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Evidence

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Gang-Related Hearsay Exception

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Code Sections Affected
Evidence Code §§ 1231, 1231.1, 1231.2, 1231.3, 1231.4 (new).
SB 941 (Leslie); 1997 STAT. Ch. 499

I. INTRODUCTION

After witnessing the 1993 slaying of Willie Bogan by a gang member, Gloria Lyons and Georgia Jones told the police what they knew.[1] Both witnesses were killed in 1994.[2] Similarly, despite attempts to dissuade him, Albert Sutton testified against the four gang members who shot his brother.[3] Three days after his testimony, Albert was shot to death.[4] These situations typify a problem with gang-related[5] crimes currently plaguing California. Over one thousand gang members walk the streets of Los Angeles alone and reportedly are to blame for 40% of the murders committed in L.A. County.[6] The prosecution of these gang-related crimes is thwarted by the fact that many witnesses who would normally testify against the criminals are threatened or killed before their testimony is taken, making gang cases among the most difficult to solve.[7]

II. BACKGROUND: THE HEARSAY RULE OF EVIDENCE

The difficulty with solving these gang-related crimes is compounded by evidentiary rules that prohibit certain types of testimony. One such type of testimony is hearsay. Hearsay is "a statement which was made out of court and which is offered

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1. Ted Rohrlich & Fredric N. Tulsky, *Gang Killings Exceed 40% of L.A. Slayings. Intimidation of Witnesses Allows Hundreds of Suspects to Walk Free. Prosecutors Try To Break the Cycle*, L.A. TIMES, Dec. 5, 1996, at A1.
2. *Id.*
3. *Id.*
4. *Id.*
5. *See* CAL. PENAL CODE § 186.22(f) (West 1995) (defining "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity").
6. *See* Rohrlich & Tulsky, *supra* note 1, at A1.
7. *Id.*

in court to prove the truth of whatever was said in the hearsay statement."[8] The "Hearsay Rule" of the Federal Rules of Evidence prohibits admission of hearsay into evidence at a court proceeding, as do other rules created by the Supreme Court under the authority granted to them by Congress or statutory authority.[9] Thus, if a witness is murdered before his opportunity to testify, or after his testimony and before cross-examination, then that witness' testimony will be inadmissible in court, as the declarant himself is not available to give the testimony or be cross-examined.[10] Federal studies indicate that witnesses for gang-related prosecutions are in the most danger preceding their testimony, likely because the criminals recognize that if witnesses are unavailable to testify personally regarding a matter, the hearsay rule will prohibit others from proffering the same information.[11]

III. HEARSAY EXCEPTIONS AND CHAPTER 499

Within the Federal Rules there are several hearsay exceptions;[12] among them is the "Residual Hearsay Exception."[13] This exception at the federal level will not go into effect until December of 1997, and its application has not yet been determined by either federal appellate courts or the United States Supreme Court.[14] The federal residual hearsay rule provides that a statement made out of court, offered in court to prove the truth of the matter asserted, will be admissible if: the statement is offered as evidence of a material fact, the statement is more probative than other evidence that the proponent could procure through reasonable effort, the interests of justice and the purposes of the hearsay rule will be served by introducing the statement into evidence, and the proponent has given sufficient notice to the adverse party in order for that party to challenge the hearsay and investigate the credibility of the declarant.[15]

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8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 941, at 4 (July 15, 1997); *see id.* (giving this example to clarify what hearsay is: "For example, while 'Mary' is testifying at her trial for murdering 'John,' her testimony that she shot John is not hearsay. Where another witness testifies that two weeks before trial that he heard Mary say that she shot John, that witness is relating hearsay. (If Mary were to testify that she did say that she shot John, that would also be hearsay.)").

9. FED. R. EVID. 802; *see* FED. R. EVID. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

10. CAL. EVID. CODE § 1200 (West 1995) (stating that evidence of a statement made out-of-court, offered in court to prove the truth of the matter asserted, is non-admissible hearsay unless there is an exception making that evidence admissible).

11. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 941, at 3 (July 15, 1997).

12. *See* FED. R. EVID. 803 (listing examples of what items are not excluded by the hearsay rule, even though the declarant is available to be a witness).

13. *See* FED. R. EVID. 803(24) (noting that if a court determines certain criteria relating to the trustworthiness of the statement, then it may be admitted into evidence).

14. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 941, at 4-5 (July 15, 1997).

