

# IN BRIEF

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*California is not in the  
vanguard of jurisdictions  
accepting videotaped  
depositions.*

## Videotape in the Courtroom

BY RICHARD ALEXANDER\*

Speed and efficiency are fundamental to an effective judicial system. Videotape offers a possible remedy to the skyrocketing costs of litigation and congestion of the court dockets. As business enterprises and private individuals



increasingly incorporate videotape into their daily regimen, the potential for use of this technology in the courtroom becomes apparent. Videotape is a versatile medium which provides a viable alternative to the conventional method of deposing witnesses, recording confessions and presenting demonstrative evidence.

### Federal Courts

In 1970 the federal courts responded to the need for flexibility in presenting evidence by amending the Federal Rules of Civil Procedure. According to the Advisory Committee on the Federal Rules,

Federal Rule 30 (h) (4) was changed to make available a less costly method of recording testimony. The law allows a court to order, upon motion, the deposition of a witness by means other than stenography and to provide assurances that the record will be accurate. Immediately after the deposition is completed, the witness is required to examine the tape and sign it unless this procedure has been waived.<sup>1</sup>

\*Grateful appreciation is acknowledged for the assistance of Jonathan Lee Willis and Margaret Jo Woolf, third year law students at the University of Santa Clara School of Law.

<sup>1</sup>Fed. R. Civ. P. 30 (e).

Videotape use in criminal depositions is permissible under Federal Rules of Criminal Procedure, Rule 15, which sanctions those methods allowable under the civil procedure rules. The primary issue involved in the criminal arena concerns the defendant's constitutional right to confront the witnesses against him.<sup>2</sup> This problem can be overcome by providing the defendant with adequate notice of the deposition, thereby insuring him the opportunity to question the witness.

An additional use of video technology involves the recording of criminal confessions. The judge is clearly better able to rule upon the voluntariness of a confession when he can observe the event on videotape. The more subjective factors, which are so important in determining the propriety of the act, are virtually impossible to convey in writing. One recent federal decision, *Hendricks v. Swenson*,<sup>3</sup> noted that video recordings provide a superior method of evaluating the voluntariness of a confession, and the court encouraged the wider use of such devices.<sup>4</sup>

### State Approaches

Numerous states have introduced procedural rules increasing the number of methods for offering evidence—one of these being videotape. The state of Ohio pioneered in this field with the adoption of the most progressive approach for integrating videotaped data into courtroom usage.<sup>5</sup> As a result a trial took place in 1972 which was comprised entirely of videotaped evidence. All parties involved considered the trial a successful application of video.

Many states, including Michigan and Nebraska, have promulgated laws more restrictive than those of Ohio. Nebraska's statute permits video depositions and responses to written interrogatories.<sup>6</sup> Generally, these amended rules will allow taped testimony when the witness is unavailable in the following circumstances:

- (1) Due to illness
- (2) Due to death
- (3) Beyond the reach of the court's subpoena power.

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<sup>2</sup>U.S. Const. amend. VI.

<sup>3</sup>456 F.2d 503 (8th Cir. 1972).

<sup>4</sup>Another example of videotape potential in the criminal setting is deposing material witnesses who are illegal aliens subject to deportation. Taping their testimony allows them to be released from jail while preserving their testimony for the defendant's trial. See generally, *Videotape Depositions: An Alternative to the Incarceration of Alien Material Witnesses*, 5 CAL. WESTERN INT'L L. J. 376 (1975).

<sup>5</sup>Ohio R. Civ. P. 40 (Supp. 1972). See, *Use of Videotape In The Preparation and Trial of Lawsuits*, THE FORUM 1152.

<sup>6</sup>Neb. Rev. Stat. §§25-1240 to 1267 (Supp. 1973).

Many laws are silent as to how broadly videotape can be utilized. Other states require the camera operators to swear under oath to their lack of pecuniary interest in the outcome of the proceedings.

