

# Videotaping of Forensic Psychiatric Evaluations

## AAPL Task Force

Forensic psychiatry, like other areas of medicine, is working to establish standards of practice as the subspecialty expands. There are a growing number of experts who routinely videotape or audiotape their evaluations. Some of them have proposed that videotaping should be the standard of practice for forensic evaluations. The purposes of the AAPL Task Force on Videotaping Forensic Interviews are to review the relevant case law, to consider the advantages and disadvantages of videotaping forensic interviews, and to give guidance to psychiatrists working as legal consultants. Many of the clinical issues are similar for audiotaping and videotaping, but this paper focuses on videotaping and the conclusions pertain to videotaping.

The first part of this report discusses the clinical and forensic advantages and disadvantages of videotaping forensic interviews. The next section will examine the emerging case law on videotapes of forensic interviews. The third part of the report will review the technique of admitting videotapes into evidence, with emphasis on the responsibility of the foren-

sic psychiatrist. The final section contains recommendations from the task force to AAPL.

## Clinical Issues

The results of forensic evaluations are generally summarized in a report submitted to the court or to the attorney requesting the evaluation. Testimony may be required and would be subject to direct and cross-examination. It is necessary for psychiatric experts to be able to explain the basis for their conclusions both in their reports and on the witness stand. The conclusions are frequently grounded, in part, upon what the plaintiff or defendant told the expert. Experts also have to describe their observations of the defendant's or plaintiff's demeanor and behavior during the evaluation. It is not surprising that most forensic psychiatrists take copious notes during the interviews and/or dictate notes shortly after the interviews so as to preserve impressions and data. With the advent of portable audio- and videotaping equipment becoming readily available, it has become increasingly feasible to record the entire interview.

The most common reason for videotaping or audiotaping is to create a more complete and accurate record in lieu of or

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in addition to note-taking. When report preparation begins, the immediate advantage is that the psychiatrist may review both what the client specifically said and how the client looked thus promoting accuracy in description and quotations. After the interviews, disputes about the factual basis for an evaluation, disclosures made during the course of an evaluation, the adequacy of an evaluation, or changes in mental status may arise. The client also may distort or misinterpret the psychiatrist's statements or questions and make allegations of inappropriate behavior by the evaluator. A videotape record will enhance the accuracy of the primary data in the resolution of these disputes. The evaluator who videotapes can document and disclose all raw data of the interview. Another long-term advantage is that the psychiatrist can review the videotapes prior to trial. Frequently, there is a lengthy time lapse between the evaluation and the trial or deposition. Being able to review the actual interview is a great asset to testifying more clearly about an evaluation which may have occurred several years before. Additionally, in some evaluations such as testamentary capacity, it may be useful to have a videotape record if challenges are brought after the death of the testator. Finally, some courts have required videotape recordings of certain types of evaluations, such as hypnosis, if testimony of the expert is to be permitted.<sup>1</sup>

Currently, some psychiatrists videotape or audiotape their forensic interviews and others do not. The practice is not uniform. Psychiatrists should consider the issues that arise with this diversity of practice.

In considering the videotaping, psychiatrists should review the following questions:

- What are the effects of videotaping on the interview?
- What is the possible in-court use of the videotapes?
- What is the possible out of court use of the videotapes?
- Do the overall advantages of videotaping outweigh the disadvantages?
- What type of consent is necessary?

There has been little research about the effects of videotaping on the interview. One study focused on audiotaped psychiatric interviews indicated that 60 percent of patients demonstrated no significant disturbance, and another 20 percent showed no disturbance after the first few moments.<sup>59</sup> Some researchers have indicated that the use of tape recorders or videorecording devices may have a substantial inhibiting effect on a psychological or psychiatric interview.<sup>2</sup> Another study aimed at residents and their patients indicated that the residents demonstrated more disturbance/anxiety than the patients when videotaped.<sup>3</sup> Subsequent studies performed on "normals" found that videotaped students reported more anxiety than audiotaped students.<sup>4</sup> Similarly, videotaped therapists indicated feelings of defensiveness and decreased empathy when videotaped.<sup>5</sup> (All of these studies can be criticized for methodology and reliability.) Of course, note-taking itself has been studied due to concerns about the possible distorting effects from cueing the interviewee with indications of what the psychiatrist considers important.

