

Section “D”

Videotaping of Children’s Evidence

Purpose

Courts in Canada have articulated a preference for video or audio taped statement evidence. This evidence is seen as an inherently reliable record of the interview process. A videotape allows the viewer the opportunity to observe the demeanor and behaviour of a witness and of the interviewer in a way that gives particular meaning to the words spoken.

This section of the protocol is designed to deal with the videotaping, production and security of taped interviews of children's evidence. In particular, reference should be made to the portions of the protocol dealing with investigation and interviewing when planning and executing a videotaped interview of a child's evidence.

This section of the protocol is intended to promote consistency of videotaped interviews from interviewer to interviewer and from site to site. Guidelines have been included as to how videotapes will be made, maintained and used. However this section does not include complete procedures involved in videotaping.

Although specifically targeted to the videotaping of children's evidence much of the information contained within it can readily be adapted to the video-taping of dependent or vulnerable witnesses of any age. Some of what is contained in this protocol is referable to the videotaping of suspect or offender interviews.

What use can be made of videotaped evidence

As evidence of what happened:

The *Criminal Code* has been amended to permit a videotaped interview of a child sexual assault complainant to be entered in evidence in a criminal trial, if the videotape was made within a reasonable time after the alleged offence and if it is later adopted by the complainant.¹

Case law has been developed which would permit the introduction of videotaped evidence as an exception to the hearsay rule of evidence in exceptional cases.²

Before a videotape can be admitted into evidence it must meet the requirements of relevance, reliability and necessity. Before its admission the court will seek, as with all physical evidence, to have the continuity of the evidence established. This is to ensure the evidence has not been altered or tampered with in advance of the trial. The court will also require evidence as to its making. That is the court will want to know what happened before, during and after the videotaping.

When complied with, this protocol should ensure the admissibility of videotaped evidence in appropriate cases.

Other uses:

Regardless of whether the videotape is ultimately admissible as evidence in a subsequent criminal proceeding, videotaping a child's evidence has several advantages:

- The videotape becomes available to others involved in the investigation and prosecution of the allegation. It is a reliable record for the investigative team. Its utility as a record does not diminish over time and is not dependent upon the recollection of the investigator. Consequently the child does not need to be repeatedly interviewed. This reduces the trauma the child may experience during the course of the investigation and prosecution.
- The videotape can be a useful investigative tool. It can be shown to the perpetrator in an effort to elicit acceptance of responsibility for actions pre or post charge.
- It can be shown to the child in preparation for court.

What to videotape

Consideration should be given to videotaping any and all verbal/demonstrable statements elicited from a child during the investigation of a criminal complaint. The decision to videotape is left to the discretion of the police and child protection worker. In exercising this discretion they will be guided by the following principle:

Videotaping is an effective way of reducing investigative trauma to an already traumatized child. Consequently it is the preferred method of recording the evidence of children and other vulnerable witnesses.

Children's evidence should be videotaped whenever possible. To facilitate this there are appropriately designed softrooms with videotape capacity throughout the province. These facilities must be booked in advance by police.

In some cases the urgency of the investigation, the medical needs of the child or the personal circumstances of the child will result in a decision not to videotape the child's evidence. In such cases the investigative team will record its reasons for not videotaping the statement taken. The interviewer will, wherever possible, audiotape interviews which are not videotaped. A detailed record of what transpired during the interview will be kept by the interviewer and the investigative team. That record will include but not be limited to the time, date and place of the interview, the duration of the interview, who was present during the interview, the precise questions asked of the child, the precise answers supplied by the child and interview aids used during the interview if any.

Interview Room: Design and Structure

Standards for Softrooms:

The room should be an environment in which the optimal conditions for videotaping are produced. It should strike a balance between a non-threatening room which will encourage disclosure and a room that will not present distractions for the child. It is necessary that the child feel relaxed and comfortable and not intimidated by austere, clinical or sterile surroundings. However, it is also important that the child not be distracted and that the child understand that the purpose in coming to the room is to talk about the incident.