15. *Id.*

This year, California has enacted an exception similar to the federal hearsay exception, Chapter 499. Chapter 499 attempts to address many of the factors considered in the federal residual hearsay exception.[16] Chapter 499 intends to make easier the solving of gang crimes by reducing fears potential witnesses may have by creating an exception to the hearsay rule that would make admissible into court sworn statements of witnesses that have died by any manner other than natural causes, thus eliminating any incentive a gang member may have to kill the witness.[17]

Existing law provides that evidence of statements made out of court are not admissible unless there is a statutory exception that would make the statement admissible.[18] Such exceptions include: confessions, declarations, statements of mental or physical state, former testimony, and prior inconsistent statements.[19] In addition, the person charged with the crime in question has, through the Sixth Amendment of the United States Constitution and Article I, section 15 of the California Constitution, the right to confront any witness against him.[20]

Chapter 499 creates a new hearsay exception in gang prosecutions by allowing the statements of declarants that have died since the declaration to be admissible in court if certain conditions are met.[21] There are six conditions that apply: (1) That the statement pertains to acts or events that are relevant to a criminal prosecution governed by the California Street Terrorism Enforcement and Prevention Act;[22] (2) that there exists a verbatim transcript, copy, or record of the statement, which includes preservation of the statement via audio or video recording technology;[23] (3) that the statement is within the personal knowledge of the declarant;[24] (4) that the statement was made under oath or affirmation in an affidavit, at a deposition, preliminary hearing, grand jury hearing, at another proceeding in compliance with the law, and was made under penalty of perjury;[25] (5) that the declarant did not die from natural causes;[26] and (6) that the statement may be determined to be trustworthy and believable due to the circumstances under which it was made.[27]

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16. *Id.* at 5.
17. *Id.* at 3.
18. *See supra* note 10 and accompanying text.
19. CAL. EVID. CODE §§ 1220, 1230, 1235, 1240-1242, 1250, 1290 (West 1995).
20. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 941, at 2 (July 16, 1997).
21. CAL. EVID. CODE § 1231 (amended by Chapter 499).
22. *Id.* § 1231(a) (amended by Chapter 499).
23. *Id.* § 1231(b) (amended by Chapter 499).
24. *Id.* § 1231(c) (amended by Chapter 499).
25. *Id.* § 1231(d) (amended by Chapter 499).
26. *Id.* § 1231(e) (amended by Chapter 499).
27. *See id.* § 1231(f) (amended by Chapter 499) (listing that circumstances relevant to determining trustworthiness include: whether or not the statement was made in contemplation of a criminal or civil matter (in which the declarant had an interest other than that of being a witness), whether or not the declarant had a bias or motive for fabricating the statement, whether the statement can be corroborated, and whether the statement was one against the declarant's interest).

Chapter 499 allows this exception only if the proponent of the testimony notifies the adverse party so that he may have a fair opportunity to determine how he will counter or explain the statement.[28] With respect to obtaining such statements, Chapter 499 allows a peace officer to certify the oaths for purposes of these exceptions.[29] Yet, any law enforcement officer that is to testify as to any hearsay statement found in Chapter 499 must have had either five years of law enforcement experience or completed a training course in investigation and reporting of cases in addition to experience testifying at preliminary hearings and trials.[30]

If evidence is admitted at trial due to Chapter 499, the jury is not to be told that the declarant died from other than natural causes, but is to be told merely that the declarant is not available.[31] Finally, Chapter 499 will not effect other evidentiary requirements, will not impair a party's right to attack the credibility of the declarant, will not affect the defendant's right to discovery to prepare rebuttal to the declarant's credibility, and cannot be used in a manner inconsistent with the defendant's right to due process and confrontation of witnesses.[32] To ensure that evidence does not violate a defendant's due process and confrontation rights, statements from a witness that is unable to testify are admissible only if they bear adequate "indicia of reliability."[33] Such reliability can be *inferred* if the evidence is within a firmly rooted hearsay exception or if there has been a showing of particularized guarantees of trustworthiness.[34]

Initial opposition to Chapter 499 arose because an earlier draft of the legislation[35] did not delineate factors that would have aided in determining such trustworthiness of the hearsay.[36] Chapter 499 now establishes particular criteria that the court must consider when determining the reliability of the testimony.[37] However, the American Civil Liberties Union, the California Attorneys for Criminal Justice, and the California Public Defenders Association remain opposed to Chapter 499, because they maintain gang-related hearsay is particularly untrustworthy.[38]

Other concerns with Chapter 499 stem from the fear that if Chapter 499 is eventually found to be unconstitutional, all convictions made pursuant to it will be overturned.[39] Thus, the already difficult and lengthy process of conviction may be

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28. *Id.* § 1231.1 (amended by Chapter 499).
29. *Id.* § 1231.2 (amended by Chapter 499).
30. *Id.* § 1231.3 (amended by Chapter 499).
31. *Id.* § 1231.4 (amended by Chapter 499).
32. *Id.* § 1231 (amended by Chapter 499).
33. Dutton v. Evans, 400 U.S. 74, 89 (1970).
34. Ohio v. Roberts, 448 U.S. 56, 66 (1980).
35. SB 941, at 2, May 8, 1997.
36. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 941, at 4 (July 16, 1997).
37. CAL. EVID. CODE § 1231(f)1-4 (amended by Chapter 499).
38. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 941, at 4-5 (July 15, 1997).
39. *Id.* at 4.

made even more arduous due to the appeals process and necessity of retrying the defendant.[40]

Another concern with Chapter 499 is that perhaps gang members will be encouraged to kill witnesses *before* they have the opportunity to speak with law officials and have their testimony taken.[41] Thus, a gang member may attempt to kill not only the true target, but all persons around him so that none of these potential witnesses will be able to submit any sort of testimony against the future defendant.[42]

IV. CONCLUSION

Gang-related crime has escalated such that it cripples many cities throughout California.[43] Prosecutors are faced with the difficult task of obtaining enough testimony against a defendant that will convince a jury to convict.[44] The nature of gang crime alone presents a great obstacle to these prosecutors in that the gang members historically intimidate potential witnesses and dissuade them from offering testimony against the defendant.[45] Without such pivotal testimony, convictions are less likely to be obtained.