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Some psychotherapists feel that note-taking also interferes with the therapist's attention to the patient.

All of these studies addressed the traditional psychiatrist-patient relationship and not forensic interviews. Forensic evaluations, unlike therapeutic ones begin with adversarial tensions. The examinee is not seeking consultation with a therapeutic objective. There is no doctor/patient relationship and the usual confidentiality rules rarely apply. Regardless of the psychiatrist's efforts to perform an impartial evaluation, the examinee will perceive the psychiatrist as an agent of the adversary if the examinee's attorney has not hired the psychiatrist. Even if the examinee's attorney has hired the psychiatrist, the examinee will be attempting to make the best possible case to support the position at issue. In this context the question then becomes how much more does the presence of a videotape recording further distort the evaluation by encouraging the examinee to "play to" the camera. The nature of forensic psychiatry may attract psychiatrists who are more comfortable with an audience and clients who are less concerned about disclosures to viewers. At this point, the effect of the forensic interview remains unstudied and the related studies indicate conflicting results.<sup>6</sup>

Advantages and disadvantages also depend upon how videotapes may be used in court. If courts were unwilling to admit videotapes into evidence, this would not be an issue. A summary of the case law, however, indicates that most courts find videotaped psychiatric interviews admissible as discussed below (see "Case Law and Guidelines on Videotaped Psychiatric

Interviews"). Most commonly, videotapes are offered to demonstrate the process of the expert psychiatrist. It allows the jury to view the demeanor of the plaintiff or defendant and can aid in the jury's understanding of the expert's conclusions. Although it is meant to aid the judge or jury, admission of videotapes presents the risk of confusing its court audience. Admission of videotapes also allows the opposing attorney to question the expert about the details of the expert's approach, appropriateness of the questions, and content of the videotape. It may provide ammunition for impeachment of the expert's statements as interviews may contain some material that may be inconsistent with the expert's conclusions and will have to be explained. Some inconsistencies in the evaluatee's statements are generally the rule rather than the exception.

In a related fashion, the case law suggested that the opposing expert could discover the videotapes. This allows the opposing expert to thoroughly review and critique videotaped interviews. The opposing expert then has the option to videotape his interview. Some psychiatrists may find this practice more time-consuming. Experts may be faced with the prospect of not only reviewing their own tapes but those of the opposing expert as well. More time may also have to be spent reviewing tapes with the attorney that may lead to more intricate cross-examination. The idea of intricate cross-examination, however, should be familiar to the forensic psychiatrist.

Possible out-of-court uses should also be considered. The most likely out-of-

court use is record keeping. The use of videotaped interviews is unlikely to create increased liability due to the nature of forensic interviews. If, however, a lawsuit occurs, then the videotapes will be discoverable. In a similar fashion, the videotapes will serve as a record of billing in the event of a billing dispute. There are also concerns about how the tape may be used following the legal proceeding. Any use, such as for teaching purposes, should only occur with the informed consent of the individual. Tapes should be regarded as part of the forensic work product.

Finally, there are many logistical problems. It is difficult to videotape in jails or prisons without prior notification, approval, and preparation. Opposing attorneys sometimes have objections to videotaping and hearings may be held to review the issue. Judges may ask if it is necessary to videotape in order to perform the evaluation. It is difficult in most circumstances to say that it is an absolute requirement. There are many evaluations where the added cost and effort may simply not be worth it.

There is some disagreement regarding the necessity of obtaining consent before videotaping interviews. Some experts feel that videotaping is equivalent to notetaking and that only consent to the interview is necessary. It is generally prudent to notify the opposing attorney that you are planning to videotape. If the attorney has objections, they may be raised before the evaluation proceeds.