The furniture should be comfortable and functional. It should be able to be moved to accommodate the child's needs and interests.

There should be no distractions (like toys) or interview aids kept in the interview room. Any aids

like anatomically detailed dolls, paper, pens, easels and the like should be brought to the room by the interviewer when the interviewer has determined that they are appropriately used.

The interview room should not contain a window or one-way glass, as they are too distracting. Viewing of the interview should be in a separate monitoring room immediately off the taping room. The monitor room should be equipped with videotape monitors and sufficiently soundproofed that any feedback or audio echo does not present a problem to the interview.

The camera and microphone will be located in interview rooms so that they will not be obtrusive or distracting for the subject.

Access to the interview room will be limited. Ideally, there should only be two people present in the interview room: the interviewer and the child. Access to the rooms by the public will be limited by posting signs advising people away from the interview room or by locking access doors. Access to the camera equipment and to the monitor room will be limited to those validly monitoring an interview or skilled technical staff.

The following standards are suggested:

monitor room

- size of room can vary, but should allow room for monitor, recording equipment and two or three persons.
- ideally the room should be close to the interview room, but can be situated anywhere where you can lead cable to.
- should have a locking door to protect equipment and provide privacy when monitoring an interview.

interview room

- should be about 10' x 12'
- located away from the general office, high traffic and high noise areas to eliminate distractions and interference. Children should not have to travel through the entire office to get to the interview room.
- lighting should be sufficiently bright to clearly light the room and provide for video recording. Florescent lighting can cause a colour camera to give a green or off-colour effect, resulting in poor picture quality.
- the acoustics of the room need to be considered to prevent echoes or a box-like sound

being picked up. This can usually be eliminated with acoustic roof tile, hanging a curtain on a wall and carpeting on the floor.

- there should be only one entrance to the room.
- walls should be painted in softer neutral colours. If used, wallpaper should have neutral colours with no patterns.
- if a window is in the room it should have a Venetian blind/curtains.
- no closets.
- no painting, posters etc. on the walls.
- carpet should be in a complementary neutral colour, and a low pile type that allows for easy movement of chairs, children playing etc.

Furniture

- any couch chosen should be a smaller size (loveseat). It should be easy for a child to get in and out of. It should not be a big soft cushion type.
- choose soft colours and avoid bold patterns or designs in upholstery.
- if a coffee table is placed in the room it should be a low style circular table (20" high, 36" diameter) to allow for easy placing of chairs around and less chance of injuries on sharp corners by children.
- end tables, pole lamps and table lamps can be used but not to excess as the room becomes cluttered. Be cautious about using halogen lights and they can burn small hands.

Camera/microphone

- Audio and video equipment should be of industrial grade. It has been field proven to be far superior in wear and quality of product. It is also easier to repair and maintain. Suppliers of parts for this type of VCR, Camera and Monitor are readily available unlike consumer grade equipment. It is worth the money to purchase better quality recording equipment which will allow for better picture and sound. Technicians can work with and enhance the quality of a video done on top quality equipment.
- Recording should be done in the VHS format.
- The camera should be overtly mounted at a lower level to allow better viewing of small children.

- Camera should show entrance to room to show who enters the room during the interview.
- Camera should have time date and continuous counter capacity.
- There are two types of video to choose from. The one camera and two camera version. The two-camera version is a picture in picture and allows for a close up of the child and a simultaneous view of the room at the same time. Either type of video is adequate.
- Videotape selection is important. There are different qualities. A couple of suggested brands are TDK or Sony. Avoid Kodak or no-name brand tapes.
- Proper storage of videotapes is important to prevent damage and extend their lifespan. Tapes should be stored in an upright position at normal room temperature. They should be kept away from sources of heat or electrical current. They should not be kept on or in the VCR for any length of time.
- Microphones should be mounted on the wall to enable good sound quality. A table-mounted microphone tends to pick up other noises.
- A body pack microphone should also be available to place on the person being interviewed, especially a child. Children often will talk down into their chests, or speak quietly and these microphones will pick their voice up.