Chapter 499, championed by the governor of California himself, attempts to ease the burden that prosecutors face and to provide a stronger measure of safety to potential witnesses. If a gang-related crime occurs, officers on the scene that satisfy the training requirements set out in Chapter 499 will be authorized to record the statements of witnesses that will be later admissible in the proceeding against the defendant.[46] Thus, once the statement has been recorded by one of the means addressed in Chapter 499, the defendant himself, or his supporters, will have no motivation to harm, kill, or to otherwise dissuade the witness from testifying, as the testimony has effectually already been taken.[47]

As with every piece of testimony in any sort of legal proceeding, the testimony offered must meet credibility requirements. The final version of Chapter 499 recognizes this and sets forth criteria that will aide the court in determining if the testimony is that which should be given credence or that which would unfairly prejudice the jury.[48]

There is no guarantee that Chapter 499 will greatly effect the number or severity of gang crimes that occur within the borders of California. However, by giving law officers and prosecutors a greater advantage than they now have, it is a

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40. *Id.*
41. *Id.*
42. *Id.*
43. *See supra* note 6 and accompanying text.
44. *See supra* note 7 and accompanying text.
45. *See supra* note 4 and accompanying text.
46. *See supra* note 30 and accompanying text.
47. *See supra* note 11 and accompanying text.
48. *See supra* notes 21-27 and accompanying text.

concerted effort to dissuade criminal activity. The legislature has attempted to strike a workable balance between the need for pertinent testimony regarding gang violence and the rights granted to defendants. Chapter 499 is drafted narrowly enough to do so and its adoption should benefit the state of California and its citizens so devastated by gang crime.

Unavailable Witnesses Allowed to Testify Via Videotape in Criminal Proceedings: Technology in the Courtroom

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Code Sections Affected
Penal Code §§ 1343, 1345 (amended).
AB 249 (Cunneen); 1997 STAT. Ch. 19

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I. INTRODUCTION

President Clinton's videotaped testimony in the criminal trial of his longtime friends, the McDougals, was highly publicized as one of the very few times in history that a sitting president has testified in a criminal trial.[1] In watching the 2 1/4

1. *See* Pete Yost, *Spotlight: Whitewater; Clinton Denies Link to Loan; Defense Rests After President's Videotaped Defense Testimony*, CINCINNATI ENQUIRER, May 10, 1996, at A02 (describing Clinton's videotaped testimony denying any knowledge of the government secured loans that are the focus of the Whitewater

hour video tape of Clinton's testimony, jurors were able to note the President's relaxed demeanor as he spoke of his early political and business dealings with the McDougals.[2] They were also witness to an irritated Clinton when prosecutor W. Ray Jahn persisted with questions about contacts with Mr. McDougal.[3] Had Clinton's testimony not been videotaped, jurors would not have been privy to the visual clues evidenced by the President's demeanor.[4] The jury's ability to observe the demeanor of a witness often proves very important in evaluating credibility.[5]

II. LEGAL BACKGROUND

The President's "court appearance" was not the first instance of videotaped testimony used in a trial when a witness was unavailable to appear in person.[6] Civil courts have admitted videotaped depositions into court for more than 20 years.[7] Additionally, many states allow prosecutors to use videotaped testimony of children when sexual abuse is involved because many children are too frightened to testify in the presence of their alleged abuser.[8]

Many California courts had been allowing videotaped testimony of witnesses in criminal proceedings who were unavailable for trial until an appellate court held that this practice was not statutorily authorized, and thus improper.[9] Consequently, courts were forced to adopt the more traditional route in criminal trials of having testimony that has been transcribed at a deposition and then read orally in court

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investigation); *id.* (listing Presidents Ford, Carter, and Reagan as three other presidents who had testified in criminal proceedings).

2. *Id.*

3. *See id.* (noting that Clinton only seemed irritated at one point in the testimony).

4. *See* James B. Reed, *Sex, Lies and Videotape*, 68 N.Y. ST. B.J. 53, 53 (1996) (indicating that a person's demeanor, attitude and appearance speak volumes beyond the words spoken); *see also* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 155 (1996) (acknowledging that videotaped testimony could replace transcripts because it allows jurors to review a witness's nonverbal evidence).

5. Reed, *supra* note 4, at 53; Strier, *supra* note 4, at 155.

6. *See* Susan J. Drucker & Janice Platt Hunold, *Videotaped Depositions: The Media Ferspective*, 60 N.Y. ST. B.J. 38, 38 (1988) (concluding that "the recent acceptance, if not embracing, of video technology is worthy of note").