In summary, there are advantages and disadvantages to videotaping psychiatric interviews. The advantages include the accuracy of the record, improvement in

reporting and the ability to use videotapes in court to support expert's opinion. The disadvantages include the likely occurrence of more intricate cross-examination (by the opposing attorney), close scrutiny by the opposing expert, inconvenience, and unknown effect on the interview, and the remote possibility of their use as a basis for liability.

### **Case Law and Guidelines on Videotaped Psychiatric Interviews**

The case law provides several areas of guidance. The first area concerns potential admissibility of the videotapes. The next focuses on the right or requirement of videotaping forensic interviews. Finally, the courts' treatment of videotaped hypnotic interviews differs from general forensic interviews.

**A. Fifth Amendment Arguments and Admissibility** The basis of the Fifth Amendment argument opposing the admission of videotapes is that the individual has a right against self-incrimination. The argument presents itself either as a self-incrimination discussion or as a failure to give Miranda warnings argument. The right against self-incrimination is applied typically in criminal cases, but it may also be applied in civil cases. *United States v. Byers*,<sup>7</sup> *The People v. Rich*,<sup>8</sup> and *State of Oregon v. Wampler*<sup>9</sup> are three criminal cases in which defendant's Fifth Amendment rights were asserted.

In *State v. Wampler*,<sup>10</sup> the appellate court faced the issue of whether the trial court erred in allowing the prosecutor to introduce videotapes of the defendant's psychiatric exams. The facts of the case

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surrounding the videotapes are somewhat unusual. The defendant initially requested the videotapes of himself in order to assist the psychiatrists with their diagnoses. The prosecutor objected to the request. When the prosecution introduced them at trial, the trial judge ruled the tapes admissible. On appeal, the defendant contended that he would have had his counsel present and he would have refused to answer questions about the shooting if he had known that the videotapes were admissible. He further contended that he was not read Miranda warnings prior to the interviews. His argument contained a combination of the self-incrimination and failure to give Miranda warnings approach. The appellate court held that the tapes were admissible. Their rationale was,

“... that defendant admitted to the shooting at trial, that the interviews were conducted and videotaped at the behest of defense counsel, and that defense counsel was fully aware that he could be present at the examinations and that his client could decline to answer questions regarding the shooting.<sup>11</sup>

In *People v. Rich*,<sup>12</sup> the trial court ordered the defendant to give the State videotapes prepared by defendant's expert. The videotapes contained 14 hours of hypnotic narcoanalysis sessions. The tapes were admitted into evidence during the trial. The prosecutor then requested the tapes so that the State's expert could view them. Defendant argued that the court order violated his privilege against self-incrimination. The Supreme Court of California rejected this argument on two bases. The defense counsel previously had given the tapes to the prosecutor. The defense counsel also admitted the tapes

into evidence during the trial. Thus, he waived his privilege. Further, even if he had not given the tapes to the prosecutor and they had not been viewed at trial, the tapes would have been discoverable. The court previously recognized that,

the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an “an affirmative defense” or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief.<sup>13</sup>

The court held that the use of videotapes would not make it easier for the State to prove its case in chief:

In *U.S. v. Byers*,<sup>14</sup> the facts did not include a videotape, but an interview which occurred while defendant was in a correctional facility. In a vigorous dissent, Judge David Bazelon argued that the protections guaranteed by the self-incrimination clause of the Fifth Amendment required recording or videotaping of all court-ordered psychiatric evaluations. The requirement would insure that the psychiatrist did not manipulate or intimidate the defendant and that there was no overreaching. The APA submitted an *amicus* brief saying that “too little is known about the potentially disruptive effect of counsel's presence at the examination, or the use of other procedures,” (audio- or videotaping) “to confidently assess whether the perceived need for such safeguards outweighs their possible costs. Although some psychiatrists may find their examination is not disturbed or impaired by the use of certain procedures, other psychiatrists may find that the same

procedures do interfere with the performance of a thorough and valid psychiatric evaluation. In so saying, we in no way wish to discourage the case by case experimentation with such procedures on a voluntary basis."<sup>15</sup> The majority argued that "such fiats would be appended to, rather than contained within, the self-incrimination clause of the Fifth Amendment."<sup>16</sup> The court held that,

when the defendant raises the defense of insanity, he may constitutionally be subjected to compulsory examination by court-appointed or government psychiatrists without the necessity of recording; and when he introduces into evidence psychiatric testimony to support his insanity defense, testimony of those examining psychiatrists may be received (on that issue) as well.<sup>17</sup>

