6-1-1975

Symposium: The Use of Videotape in the Courtroom

Tom C. Clark
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Introduction

*Tom C. Clark*

I am pleased to see the publication of this symposium issue of the Brigham Young University Law Review on the use of videotape in the courtroom. The articles and comments comprising the symposium represent at least a partial report to the legal community of the progress that has been made in this challenging aspect of the new judicial technology. This process is marked by two historic breakthroughs in effective judicial administration: first, a marriage between technologists, the behavioral scientists, and the legal profession; and second, a major change in the basic format of our ancient system of adjudication of grievances.

There have been many students of and workers in the field of judicial decision making since Pound issued his clarion call back in 1906, but none will contribute more than those who are now subjecting judicial procedures to scientific research. One need only glance at the subject matter and the mix of contributors—social scientists, law professors, and law students—found in this issue to see that an exciting and significant new day has come to judicial administration. On behalf of the courts and the legal profession, I not only welcome the new technology but also those who so ably propose it and subject it to critical inquiry. I believe that the crossing of these disciplines will bring not only expedition to adjudication but improvement to judicial procedures.

One should not conclude by this that we men and women of the law have been entirely smitten by the charms and enticing whispers of the technologists and behavioral scientists; nor that we, in our groping for judicial improvement, have concluded that the technologists and behavioral scientists offer the last clear chance. Simply, we believe that the members of these disciplines have something that can be adapted and utilized to modernize our system. And our views

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Mr. Justice Clark is currently serving as chairman, Standards of Criminal Justice Implementation Committee, A.B.A.; chairman, United States Supreme Court Historical Society; chairman emeritus, National College of the Judiciary; chairman emeritus, North American Judges Association; and is involved in a wide range of endeavors dealing with judicial administration.
in this regard are buttressed by the obvious fact that technologists and social scientists have discovered in the law a vast and exciting new field for the application of technology and techniques of behavioral and communications research.

We in the law have learned the hard way that other disciplines offer much in the adjudication of the great economic, social, and political issues that are thrust upon the courts. Witness the economic, financial, and social testimony that is now commonplace in our trials. But, unfortunately, we have not been as ready and willing to rely on these kindred disciplines in the internal management of the legal system itself. It appears to me, however, that the legal profession is becoming increasingly more willing and anxious not only to accept the guidance of the social and technical scientists but also to enlist their active support. This is itself a milestone in judicial management. By contrast, one may note that the rules of civil procedure initially adopted in 1939 were not subjected to systematic research until the 1960's. Apparently we have learned a lesson from that experience and now seek objective findings from actual use before final adoption of a new and innovative technique. In this regard, the studies conducted at Michigan State University and Brigham Young University, and by Ernest H. Short & Associates, the findings of which are reported in this symposium issue, have paved the way for a more general use of videotape trials. Or, at the very least, these studies have pointed the way for further research and inquiry. And because of the videotape research, both that gathered together in this issue and that currently in progress or yet to be conducted, the courts will save decades from the use of the old "trial and error" method.

Consider, for instance, how brief has been the history of organized efforts at modernizing the judicial system. It was less than 10 years ago that the American Assembly on "The Courts, the Public, and the Law Explosion" first outlined the alarming dimensions of the problem of judicial administration and brought them meaningfully to the attention of the national legal community. The groundbreaking 3-year effort of the Joint Committee for the Effective Administration of Justice, combining the resources of 17 national legal organizations, did not get underway until 1961. One of its principal legacies, the National College of the State Judiciary, was not founded until 1964. Remember too that the first offshoot of the College—the Federal Judicial Center—was not organized until 1968. The Institute for Court Management began its first class for court administrators in 1970. And, finally, the old and much sought for National Center for State Courts was chartered in 1971, through assistance from the Chief Justice and the President of the United States.