7. *See id.* at 39 (recognizing that the use of videotape to record depositions was uncommon prior to the 1970 amendments to the Federal Rules of Civil Procedure which first authorized the use of nonstenographic recordings of depositions); *see infra* notes 18-25 and accompanying text (discussing the role of videotaped testimony of unavailable witnesses in civil proceedings).

8. Diana B. Lathi, Comment, *Sex Abuse, Accusations of Lies, and Videotaped Testimony: A Proposal for a Federal Hearsay Exception in Child Sexual Abuse Cases*, 68 U. COLO. L. REV. 507, 531 (1997); *see infra* notes 26-35 and accompanying text (addressing the role of videotaped testimony in child sexual abuse cases).

9. *See* People v. Watkins, 45 Cal. App. 4th 485, 491, 53 Cal. Rptr. 2d 13, 17 (1996) (holding that videotaped testimony of witnesses not available at trial is not authorized by the statutory scheme prior to Chapter 10). *But see* Strier, *supra* note 4, at 139 (indicating that California is currently experimenting with videotape as a substitute for stenographer notes).

where the witness is unavailable.[10] More likely than not, the Legislature's hesitance to allow videotaped testimony in criminal proceedings stemmed from the fact that a defendant's freedom is at issue in a criminal trial where mere money is at stake in a civil trial.[11] This is consistent with a general tendency by the Legislature to be much more careful when tampering with issues of procedure in criminal proceedings where a defendant's Constitutional rights may be affected.[12] While this is a valid claim, legal scholars argue that this attitude sacrifices the overall integrity of trial by depriving jurors of the opportunity to "review witness behavior and other nonverbal evidence."[13] Likewise, many attorneys feel that a witness' demeanor and expressions are just as important to their testimony as the actual words they are saying.[14] California's Legislature has addressed this concern by enacting Chapter 19, which enables criminal court judges to admit videotaped testimony of witnesses who are unavailable to attend the trial in person.[15] It is likely that defendant's will challenge Chapter 19 by arguing that it abridges their Sixth Amendment right to confront accusers via cross-examination.[16]

A. *Videotaped Testimony in Civil Proceedings*

Before the 1970 Amendments to the Federal Rules of Civil Procedure authorizing "nonstenographic recordings of depositions," attorneys rarely, if ever, used videotape to record depositions in civil cases.[17] Prior to the 1970 Amendments, if an attorney wished to admit the deposition of a witness who was unable to appear at trial, the attorney himself would be forced to read the deposition transcript in open court.[18] This "oral presentation" of testimony prevented juries from assessing

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10. *See* SENATE FLOOR, COMMITTEE ANALYSIS OF AB 249, at 1 (Mar. 17, 1997) (indicating that the testimony given by a witness conditionally examined must be reduced to a writing and read aloud in open court); *see also Watkins*, 45 Cal. App. 4th at 491, 53 Cal. Rptr. 2d at 17 (interpreting the statutory scheme governing conditional examination not to authorize the admission in evidence of a videotaped deposition); *id.* (holding that the Legislature would have included a provision for videotaped depositions in criminal trials, as it had for civil trials, if that was their intent).

11. *Watkins*, 45 Cal. App. 4th at 491, 53 Cal. Rptr. 2d at 17.

12. *See infra* notes 35-37 and accompanying text (discussing how Legislatures are less likely to change procedures for criminal trial based on a concern that the changes might violate the constitution).

13. Strier, *supra* note 4, at 155.

14. Reed, *supra* note 4, at 53; *see* Gregory T. Jones, *Sex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613, 613 (1996) (describing videotape as "an increasingly prevalent arrow in the trial lawyer's quiver"). *But see id.* (indicating that many trial lawyers do not understand the procedural requirements of using videotape and fail to recognize its full impact when presented in court).

15. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 249, at 2 (Mar. 17, 1997).

16. *See* U.S. CONST. amend. VI (setting forth the Confrontation Clause); *see also* Lathi, *supra* note 8, at 531 (recognizing the arguments defendants have levied against videotaped testimony as being violative of their 6th Amendment rights, but noting that most courts allow the videotaped testimony anyway).

17. FED. R. CIV. PROC. 30(b)(4).

18. *See* Drucker & Hunold, *supra* note 6, at 39 (indicating that the use of videotaped depositions prior to the 1970 amendments was "virtually unheard of").

the credibility of a witness based on their demeanor and willingness to answer questions posed.[19]

Early critics of videotaped depositions claimed videotaping would "cause unreasonable annoyance, harassment and embarrassment..." to defendants in civil cases because plaintiffs would be able to unfairly inject emotion into the proceedings where it had not previously been allowed.[20] Today, many civil trial attorneys consider videotaped depositions a crucial step in securing their clients' best interests.[21] The procedure for taking a civil litigant's deposition is nearly identical to traditional transcribed depositions.[22] The only real difference in the two types of depositions is that the modern version has a videotape recorder in the room while the traditional has a court reporter. As a procedural matter, anyone may operate the video camera, even the attorney himself.[23] Consequently, the client benefits from a tremendous cost savings with the use of videotaped depositions as there is no longer the need to retain the expensive services of court reporters.[24]