Taken together, the holdings in *Wampler*, *Rich*, and *Byers* provide the following guidelines. The self-incrimination clause does not bar the admission of videotapes of psychiatric interviews. A Miranda-type warning is not required prior to a taped psychiatric interview. Finally, the protections guaranteed by the Fifth Amendment do not include mandatory recording of compulsory psychiatric examinations.

Although Fifth Amendment arguments typically arise in criminal cases, the plaintiffs in *Ughetto et al. v. Acrish*<sup>18</sup> argued that their right against self-incrimination applied to civil commitment prehearing evaluations. Plaintiffs specifically argued that they could refuse to participate in court-ordered prehearing evaluations for continued commitment. The court held that the privilege against self-incrimination does not attach at the prehearing psychiatric interview. The court went on to find a statutory right to

preserve the interview on videotape.<sup>19</sup> (See discussion under "Required Videotaping or Presence of an Attorney/Expert").

**B. Sixth Amendment Arguments** In addition to the Fifth Amendment arguments in *Byers*, the appellant argued that his Sixth Amendment guarantee of assistance of counsel was violated. The court reviewed whether the Sixth Amendment required recording or videotaping of compulsory psychiatric interviews as an alternative to the presence of an attorney. In making their decision, they quoted *United States v. Ash* for the proposition that the "[I]ack of scientific precision and inability to reconstruct an event are not tests"<sup>20</sup> for the Sixth Amendment guarantee. The court held:

Recording psychiatric interviews may be a good idea, but not all good ideas have been embodied in the Constitution in general or the Sixth Amendment in particular. It is enough, as far as the Constitutional minima of the criminal process are concerned, that the defendant has the opportunity to contest the accuracy of witnesses' testimony by cross-examining them at trial and introducing his own witness in rebuttal.<sup>21</sup>

The *Byers*' court suggests that the Sixth Amendment neither requires nor bars videotaping of psychiatric interviews.

**C. Required Videotaping or Presence of an Attorney/Expert** Fifth and Sixth Amendment guarantees have fallen short of requiring psychiatrists to videotape their forensic interviews. There are some state and federal courts, however, that have upheld other bases which allow the defendant to request videotaping. The courts of *United States v. Clark*<sup>22</sup> and *Ughetto et al. v. Acrish*<sup>23</sup> dealt with stat-

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utorily required videotaping. The court of *State of New Jersey v. List*<sup>24</sup> found a case law basis for required videotaping of the prosecution's witness.

*U.S. v. Clark* was a federal insanity defense case.<sup>25</sup> Defendant Clark was found not guilty by reason of insanity under Title 18, United States Code, Section 4244(b). Three months later, a dangerousness hearing was held to determine the appropriateness of and/or conditions of release. Defendant requested pursuant to Title 18, United States Code, Section 4247(f) that any further evaluations (to be used in preparation for forensic reports) be videotaped. The court reviewed the referenced section which stated,

Upon written request of defense counsel, the court may order a videotape record made of defendant's testimony or interview upon which the periodic report is based pursuant to subsection (e). Such videotape record shall be submitted to the court along with the periodic report.<sup>26</sup>

The court granted the request.