### California

California has been slow to institute change in its procedural rules regarding videotape application. California Code of Civil Procedure, Section 2004, defines "deposition" as a "written declaration, under oath, made upon notice." "Writing" is defined two ways. In Code of Civil Procedure, Section 17, the word is given the narrow and literal meaning including only handwritten, typed or printed matter. The Evidence Code, Section 250, provides a broader definition of "every . . . means of recording upon any tangible thing, any form of communication or representation." But the Code of Civil Procedure controls, and videotaped depositions are disallowed,<sup>7</sup> although other taped evidence, *e.g.*, *ex parte* statements and demonstrative evidence, is permitted. There exists no apparent reason for the failure of the legislature to amend the rules expressly to permit videotape use, other than general inertia. Certainly a change in the law is worthwhile and strongly recommended in light of the advantages this medium offers.

### Advantages

The most impressive advantage of videotaped depositions is the ability of the trier of fact to observe the demeanor of the deponent. The traditional procedure of counsel reading the testimony into the record is universally recognized as tedious and often boring. Clearly, the effectiveness of testimony submitted in this fashion is seriously jeopardized by the inability of the judge or jury to associate the words spoken with a personality or a face. A taped deposition enables jurors to assess more accurately the witness' credibility based on a multi-dimensional presentation of testimony. The subtleties of body language, nuances of speech and the witness' overall behavior are invariably influential and oftentimes determinative factors in weighing the given testimony.

When a witness is unavailable at the time of trial, videotaped depositions can provide a method of recording testimony far superior to the stenographic convention. Not only does it allow the jury to observe the totality of the evidence, but it also does so, in many instances, at a cost lower than that of court reporters.

Expanding the utilization of videotaped depositions beyond that of unavailability of witnesses is another potential advantage. Expert witnesses, especially medical experts, are often required to testify, and conflicts in scheduled appearances are an ever-present dilemma. The expense of compen-

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<sup>7</sup>*Bailey v. Superior Court*, 19 Cal.3d 970 (1977).

sating these individuals for the time taken from their practice can be prohibitive. Taping also eliminates the problem of witnesses failing to arrive on time at the courthouse, resulting in the disjointed presentation of testimony. Taping all testimony insures the continuous, logical order of evidence.

Because the tapes can be reviewed by counsel and judge prior to the trial, the majority of objections to admissibility of evidence can be resolved and the objectionable portion of the testimony deleted. This practice reduces the time devoted to conferences between counsel and judge during the trial, and it automatically prevents the jury from being exposed to the inadmissible testimony.

### **Disadvantages**

In a tactical sense, trial attorneys should recognize that in some instances it is more advantageous to refrain from taping a witness. If the individual's appearance is such that viewing the witness might be more harmful than beneficial, the testimony should be submitted by conventional written means. Counsel must use judgment in evaluating the advantages of presenting the witness to the jury on videotape.

Heavy reliance on taped depositions can also result in a monotonous presentation. Maintaining the attention of the jury in such a situation is difficult, and too much use of the video medium can seriously limit the effectiveness of the evidence. Planned interruptions of the tape can frequently alleviate the tedium of watching long stretches of testimony. Obviously, these interruptions should not disrupt the general momentum of testimony but, rather, should provide the jury a brief rest after which they can resume with their full attention.

Videotape can be helpful in reducing much of the court's burden. However, it should be applied carefully so as not to impair justice. Regulations concerning the editing and storage of the tape should be developed by those familiar with both video technology and legal procedure. Storage facilities should be established in each courthouse to insure the preservation of the tapes.

### **Conclusion**

Changes are needed in the court system to maintain faith in the efficacy of bringing suit. The assumption that long delays and high expenses are inherent in a judicial system is erroneous and has been proven wrong by the use of new techniques like videotaped depositions. With regulations to preserve fairness and justice, the application of video in legal proceedings can rejuvenate the system. Affirmative steps can be taken to provide specifically for flexibility in procedural aspects to encourage use of videotape in the courtrooms of California.