B. The Use of Videotaped Testimony for Child Witnesses to Promote Public Policy

Most of the controversy surrounding videotaped testimony stems from its use in criminal proceedings.[25] One area of criminal law which has been quick to accept the introduction of videotaped testimony is child sexual abuse cases, even if the child would be available to testify at trial.[26] States which have statutes allowing videotaped testimony of children wish to protect the child from having to recount the alleged events many times.[27] In other words, there is a public policy interest in protecting child witnesses from the emotional trauma accompanied by the retelling

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19. *See* Reed, *supra* note 4, at 53 (recognizing the shortcomings of having prior testimony read aloud in court).

20. *Id.* at 54.

21. *See* Drucker & Hunold, *supra* note 6, at 40 (characterizing the videotaping of pre-trial depositions as a necessary step in the modernization of discovery and trial practice).

22. *See also* Reed, *supra* note 4, at 56 (indicating that videotaped deposition testimony may be used in the same way as any other deposition at trial).

23. *See* Jones, *supra* note 14, at 620 (discussing how a number of attorneys employ independent contractors to run the camera, but noting that this is not necessary because the parties may stipulate that anyone may operate the camera).

24. *Id.*

25. *See infra* notes 66-86 and accompanying text (detailing the constitutional issues which are implicated as a result of using videotaped testimony in criminal proceedings).

26. John E. B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, 205 (1996); *see id.* at 205 n.205 (listing states that have laws allowing pretrial videotaping of children's testimony in abuse cases).

27. *See* Lathi, *supra* note 8, at 531 (detailing the public policy justification for allowing videotaped testimony of child abuse victims to be entered into evidence despite the fact that defendants argue that this kind of testimony is violative of their Sixth Amendment Confrontation Clause rights).

of criminal events over and over.[28] Additionally, these statutes are designed to protect children from the trauma of testifying in the presence of the defendant.[29] At least one court has held that "even without an enabling statute or rule, the trial court properly permitted two children who witnessed a murder to testify by way of closed-circuit television."[30] The rationale the court used for allowing videotaped testimony absent a statute was that it "furthered the important public policy considerations of protecting the child witness from severe emotional harm."[31]

Individual state courts are not the only ones concerned with protecting child witnesses, the federal government also allows videotaping of children's testimony under certain circumstances.[32] Consequently, the states which allow videotaping of child witnesses and the federal government have similar procedural measures to protect the defendant's confrontation right.[33] While many of the laws require that the defendant be present at the videotaping, the same statutes give judges the power to exclude a defendant from the videotaping if face-to-face confrontation would harm the child emotionally.[34]

III. VIDEOTAPED TESTIMONY IN CRIMINAL PROCEEDINGS

In recent California court decisions, judges have been unwilling to extend the use of videotaped testimony to criminal proceedings absent statutory authorization or protection of public policy interests.[35] Even though the use of videotape is not unheard of in criminal courtrooms (i.e. videotapes have been used extensively to

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28. *Id.*

29. *See* Myers, *supra* note 26, at 205 (indicating that many states which allow the defendant to be present at the taping give the judge discretion to exclude the defendant from the taping if it would traumatize the child witness); *see, e.g.*, State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993) (holding that the policy reason for allowing videotaped testimony of child witnesses is to "protect[ ] a child witness from the trauma of testifying in the presence of a defendant accused of killing her parent").

30. *Ford*, 626 So. 2d at 1344.

31. *Id.*

32. 18 U.S.C.A. § 3509 (West Supp. 1997).

33. *See* Myers, *supra* note 26, at 205 (describing the procedure employed when child witness testimony is videotaped for use at trial: "The taping occurs in the courtroom or at some other location. The laws usually require that the defendant be present at the videotaping. A number of statutes allow the judge to exclude the defendant from the videotaping if face-to-face confrontation would traumatize the child.").

34. *Id.*; *see* 18 U.S.C.A. § 3509(b)(2)(B)(iv) (West Supp. 1997) (providing that the defendant cannot be present at the videotaped deposition of a child sexual abuse witness if the judge made a preliminary finding that the child is unable to testify in court because of fear of being in the presence of the criminal defendant).