In *Ughetto v. Acrish*,<sup>27</sup> involuntarily committed patients at Harlem Valley Psychiatric Center argued that they had a right to counsel at prehearing psychiatric interviews which were the basis for expert testimony at subsequent judicial retention hearings. The court held that counsel is permitted to observe directly or by videotape the prehearing psychiatric evaluations following the motion for recommitment. The attorney, however, may not interfere with the psychiatric examination. The court based its holding on the comprehensive nature of the statutory provisions of the Mental Hygiene Law. The court went on to state that had they not found a statutory basis, they would

have upheld a due process requirement. The court found that,

plaintiffs have advanced a cogent argument as to how the fundamental fairness of their retention hearings is undermined by the refusal of the defendants to allow counsel to observe prehearing examinations. Permitting counsel to observe at such examinations would serve to assist the plaintiff's attorneys in preparation for retention hearings and, thus, enhance the reliability of such hearings as to the truth finding functions.<sup>28</sup>

In *State v. List*, the defendant made a motion to preclude the state's expert from "questioning the defendant whether he killed the decedent."<sup>29</sup> The court denied the motion. The court, however, stated that the "State may either permit defendant's expert to attend its examination or it should videotape it."<sup>30</sup> The defendant was entitled to this relief under the precedent of *State v. Whitlow*.<sup>31</sup>

**D. Other Case Law** There are a number of other cases in which videotaped psychiatric interviews were offered into evidence. In *State of North Carolina v. Bonney*,<sup>32</sup> the defendant's expert videotaped sessions in which defendant's 10 personalities were interviewed. The tapes were admitted into evidence to illustrate the expert's testimony. The videotapes were not at issue in the case.

In *People of the State of Michigan v. Furman*<sup>33</sup> the trial court denied defense counsel's motion to admit defense psychiatric expert's videotaped interviews into evidence. The trial court's rationale was that the tape was prejudicial because defendant would be allowed to testify without being under oath and without being subject to cross-examination. The trial court further reasoned that a caution-

ary instruction would not be enough. The appellate court reviewed the decision on the abuse of discretion standard and upheld the ruling.<sup>34</sup>

This case may represent an exception to the admissibility of videotaped psychiatric interviews. It is distinguishable from the previous cases in that the tapes were made by defendant's expert and are being offered by the defendant in addition to the defendant's testimony or decision not to testify.

In *State v. Steiger*<sup>35</sup> the Connecticut Supreme Court reviewed the introduction of the videotaped interviews, by the state's expert, of the defendant in an insanity defense trial. On appeal the defendant objected to their introduction on a number of grounds. At one point the defendant argued that the tapes were inadmissible as the expert was capable of testifying concerning the basis of his opinion without relying on the tapes. The Court responded:

This argument misrepresents the standard to be applied in determining whether video recordings of psychiatric examinations are admissible when the defendant has raised his mental status as a defense. The question is not whether the psychiatrist has a clear recollection of the examination and could possibly testify without the tapes, but rather whether the probative value of the tapes outweighs the risk that the trier of fact might not be able to consider and weigh their relevance properly.<sup>36</sup>

The tapes were admitted into evidence and shown in full to the triers of fact (a three judge panel).

**E. Military Cases** *United States v. Stark*<sup>37</sup> dealt with the issue of whether the military judge erred by denying admission of videotapes of defendant made by

defendant's psychiatric expert. The defendant was hypnotized during some of the interviews. The court of appeals affirmed based on five points.

First, the psychiatrist testified about the videotapes and the hypnotic interviews. Second, court review of the videotapes would allow defendant "to smuggle eight hours of testimony before the court members without subjecting himself to the crucible of cross-examination."<sup>38</sup> Third, the use of hypnotic testimony is controversial. Fourth, it was not necessary for the court to see the process in order to understand, determine and apply the psychiatrist's findings to the ultimate conclusion. Finally, defendant was allowed the opportunity to testify and to have his expert testify.<sup>39</sup> This holding is consistent with the holdings of other cases considering hypnotic sessions (see discussion under "Hypnotic Sessions").