More specific equipment specifications are available from Sgt. A.E. (Gus) Schmid, RCMP Special "I" Division, 1721 8th Street East, Saskatoon, Sask. S7H 0T4, (306) 975-5677.

What should be on the Videotape?

The videotape should accurately record what transpired during the interview with the child. It should therefore show as much of the interview room as possible. It should show all entrances and exits from the room so that we may know who is in the room at all times.

During the interview only the interviewer and the child should be present in the room. Both of them should be plainly visible on the videotape. The videotape must record their facial and bodily expressions as well as any sounds they may make.

The presence of a second interviewer, or child or of a support person or parent is strongly discouraged. In some cases, for example where an interpreter or translator is required to assist the interviewer, a third person may need to be present. That person must be instructed not to

coach, assist or lead the child in providing their evidence. In those rare cases where a third person is present their facial and body expressions must be clearly visible at all times on the videotape.

The videotape should have a time/date display or other method of determining whether taping was disrupted [like a large clock in the background].

Remember the accused and his counsel will likely view the videotape. Sometimes the videotape may be played in open court. Consequently, while we recognize the need for rapport building with the child, some things should never be recorded on the videotape:

Never Record Identifying Information About The Child like their address, phone number, school, grade and teacher, day-care address and name. Respect these children's privacy. The accused or other's attending court proceedings can obtain information about the child that might not otherwise be available to them. If a written statement were taken the prosecutor's office would edit that identifying information out before providing the statement to the accused, it is very difficult to do that with a videotape.

Never Record Their Sexual History with persons other than the suspect or suspects. This is particularly so with sexually active adolescents. The fact that they may or may not be sexually active is generally irrelevant to the investigation. Once elicited this information can become the subject of defence motions and inquiries into the child's private life that can be very embarrassing and damaging to the self-esteem of the child.

Do Not Ask The Child Their Opinions About:

-the content or reliability of medical or other evidence

-what should happen to the suspect

At best this information is irrelevant to the investigation.

Monitoring the Interview

All of the softrooms in the province have been designed to allow monitoring of the interview in a separate room. It is recommended that in all cases where a videotape is being made of a child's evidence that the interview be monitored by members of the investigative team. Monitoring is different than providing technical support to the videotaping process. In fact those monitoring the interview must be clearly instructed to **not touch the recording equipment** unless they are a designated and trained technicians.

Those monitoring the interview must pay close attention to the interview in progress and take detailed notes of the interview. Those notes may be required to supplement or explain any subsequently identified technical or other difficulties with the videotape. They are there to assist the interviewer in conducting a comprehensive and sensitive interview with the child. In performing that function they may be required to interact with the person conducting the

interview.

In very few locations throughout the province it is possible for those monitoring the interview to communicate with the interviewer by speaking directly to him, via an ear microphone, while an interview is occurring. Where such an opportunity exists those monitoring should be careful to interject comments when they will be least disruptive to the flow of the interviewing process. Comments should be limited. Many comments can be reserved to the time when the interviewer breaks to consult with the other members of the team. Detailed analysis, criticism or suggestions should be held back until there can be a face to face debriefing with the interviewer.

Generally, during every interview the interviewer should break to consult with those monitoring the interview. The purpose of the consultation is to ensure that the interviewer has elicited all relevant information from the child. Generally this will occur near the completion of the interview. The interviewer should advise the child that he is leaving the room to speak with his helpers and that he will be right back. Upon returning he should tell the child that he has talked to his helpers and they have reminded him that he forgot to ask...., or suggested that he might want check to make sure about...., or that we have done a good job of describing what happened and so I have no more questions for you.