35. *See* People v. Watkins, 45 Cal. App. 4th 485, 488, 53 Cal. Rptr. 2d 13, 15 (1996) (quoting Bailey v. Superior Court, 19 Cal. 3d 970, 977, 568 P.2d 394, 140 Cal. Rptr. 669 (1977) and stating the issue as "whether the use of videotape for the recording and reporting of deposition testimony has been authorized by the Legislature"); *id.* at 490, 53 Cal. Rptr. 2d at 16 (referencing CAL. CIV. PROC. CODE § 2025(1) and noting that "the Legislature knows how to authorize the videotaping of a deposition if it wishes to do so, because it has done so expressly in civil cases"); *id.* at 491, 53 Cal. Rptr. 2d at 17 (concluding that the Legislature would have expressly allowed videotaped testimony of unavailable witnesses in criminal proceedings if that is what they had intended because a defendant's freedom is at issue in a criminal case, whereas only money is involved in civil cases).

record confessions or victim's statements), many judges have drawn the line at videotaped testimony and have held that deference on this issue should be given to the Legislature.[36] As a result, cases which have addressed the issue of videotaped testimony in criminal proceedings tend to frame the issue as "whether the use of videotape for the recording and reporting of deposition testimony has been authorized by the Legislature."[37]

A. *Testimony of a Witness Conditionally Examined Prior to Chapter 19*

In *People v. Watkins*, the California Court of Appeals found that "[t]he procedures for the taking and use of a deposition of a witness in a criminal case, set out in sections 1335 through 1345 of the California Penal Code,"[38] establish that a witness may be "conditionally examined" via deposition if he will be unable to testify at trial.[39] Witnesses may be conditionally examined when "the witness is about to leave the state, or is so sick or infirm as to afford reasonable grounds for apprehending that he or she will not be able to attend the trial, or [when] the life of the witness is in jeopardy."[40] Additionally, section 240 of the California Evidence Code provides that a witness is unavailable for trial if "the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."[41]

Existing law provides that once a witness is deemed to be "unavailable to testify at trial,"[42] he is required to testify in the presence of a magistrate.[43] If the witness is for the prosecution, "[t]he defendant has the right to be present in person and with counsel at such examination."[44] Furthermore, existing law requires that the testi-

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36. *See* Jones, *supra* note 14, at 630-31 (indicating that videotape has been used extensively in criminal proceedings to "memorialize confessions or victim's statements, to show crime scenes or to depict criminal activity that has been captured on film"); *see supra* note 35 (describing the logic used by the *Watkins* court in holding that the Legislature has not authorized videotaped testimony in criminal proceedings).

37. *See, e.g., Watkins*, 45 Cal. App. 4th at 488, 53 Cal. Rptr. 2d at 15 (quoting Bailey v. Superior Court, 19 Cal. 3d 970, 977, 140 Cal. Rptr. 669, 568 P.2d 394 (1977)).

38. *Id.* at 488, 53 Cal. Rptr. 2d at 15; *see* People v. Ware, 78 Cal. App. 3d 822, 828, 144 Cal. Rptr. 354, 357 (1978) (stating that "Penal Code sections 1335-1345 set forth the specific requirements which must be followed for conditional examination of unavailable witnesses").

39. *See generally* CAL. PENAL CODE §§ 1335-1345 (West 1982) (describing the procedure involved when a witness is unavailable to testify in person at a criminal trial).

40. CAL. PENAL CODE § 1337(4) (West 1982).

41. CAL. EVID. CODE § 240(a)(5) (West 1995).

42. *See id.* § 240(a)(1)-(5) (West 1995) (providing that a witness is unavailable to testify at trial if the witness is: (1) Exempted from testifying by privilege; (2) disqualified from testifying to the matter; (3) dead or unable to testify because of an existing physical or mental illness or infirmity; (4) absent and the court is unable to compel attendance through its process; or (5) absent and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure attendance by the court's process); *see also id.* § 240(b) (West 1995) (indicating that a declarant is not deemed unavailable if his or her absence is a result of wrongdoing by the proponent of his or her statement).

43. CAL. PENAL CODE § 1339 (West 1982).

44. *Id.* § 1340 (West 1982).

mony given by the witness be reduced to a writing which is then read aloud orally in court by the proponent's attorney.[45] In interpreting existing law prior to the enactment of Chapter 19, the *Watkins* court held that "the statutory scheme governing conditional examinations does not authorize the admission in evidence of a videotaped deposition."[46]

B. *Chapter 19*

Chapter 19 adds to existing law by providing that the conditional examination of a witness may be video-recorded.[47] In addition, Chapter 19 allows the videotaped deposition of a conditionally examined witness to be admitted at trial when the witness becomes unavailable.[48] The authors of Chapter 19 claim that it enables the jury to view the full testimony of a witness, including the demeanor of the witness during his testimony.[49] Various courts had been allowing videotaped conditional testimony into criminal proceedings for some time because sections 1335-1345 of the California Penal Code did not expressly prohibit admission of videotaped testimony of unavailable witnesses.[50] However, when the *Watkins* court held that "the statutory scheme governing conditional examinations does not authorize the admission in evidence of a videotaped deposition,"[51] the authors of Chapter 19 responded by expressly allowing videotaped depositions to be admitted at trial.[52]

C. *Advantages and Disadvantages of Videotaped Testimony*

Since the ultimate decision whether to videotape a deposition rests with the attorneys, it is important for them to understand both the advantages and disadvantages of this new medium.[53] In order to make an informed decision, attorneys must realize that video is not a neutral medium.[54] There are subtle ways in which the operator can frame a shot in order to make a witness seem more or less

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45. *See id.* § 1343 (West 1982) (requiring that the witness' testimony be reduced to a writing and duly authenticated); *id.* § 1345 (West 1982) (providing that the deposition previously taken from the unavailable witness be read into evidence by either party in the trial).