*United States v. Day*<sup>40</sup> dealt with the issue of whether the government's psychiatrist should give a Miranda warning prior to interviewing a defendant. The court reviewed previous case law and an amended paragraph in the *Manual for Courts-Martial* (para. 140a(2), MCM 1975) to conclude that a psychiatrist may interview a defendant and testify about his conclusions from the interviews without giving a Miranda warning.<sup>41</sup> This holding is consistent with the previously discussed Fifth Amendment decisions.

**F. Hypnotic Sessions** In general, videotapes of hypnotic sessions and amytal-induced interviews are less likely to be admitted into evidence than traditionally conducted interviews. This is due more to the unreliable nature of the tech-



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niques than to the inadmissibility of videotapes. In the majority of cases, the purpose of hypnosis or amytal-induced interview is intended to aid in the recovery of memory.

A landmark case on admissibility of hypnotically refreshed memory is *State of New Jersey v. Hurd*.<sup>42</sup> The court enumerated standards for admissibility of testimony that included:

All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might be later reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory.<sup>43</sup>

Even though the standard requires recording of the interviews, many courts ironically have denied admission of the videotapes into evidence. The following three cases provide examples.

In *People v. Milner*,<sup>44</sup> defendant was unable to remember a stabbing in which he allegedly murdered a man during the course of a robbery at Gamble's clothing store. Three psychiatrists interviewed the defendant for the defense. One psychiatrist conducted a sodium amytal interview. Another used hypnosis. The defense attempted to admit the videotaped hypnotic sessions as a basis for the psychiatric conclusions. The court ruled that the videotapes were inadmissible because the tapes would confuse and mislead the jury. The California Supreme Court found that the trial court's exclusions of the videotapes was not an abuse of discretion.<sup>45</sup>

Similarly, the appellate court in *People*

*v. Johnson*<sup>46</sup> reversed the trial court. The trial judge had admitted a videotape of a sodium amytal interview. The appellate court stated, "In this case, the People did not even attempt, by expert witnesses, to prove the reliability of sodium amytal tests. In such a situation, and in the face of defendant's experts' testimony, it was clearly error for the truth serum interviews to have been admitted."<sup>47</sup>

Finally, the trial court in *Eaton v. State of Delaware*<sup>48</sup> refused to admit a tape recording of an amytal interview that defendant's psychiatrist conducted. Defense attorney argued that he offered the tape recording to support the expert witness. The expert changed his opinion in the second trial after conducting the interview. The Supreme Court of Delaware found that the trial judge ruled the tapes inadmissible for possible prejudice and confusion and, therefore, did not abuse his discretion.<sup>49</sup>

## ABA Criminal Justice Mental Health Standards

In the late 1970s, the American Bar Association (ABA) sought clarification of the mental health issues in criminal law. The Criminal Justice Mental Health Standards Project contained six interdisciplinary task forces with representatives from the American Psychiatric Association, the American Psychological Association, the American Orthopsychiatric Association, and the National Sheriffs' Association. The standards were designed for use by lawyers and clinicians. The standards formulate uniform requirements for ordering, conducting, and reporting mental examination results in criminal proceedings.

The ABA House of Delegates adopted the standards in 1984. Standard 7-3.6(d) states:

Recording the evaluation. All court ordered evaluations of the defendant initiated by the prosecution should be recorded on audiotape or, if possible, on videotape, and a copy of the recording should be provided promptly to the defense attorney. The defense may use the recording for any evidentiary purpose permitted by the jurisdiction. If the defense intends to use the recording at the trial, it should notify the court. Upon receiving notice, the court should promptly provide to the prosecution the recording. Upon defense motion, the court may enter a protective order redacting portions of the recording before it is forwarded to the prosecution.<sup>50</sup>

The commentary on the standard clarifies that recordings have frequently demonstrated the basis of the expert mental health or mental retardation professional opinions. It cautions that recordings must be excluded if their prejudice effect outweighs their probative value. It notes that the California Supreme Court has allowed the use of audiotapes for the impeachment of a witness.<sup>51</sup>