Persons who are not members of the investigative team should not be allowed to monitor the interview or be present during the interview of the child. Most commonly the caregiver of the child will ask to be present. At this point in time the investigator is likely not fully aware of the circumstances of the allegation (if they are, one wonder's why the interview is necessary). The presence of a caregiver during the interview may taint the evidence given by the child or may cause the child to withhold or colour evidence to protect himself or the caregiver. The interviewer does not know at this time whether the caregiver is an offender and consequently permitting them to participate in the interview may expose the child to increased risk.

If a parent or caretaker is permitted to monitor or be present during the interview they must be carefully instructed as to permissible behaviour. They may also need to be warned that anything they say or do during the course of the interview may be used against them in subsequent proceedings.

To avoid these difficulties it is suggested that at the time the child is being interviewed the caretaker be given some tasks. They should be asked to provide a detailed statement of all the events leading up to their bringing the child in for an interview. The statement should include the details of any conversations they have had with the child about the incident or about the purpose of the child attending for an interview. They should also be asked to provide detailed biographical information on the child. That is, their date of birth, their family status, their current

age, where they attend school, their grade, their teacher's name, favourite pastime, things they fear, favourite toy or clothing, doctors name, counsellors name, special needs, parents names and addresses, siblings names, friends, babysitters day-care workers, extracurricular activities, any observed behaviour changes: specify what, when occurred, how often, how severe....., who to contact to arrange interviews or court preparation. If it has not already occurred the investigator should provide the caretaker with the name and phone number of the key investigative team members, a number to contact for information throughout the proceedings and the name and number of victim assistance personnel.

Planning and Follow-up to the videotaped interview

As with all interviews of children the investigative team should meet in advance of the interview and plan it. The primary interviewer and monitors should be identified. Any special needs the child has should be identified and prepared for. If special equipment will be required to elicit the statement from the child it should be arranged for. If interview aids will be used, the interviewer should take steps to ensure that their use will be plainly visible and comprehensible on the videotape.

Arrangements should be made to book the interview room at a time that is convenient to all parties. When booking be sensitive to the schedule and needs of the child. Do not interview during normal nap or meal times. Do not schedule an interview which conflicts with the child's school, activity or social schedule.

Arrange to have the child transported to and from the interview site. Provide instructions to the person transporting the child about the requirement to record what transpires during those times. Arrange and communicate what you expect the person transporting the child and/or other support persons or family members who accompany the child during the interview to do during the interview.

Arrange to greet the child upon arrival at the interview site. Generally speaking the child should be advised that they will be videotaped. Often these children will view a copy of the videotape at a subsequent point in the proceedings.

It is best if all of the interaction with the child is on videotape. There must be no pre-tape interview with the child.

Each interview conducted should be recorded on a separate videotape.

Once the interview is completed the interviewer should review the videotape and make notes. The purpose of this exercise is twofold: first it enables the interviewer to determine whether the videotape accurately records the interview, at a time when the interview is fresh in the mind of the interviewer. Secondly it enables the interviewer to, with some degree of accuracy, to note what was said or done during portions of the videotape that may have poor picture or sound

quality.

Having reviewed the videotape the team should discuss what will happen next with the investigation. It may be appropriate at this time to forward the file [including a copy of the videotape] for opinion to the prosecutions child abuse team in your area.

The videotape must be marked and treated as an exhibit by the police member of the team.

The team should determine whether copies should be made and if so who should receive those copies and when and why.

The investigative team should keep an accurate record of all that transpired prior to and subsequent to the interview, in the event they are later called to testify about the content or process of obtaining this child's evidence.

Copying the Videotape

The original videotape is evidence. It must be treated in every way like other real evidence in a criminal proceeding. The police are responsible to ensure that this happens and to preserve the integrity of this evidence.

Others involved in the investigation may from time to time require copies of the videotape.