46. People v. Watkins, 45 Cal. App. 4th 485, 491, 53 Cal. Rptr. 2d 13, 17 (1996).

47. CAL. PENAL CODE § 1343 (amended by Chapter 19); SENATE FLOOR, ANALYSIS OF AB 249, at 2 (Mar. 17, 1997).

48. CAL. PENAL CODE § 1345 (amended by Chapter 19).

49. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 249, at 1 (Apr. 21, 1997).

50. *See* SENATE FLOOR, ANALYSIS OF AB 249, at 3 (Mar. 17, 1997) (stating that "videotaped testimony was becoming routine" in California before a California Court of Appeal held that it was improper).

51. People v. Watkins, 45 Cal. App. 4th 485, 491, 53 Cal. Rptr. 2d 13, 17 (1996).

52. CAL. PENAL CODE § 1345 (amended by Chapter 19).

53. *See* Jones, *supra* note 14, at 613 (noting that attorneys who are unfamiliar with videotaped depositions often "trip over questions of procedure, admissibility, and technique").

54. Drucker & Hunold, *supra* note 6, at 42.

reliable.[55] In addition, some people are naturally more "telegenic" than others and may appear to be devious when they are merely intimidated by the camera.[56]

Aside from the general warnings about videotape discussed above, attorneys should recognize the various advantages of videotaped testimony.[57] The most important advantage of videotaped testimony as opposed to written testimony is that "videotape preserves the actual appearance and demeanor of the witness."[58] In other words, the videotape will record when a witness's answer to a question seems particularly sincere and open.[59] Second, videotaping enables attorneys and jurors to better understand a witness' reference to exhibits and other evidence when the witness on the videotape can actually point to the item being discussed.[60] Third, videotaping is usually less-expensive than traditional stenographic recordings which require the services of a court reporter.[61] Finally, videotape is much more interesting for jurors than dry transcripts which are merely read aloud by an attorney.[62]

The disadvantages of videotaped testimony are often similar to its strengths.[63] Just as videotape preserves the honesty and integrity of a "good" witness, it also records the hesitancy, evasiveness, and uncertainty of a "poor" witness.[64] Similarly, videotaping requires that an attorney prepare for the deposition just as if it were trial, offering but another opportunity for something to go wrong.[65] While this is not a comprehensive list of all the advantages and disadvantages associated with videotaped testimony, it does help give attorneys an idea of issues they must consider when deciding whether or not to use videotaped testimony at trial.

IV. THE CONSTITUTIONAL DEBATE

A. Challenges to Constitutional Due Process

As one law review article notes, "[t]he Due Process Clause grants the defendant the . . . 'right to be present at any stage of the proceeding that is critical to its

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55. *See id.* at 42-44 (warning that attorneys who use videotaped depositions which will eventually be shown to a jury need to be aware that there are subtle ways a skilled cameraman can editorialize a witness's testimony).

56. *Id.* at 44.

57. *See* Reed, *supra* note 4, at 53 (listing the many advantages of using videotaped depositions as a litigation technique).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Strier, *supra* note 4, at 155.

63. *See* Reed, *supra* note 4, at 53 (characterizing the use of video tape as a "double-edged sword"); *see also* Jones, *supra* note 14, at 613 (comparing a videotape to a "two-edged sword").

64. Reed, *supra* note 4, at 53; *see* Drucker & Hunold, *supra* note 6, at 44 (recognizing that the time lapse between the time the question is asked and answered may make the witness look tentative and detrimentally affect his credibility in the eyes of the jury).

65. Reed, *supra* note 4, at 53-54.

outcome if his presence would contribute to the fairness of the procedure.'"[66] In *Department of Social Services v. Brock*, the Michigan Supreme Court questioned whether use of videotaped testimony of a child witness in child protective proceedings violates the parents' or guardians' due process rights.[67] The *Brock* court held that videotaping the child's testimony outside the presence of the defendant and counsel did not deprive the defendant of a constitutionally protected liberty interest.[68] When analyzing due process issues, the United States Supreme Court has viewed the doctrine as "flexible," recognizing a balancing test that considers: (1) The private interest affected; (2) the risk of erroneous deprivation of such an interest, and whether additional or substitute safeguards have any probable value; and (3) the Government's interest.[69]

Even after the enactment of Chapter 19, section 1340 of the California Penal Code enables the defendant to be present at the deposition.[70] This fact tends to indicate that the defendant's private interest is not affected substantially by allowing the deposition to be videotaped. In addition, the comprehensive procedure set forth in California Penal Code sections 1335-1345 regarding testimony of witnesses conditionally examined establishes sufficient safeguards. As stated in section 1341, the magistrate may determine at the time of the deposition whether the witness will be able to appear at trial, and if he or she can, the magistrate is required to dismiss the deposition.[71] This procedural safeguard has the benefit of testing witnesses' availability at different stages in the procedural process.