### **American Academy of Child and Adolescent Psychiatry Guidelines**

Courts have used the videotaping of children more extensively. Videotaping has been viewed as protecting the child from the stresses of courtroom testimony and guarding against the coercion and suggestion of testimony. The American Academy of Child and Adolescent Psychiatry adopted guidelines for the clinical evaluation of child and adolescent sexual abuse in 1988. The position statement

commented on the use of videotaped interviews. Guideline 13 stated:

Videotaping, when possible, can serve useful purposes including (1) preserving the child's initial statements; (2) avoiding duplication of efforts by sharing the video with others involved in the investigation; (3) encouraging the defendant to plead guilty, thereby sparing the child from testifying in court; (4) presenting the video to the grand jury in lieu of the child; and (5) as a teaching tool to help the interviewer and others to improve techniques.

In making a videotape, the following concerns, disadvantages or risks should be taken into consideration. Videos can be used to harass or intimidate the child on cross-examination, or viewers may regard the testimony as more credible because it was given on video. Videos might be shown out of context or fall into the hands of those who have no professional obligations of confidentiality or concerns for the child's best interest. Clinicians should familiarize themselves with the laws in their states relative to admissibility of videotaped testimony. The child should always be informed as to the purpose of the videotape and about who is present if a one-way mirror is being used. Parental consent and the child's assent should be obtained to videotaping.<sup>52</sup>

Clinical evaluations of child and adolescent sexual abuse may arise from or eventually become part of a legal case. The guidelines are part of a position paper. The guidelines have been cited in legal cases.<sup>53</sup> Guideline 13 and its videotaping recommendations, however, have not been an issue in any published legal cases.

### **Technical Admission into Evidence**

It is important for the forensic expert to have an appreciation of the attorney's obligations to the court if videotape evidence is going to be part of the case.

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Admitting videotapes into evidence is similar to the admission of photographs. In order to lay the proper foundation, the attorney must demonstrate the following seven points:

1. The videotape is capable of functioning properly, both as to the visual part and the audio part;
2. The operator of the device is competent—not necessarily an expert, but well-trained in operating the device and somewhat experienced in doing so;
3. The recording as well as the video part is authentic and correct;
4. No changes, additions, or deletions have been made;
5. The film has been properly preserved;
6. The visual part is clearly visible and the audio part is sufficiently audible so as not to be unintelligible or misleading; and
7. The confessions or statements involved, if any, were made voluntarily and without improper inducement.<sup>54</sup>

Points 2, 5, and 7 are points that directly affect a psychiatrist filming a forensic interview. In order to prove that the operator of the device is competent (point 2), the attorney need not demonstrate special training or skill. The videotape, however, must show an accurate portrayal.<sup>55</sup> In essence, the psychiatrist need not be an expert in two fields. The psychiatrist should have video equipment that complements his skills or arrange for technical support.

Point 5 deals with the proper preservation of the videotape. This usually means

a continuity of possession. The psychiatrist should keep videotaped interviews in a safe place until turned over to the attorney or court in order to prevent tampering. Continuity of possession is not a rigid requirement. When the question of tampering arises, the content of the videotape is considered in addition to the continuity of possession.<sup>56</sup>

Point 7 deals with the voluntary nature of statements and confessions. Although this takes on a different meaning in other contexts, the psychiatric interview, by its nature, should address this point. Case law has not required Miranda warnings. APA ethical guidelines and some state confidentiality statutes require the forensic expert to clarify the limits on confidentiality prior to beginning a forensic evaluation. Other parts of the interview will naturally speak to issues regarding voluntariness and/or competence.<sup>57</sup>

### Recommendations of the AAPL Task Force on Videotaping Forensic Interviews

The Task Force on Videotaping Forensic Interviews began by reviewing the current case law and professional guidelines. There were no specific AAPL or APA standards or guidelines on videotaping forensic interviews. Similarly, a review of pertinent case law indicated videotaping forensic interviews was neither prohibited nor mandatory; admissibility of videotaped interviews is neither barred nor mandated by Fifth and Sixth Amendment arguments. Case law also does not provide strict guidelines for videotaping forensic interviews (except in the area of hypnotic and amytal interviews). Conse-

quently, the issue of videotaped forensic interviews is an appropriate area in which to establish AAPL standards.