- Only police may make copies of the original videotape. They must keep a record of all copies made and who they are provided to.
- Copies of videotapes shall be carefully packaged in a sealed container; delivered by hand, courier or registered mail directed to the recipient and marked personal and confidential.
- All copies must be returned to police for destruction when no longer required for the purpose they were provided, unless written permission is obtained from the police service to retain possession of the copy of the tape.
- Several interviews can be copied onto a single videotape. But the interviews must all relate to the same case, suspect or file.

Prosecution of criminal cases

A copy of the videotape should be provided to the prosecutor's office when requesting an opinion as to charges. The videotape will be returned to police when the opinion has been delivered, unless a prosecution has commenced or charges will be laid immediately. In the latter cases the prosecutor providing the opinion will advise that the videotape has been retained on their file.

Immediately upon charges being laid the police shall provide the prosecutor's office with two copies of each relevant interview. One copy is intended for disclosure purposes. One copy is intended for trial preparation.

- The prosecutor's office will in all cases provide disclosure of copies of videotapes of children's evidence. All requests for disclosure are to be forwarded to the appropriate prosecutor's office.
- The prosecutor will determine and impose necessary trust conditions or seek court orders in appropriate cases to preserve the privacy of the child and ensure return of the copy.
- The prosecutor will assume responsibility for ensuring the videotape is not copied further, or if additional copies are made, track them and ensure their return upon completion of the prosecution.
- Upon completion of the prosecution and the expiry of any relevant appeal periods all copies of the videotape shall be forwarded to the police investigator for destruction.

Other professionals

Other professionals involved in the investigation and prosecution of the complaint may from time to time require a copy of the videotape.

- All requests for a copy of the videotape shall be made in writing and directed to the investigating officer.
- Wherever possible the preference shall be for the police to provide these professionals with an opportunity to view the videotape at the police station. Only in cases where that is not feasible will a copy of the videotape be provided.
- Where a copy is provided by police, they shall document who received a copy, when and why.
- The recipient of the videotape is not entitled to make a copy.
- The copy shall be returned to the investigator for destruction at a date and in a manner specified by the investigator, but in any event no later than 5 years from the date of receipt.

Destruction of copies

Upon receipt of returned copies of videotapes the investigator shall immediately arrange to have

them erased, and shall make a record of their return and erasure.

Erased videotapes can be used for other purposes but can never be used again as the original videotape for an interview.

Retention and Storage of Original Videotapes

The original videotape should be in the possession of the police at all times, unless and until it has been marked as a court exhibit.

Where an original videotape has been marked as a court exhibit the Crown prosecutor will request an order that it be returned to the police upon the conclusion of all relevant proceedings and appeal periods.

The police may rely on existing retention of exhibits policies.

Endnotes

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1. Section 715.1 of the *Criminal Code* allows for the admission of videotaped evidence of complainants in proceedings related to listed sexual offences. The offences include all sexual assaults and child molestation offences. They include prostitution related offences involving children. The listed offences currently include sections: 151, 152, 153, 155, 159, 160(2), 160(3), 163.1, 170, 171, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272, 273 of the *Criminal Code*.

The videotaped evidence may be admitted if

- the complainant was under 18 ***when the offence occurred***;
- the tape was made within “a reasonable time after the alleged offence”;
- the tape records the complainants description of the acts complained of;
- the complainant testifies; and
- while testifying the complainant adopts the contents of the tape.

2. Developing case law allows certain out of court statements, including videotaped statements, to be admitted into evidence as proof of their contents. These statements are only admissible as an exception to the hearsay rule and only if the requirements of necessity and reliability are met. (*R. v. Khan* (1991), 59 CCC (3d) 92 (SCC))

In certain circumstances a prior inconsistent statement will be admissible. In *R. v. B (K. G.)* (1993), 79 CCC (3d) 257 the Supreme Court of Canada stated that a statement videotaped in its entirety has inherent reliability and a court may consider that fact when determining whether such statements be admitted.

