technical details for CCTV and recording programs. This includes suggestions for finding vendors, lighting placement, camera and microphone considerations, installation, recording information, and maintenance.

- [Program Planning and Evaluation Toolkit](#)

The Program Planning and Evaluation Toolkit outlines planning your program, conducting a needs assessment, data collection ideas and methods, creating a program, evaluations, and sample data collection instruments.

Judges hold enormous responsibility to uphold the law, assure fair trials, and render decisions based on evidence. The use of technology to assist in evidentiary and trial testimony is one that each judge must assess, based on the availability of equipment, requests by prosecution and challenges by defense attorneys, and the perceived distress of the child victim, on a case-by-case basis.

The authors believe the information presented in this Overview, along with the resources available on-line, through the ABA's webpage <http://new.abanet.org/child/Pages/vidiotape.aspx>, provides helpful guidance to support judges' decisions in these matters.

# TECHNOLOGY IN USE:

## MENTOR SITES

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Judges in both Kansas and Virginia support the use of technology in their courtrooms. The frequent use and the continuing expansion of the Western Kansas Mobile Child Advocacy Center and Virginia State Police's Closed-Circuit Television Program demonstrate this. Both programs give children the opportunity to disclose their abuse in a safe environment, preventing further trauma, while also following state laws and statutes.

The CCTV and Recording Technology Program recognizes the unique capacity of portable equipment as both a cost-saving measure and an innovative method to reach underserved victims. Two outstanding programs have been funded by BJA and the ABA: The Virginia State Police Department's Mobile CCTV program, and the Western Kansas Mobile Child Advocacy Center, which can both record victims' forensic interviews, and serve as a remote site for CCTV transmission into a courthouse.

The CCTV and Recording Technology Program recommends that judges and professionals work with stakeholders to improve the quality of recordings in their jurisdiction, educate themselves on current statutes and related case law, participate in appropriate training, and review literature on child victim testimony.

### **Western Kansas Mobile Child Advocacy Center (WKCAC/MCAC) Scott City, Kansas**

Despite the development of three strategically placed child advocacy centers throughout western Kansas, families and multidisciplinary team members living in rural counties were often required to travel significant distances (i.e., three or more hours by car) in order to access services provided by the WKCAC.

The staff of the Western Kansas Child Advocacy Center (WKCAC) created their first mobile child advocacy center (CAC). In 2007, in response to a growing demand to the services of a child advocacy center, the Western Kansas Mobile Child Advocacy Center (MCAC) serves a 29-county region, covering the western portion of Kansas. This recreational vehicle (RV) offers most of the services available at a stand-alone center: forensic interviewing,

**During its first year of operation, the WKCAC caseload increased 107%. By the third year, the increase was 158%.**

extended forensic interviewing, family and child therapy, and the option of testimony via closed-circuit television. The mobile unit is a large 38-foot RV renovated into a CAC. It is divided into three distinct parts:

- **Observation room**, located in the driving compartment. To ensure privacy, there are curtains that cover the windshield of the MCAC. The cameras and recording equipment are housed in this area and can be controlled by observers.
- **Child-friendly waiting area**, in the center of the RV. There are chairs as well as toys appropriate for children of varying ages.
- **Interview room** in the rear. There is a bench in one corner for the child and forensic interviewer to sit. The ceiling is outfitted with two cameras (this enables picture-in-picture capabilities) and a microphone. Sliding doors between ‘rooms’ and a white noise machine provide sound-proofing.

When the mobile center is being used to record a forensic interview, professionals in the monitoring room communicate with the forensic interviewer through an earbud. This allows the MDT to take an active role in the interview while letting the forensic interviewer present the questions in an age-appropriate manner.

The state of Kansas allows for two-way closed-circuit television to transmit a child’s live testimony into a courtroom. The child may be permitted to testify via CCTV if the court finds that testifying in open court would traumatize the child so much that he would be unable to effectively communicate to the jury. The only people that are permitted in the room while the child is testifying are the defendant’s attorney, the attorney for the state, and an equipment operator.

When the Center is being used to transmit live closed-circuit television there is a camera on the judge at all times as well as two cameras in the interview room in the mobile unit. There is a telephone connecting the defendant with his lawyer. The equipment technician is in the monitoring room and can see both the judge and the child’s transmission.

The WKCAC staff bought a used motor home for approximately half of the cost of a new one. Throughout the year the operating costs of a mobile unit are a fraction of that of a stand-alone center. The mobile unit averages 17,500 miles a year.

When the MCAC reaches its destination, it can park at a school, nearby park, police station, courthouse, the child’s home, or any other nearby location.