B. The Confrontation Clause and the Craig *Decision*

The Sixth Amendment to the United States Constitution secures criminal defendants the right to confront witnesses who testify against them at trial.[72] While many Supreme Court cases have commented generally on the confrontation right,[73] *Maryland v. Craig*[74] involves the confrontation right as it applies to cases where videotaped testimony is presented in lieu of live testimony. In *Craig*, the defendant,

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66. Christopher K. DeScherer & David L. Fogel, *Sixth Amendment at Trial*, 84 GEO. L.J. 1222, 1230 (1996).

67. Department of Social Services v. Brock, 499 N.W.2d 752 (Mich. 1993); *see* Heather Jefferson, Note, *Department of Social Services v. Brock: Videotaped Testimony in Lieu of Live Testimony*, 1994 DET. C.L. REV. 897, 897 (1994) (discussing the issue in the *Brock* case).

68. *Brock*, 499 N.W.2d at 759.

69. *See* Jefferson, *supra* note 68, at 903 (discussing a general analysis used by the Supreme Court in which the defendant argues that his Constitutional Due Process rights have been violated on facts similar to those in *Brock*).

70. CAL. PENAL CODE § 1340 (West 1982).

71. *Id.* § 1341 (West 1982).

72. U.S. CONST. amend. VI; *see* CAL. CONST. art. I, § 15 (including Sixth Amendment principles into the California Constitution).

73. *See* Christine M. Adams, *The Confrontation Clause and Evidentiary Admissions*, 28 PAC. L.J. 809, 811-16 (1997) (surveying a line of Supreme Court cases dealing with the confrontation right).

74. 497 U.S. 836 (1990).

who owned and operated a preschool in Maryland, was charged and convicted in a lower court of sexual abuse of a 6-year-old child.[75] During the trial, the alleged victim of the sexual abuse was permitted to testify via a one-way closed circuit television, outside the presence of the defendant.[76] Craig objected to this procedure as violative of her Sixth Amendment confrontation right.[77] The trial court rejected Craig's argument, "concluding that although the statute 'take[s] away the right of the defendant to be face to face with his or her accuser,' the defendant retains the 'essence of the right of confrontation,' including the right to observe, cross-examine, and have the jury view the demeanor of the witness."[78]

On appeal, the United States Supreme Court began its opinion by discussing, in general, the significance of the Confrontation Clause.[79] "The central concern of the Confrontation Clause," stated the Supreme Court, "is to insure the reliability of the evidence by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[80] The Court went on to say that "face-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person."[81] However, recognizing the importance of the Confrontation Clause did not prevent the Court from holding that a defendant's face-to-face confrontation right is not absolute. According to the Court, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[82] On the facts presented in *Craig*, the Supreme Court found that the denial of face-to-face confrontation was justified to further the public policy of preventing further trauma to child abuse victims and found that the testimony given was reliable because defense counsel was able to conduct cross-examination just as he would have had the witness been in the courtroom.[83]

Chapter 19 also complies with the *Craig* decision in that Penal Code sections 1340 and 1341 include procedural safeguards designed to protect a defendant's confrontation right.[84] These safeguards existed prior to Chapter 19's enactment, and

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75. *Id.* at 840.
76. *Id.*
77. *Id.* at 842.
78. *Id.*
79. *Id.* at 845.
80. *Id.; see* DeScherer & Fogel, *supra* note 66, at 1228 (recognizing that the Confrontation Clause facilitates the "truth-seeking function" of trials in that it subjects witness testimony to rigorous examination in an adversarial arena).
81. *Craig*, 497 U.S. at 846.
82. *Id.* at 850.
83. *Id.* at 857.
84. *See* CAL. PENAL CODE § 1340 (West 1982) (reinforcing the defendant's right to be present at the time of the videotaping so that he may confront the witness); *id.* § 1341 (West 1982) (indicating that the magistrate may determine upon commencement of the videotaped testimony whether the witness will be unavailable at trial and may call off the deposition if the witness will be available).

were left unchanged by Chapter 19.[85] The pertinent code provision permits the defendant to be present at the taking of the unavailable witness' testimony.[86] Courts will more than likely view this safeguard as protecting the defendant's confrontation right from being abridged.

V. CONCLUSION

Procedural modifications to the criminal code are often accompanied by constitutional scrutiny. When a defendant's freedom is at issue, courts seek to ensure that constitutional safeguards remain intact. In the case of videotaped testimony, however, public policy and accuracy dictate that videotaped testimony be used in lieu of transcribed depositions read aloud in court. There is no compelling reason why videotaped testimony should not be allowed where transcribed testimony is allowed. As a result, Chapter 19 will more than likely withstand a constitutional challenge.

85. *See* 1997 Cal. Legis. Serv. ch. 19, sec. 1-2, at 224 (West) (amending CAL. PENAL CODE §§ 1343, 1345) (making no changes to California Penal Code §§ 1340 and 1341).

86. CAL. PENAL CODE § 1340 (West 1982).