Both state and federal courts indicate that the Fifth Amendment right against self-incrimination does not bar videotapes of defendants who have put their mental state at issue. Likewise, the defendant does not have the legal right to a formal Miranda warning prior to the forensic psychiatric interview, although the expert at the beginning of the evaluation should clarify the confidentiality status of the communications. Finally, the absence of counsel during the videotaping does not violate the Sixth Amendment guarantee of assistance of counsel. In the reciprocal argument, the courts have not found constitutional bases for mandating videotaping.

Although the admission of videotapes into evidence is not the primary purpose of making the tapes, their potential uses in court are important considerations. First, two courts (one civilian and one military) found videotapes of defendants made by defense experts inadmissible. Although multiple reasons were cited, both courts found that the videotapes gave defendants the opportunity to testify without taking an oath or being cross-examined. Second, courts have generally found videotapes of hypnotic and amytal-induced interviews inadmissible on the basis that they are confusing and misleading. The final exception deals with mandatory videotaping. Statutory requirement and case law precedent were the bases for finding mandatory videotaping. The court of *Ughetto*, however, indicated that they would have upheld a due process argu-

ment for videotaping had the statutory basis not existed in civil commitment proceedings as an alternative to the attorney being in the interview room.

The purposes of videotaping forensic interviews focus on creating a complete record. The advantages include review of statements and appearances to prepare for future interviews, report writing and testimonial. In cases where counsel is permitted to observe the interview, it may be preferable to use videotape and/or monitor rather than have the attorney in the room.

Commonly cited disadvantages included inconvenience, cost, and review time. Considering convenience, both the types of interview and personal practices were cited. For example, videotaped competency evaluations might be less useful than videotaped insanity defense or civil suit interviews. Similarly, it is usually more convenient to videotape in a private office than a jail. Finally, the actual cost of videotaping was considered minimal for all cases, except for the additional time spent by the expert in reviewing the tapes.

The goals for recommending videotaped forensic interviews included peer-review and educational and legal factors. Practical future effects of recommending or requiring videotaped forensic interviews included establishing interview guidelines as well as sanctions for those who fail to provide adequate interviews.<sup>58</sup> Taped forensic interviews would provide both means to view and to critique others' interviews. Videotapes would also encourage the creation of standardized interviews for common forensic issues. In a

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similar fashion, criticism both in and out of court would encourage the development and integrity of psychiatrists performing forensic interviews. It may promote understanding of the forensic evaluation by the lay person.

Videotaped forensic interviews would also serve educational purposes. The direct educational use of videotaped interviews would be to teach colleagues, fellows, residents and other trainees about forensic interviews. Videotaped forensic interviews also can be shared among practicing forensic psychiatrists in preparation for interviews concerning unfamiliar issues.

Finally, the legal effects of videotaped forensic interviews should be studied. Anticipated areas of study would include effects of videotaping on attorney preparation, cross-examination, and quality of testimony. Additionally, the courts' use of videotapes can be reviewed periodically.

After reviewing the case law and practical advantages and disadvantages of videotaped forensic interviews, the AAPL task force makes the following recommendations:

1. Given the state of the research, feasibility, possible adverse effects on the examiner and examinee, AAPL does not support a blanket rule of requiring videotaping in all forensic interviews. The Task Force finds the option of videotaping to be an ethically acceptable medical practice.
2. AAPL recognizes the existence of other legal and professional sources (statutes, case law, and practice

guidelines) that may require or recommend videotaping in certain circumstances, such as (a) interviews where hypnosis is used or (b) when children are being evaluated for sexual abuse.

3. Videotaped forensic interviews done by trainees and experienced experts are extremely useful teaching materials. All forensic training programs should consider the educational use of videotaping equipment.

## References

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