**Within three years, the number of Interagency Agreements between WKCAC and area counties for Mobile CAC services increased from three to 23 counties.**

In 2010, the WKCAC bought a second, smaller RV to convert into a Child Advocacy Center. This unit is used primarily for forensic interviews and extended forensic evaluations.

To learn more about the Western Kansas Mobile Child Advocacy Center, visit their website: <http://www.wkcac.com>.



## Virginia State Police Richmond, Virginia

The *Code of Virginia* allows a child victim in a criminal or civil proceeding to testify via two-way closed-circuit television. A child can testify from a remote location if he is 14 years or younger at the time of the offense or 16 years or younger at the time of the hearing. This *Code* also applies to children who witness a crime, if they are 14 or younger at the time of the hearing. There are three circumstances under which an eligible child may testify via CCTV. The child must:

- Refuse to testify despite the judge's repeated requests
- Demonstrate an inability to communicate about the offense
- Be likely to suffer severe emotional trauma from testifying; an expert witness must corroborate this

The closed-circuit equipment can be used in kidnapping, criminal sexual assault, certain family offenses, or murder cases. A child can testify over the system at preliminary hearings, bench trials, jury trials, or civil child protection hearings.

To facilitate the use of CCTV, the Virginia State Police developed a Mobile CCTV program in May 1994. This program expanded the use of closed-circuit testimony throughout the Commonwealth of Virginia. The use of the equipment ranges among counties within Virginia; some use the equipment repeatedly, while others are more sporadic in their requests. Almost all counties have requested the equipment since the program began.

**The most common reason for non-use after a request for the equipment is the defendant entering a guilty plea.**

Working with the Virginia Department of Criminal Justice Services (DCJS), the State Police developed protocols for requesting CCTV equipment in any courthouse in the Commonwealth. The State Police also wrote a brochure detailing the legal underpinnings and criteria under which the CCTV may be requested for use.

It is possible for five different professionals to request the equipment: attorney for the Commonwealth, child's attorney, guardian ad litem, DSS attorneys, defense attorney in a criminal case. A request is sent to the State Police in writing. Virginia State Police should be

contacted as soon as it is likely that the equipment will be needed. For a criminal hearing, they must know at least seven days in advance, and require two days notice for a civil hearing. Prior to the date of the hearing and before any equipment is installed, a Virginia State Police special agent views the courtroom and interview room. This allows time to make special arrangements for any identifiable technical or logistical issues.

Trained special agents bring the equipment to the courthouse, install it, and monitor it while it is in use. On average, it takes approximately 13-man hours to travel to the location, setup, and breakdown. During the equipment set-up, the special agents are instructed to listen to any requests and directions given by the judge

There are four different systems. Each system includes four to five monitors; not all of them are required to be used. A telephone is provided in the courtroom and remote interview room, to allow for confidential communication between the defendant and his attorney. There are two cameras for the respective rooms. One camera is generally focused on the witness, while the other is directed at the judge. The proceedings are not recorded unless requested. If the judge requests that a recording be made, the state police agent gives the recording to the court for custody as part of the court record.

**In the first 10 years of the program's existence the use of CCTV in the courtroom doubled.**

Several professionals are permitted to be in the room while the child is testifying: the commonwealth's attorney, the defendant's attorney, a person necessary for the child's well being, and a technician for the equipment. The child's testimony is transmitted live from the remote location into the courtroom; therefore the judge and jury are able to see the testimony as it is happening.

The purchased equipment was chosen based on its portability and the plans for its use. All of the equipment is commercial grade, meaning that it is more durable than consumer-grade products. This service is provided at no cost to the court, prosecution, or defense. It is based on a first-come first-served basis.

To learn more about the program with the Virginia State Police, visit their website: <http://www.vsp.state.va.us/>.

# TECHNOLOGY AND THE LAW:

## CONCLUSION

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Recording devices and closed-circuit technology have an important role in child abuse case investigations and prosecutions. Most child advocacy centers record and preserve forensic interviews, which become part of the investigative record. These recordings: document the forensic interview; maintain consistency across investigations; can be shown at grand jury or pretrial hearings; or can be presented in court to support a child victim's assertion of their sexual abuse. All of these uses assist the criminal investigation and prosecution, while also preventing the child from recounting their abuse multiple times to multiple people. Similarly, CCTV is one of the tools prosecutors may request to limit further trauma to a victim and help those who are reluctant to testify.

The U.S. Supreme Court, appellate courts, and state courts support the introduction of recorded interviews and testimony, and the use of CCTV to present victim testimony, so long as defendants' rights to face their accusers are not abrogated in the process. When allowed, CCTV supports live victim testimony while recorded statements of victims can be used as long as the victim is available to testify (perhaps by CCTV) and the defense has had the opportunity to cross-examine.