It seems clear from this brief history that the main thrust of the movement for modernization of our judicial system is barely 10 years old. But even in this era of accelerating change, the progress in the application of video technology to the law has set an astonishing pace. It was less than 5 years ago, in 1970, that the Federal Judicial
Center purchased for experimental use the first videotaping equipment in the federal court system. The year 1970 was also marked by the publication of a groundbreaking law review article on the videotape trial.\(^1\) Written by Alan E. Morrill, a Chicago trial lawyer with remarkable prescience, the article begins with this statement:

One day very soon now, a courtroom somewhere in this illustrious land will introduce a sweeping change in the present system of trial by jury. It is doubtful that this ineluctable transformation will be strikingly recognized as such at the time. The event will probably provoke no more than an impassive article or two from the local newspapers, and some of the publications serving the law profession will volunteer a commentary if this novel endeavor is brought to their attention. It will be an occurrence of which comparatively few people will have cause to contemplate. A jury will have decided the issues of a law suit by merely viewing and hearing the entire proceedings of a trial on a television screen . . . .

The trial that Mr. Morrill predicted took place just 1 year later, on November 18, 1971. The case, *McCall v. Clemens*,\(^2\) was tried by the Honorable James L. McCrystal, Judge of the Court of Common Pleas in Sandusky, Ohio. As often has been the case in the history of invention and innovation, the two men were functioning independently. Judge McCrystal had not read nor heard of Mr. Morrill's article, although it discussed in considerable detail the type of trial Judge McCrystal actually was to conduct.

The success of the trial, as Judge McCrystal has noted,\(^3\) led Chief Justice G. William O'Neill and the Ohio Supreme Court to submit Civil Rule 40 to the General Assembly of Ohio. The rule, giving official sanction to the prerecorded videotape trial, was approved July 1, 1972, and was, of course, another historic first for the courts of Ohio. At least five states and the federal courts now have adopted rules permitting the videotaping of depositions,\(^4\) but Ohio remains the only state authorizing videotape trials.

I am told there have been well over 4,000 depositions taken on videotape and that there have been several hundred trials in which videotape testimony has been used. These figures are small when measured against the total number of cases tried in the state and federal courts, but they seem a significant number to me when one considers the remarkable change they represent in traditional procedures and the short time since the initial experiments began.

Lawyers and judges, we often have been told, are very much in favor of progress but sit on their hands when someone suggests . . . .


\(^{2}\)Civil No. 39,301 (C.P., Erie County, Ohio, Nov. 18, 1971).

\(^{3}\)See, e.g., McCrystal & Young, *Pre-Recorded Videotape Trials — An Ohio Innovation*, 39 BROOKLYN L. REV. 560 (1973). For a collection of articles and comments on the *McCall v. Clemens* case, see id. at 560 n.3; Symposium — First Videotape Trial: Experiment in Ohio, 21 DEFENSE L.J. 266 (1972).

\(^{4}\)See, e.g., *FED. R. CIV. P.* 30(b)(4), (c); *NEV. R. CIV. P.* 30(b)(4), (c).
change! Instead of doing this, the lawyers must not only support progress but welcome change, for they go hand in hand. I am happy to say that despite the lawyers, change is nonetheless occurring at an increasing pace to legal processes and institutions. Moreover, we can expect this pace to continue as the courts' new research and training institutions help the judiciary adapt the modern computer, recording, and video technology to modern management procedures, such as data gathering, processing, and statistical analysis. Indeed, I predict that the federal courts will soon have a national computer system that will gather, process, and analyze case filings in such a sophisticated manner that a judge, as well as an administrator, will be able to secure the answer to delays, bottlenecks, and other difficulties presently plaguing us in the federal system.

Thus far, as Judge McCrystal reminds us, experience with the videotape trial "has attracted the attention of the scientist to a far greater degree than that of the judge and lawyer." But, knowing the judges and the Bar, we can count on them to correct this imbalance. I predict the universal use of videotape in personal injury cases, especially as to medical testimony, and its expansion to other litigation as the Bar and the courts become satisfied as to its adaptability. Perhaps not in my day, but I truly believe not too far in the future, we will be "videoing" the entire case. Indeed, at this moment the Appellate Section of the American Bar Association is developing an experiment in this area under its present chairman, Justice Albert Tate. The concept is that the appellate record would be the videotape, thus saving time and money and ensuring absolute accuracy.

Let me take this opportunity to again call upon the Bar and the law schools to help evaluate the use of videotape in the judicial process, especially during this experimentation period. Some say we should not experiment with the law. But I call attention to the fact that doctors experiment with life every day. They bury their mistakes. While we of the legal profession are unable to do that, our shoulders are broad enough to carry our errors. I hope that every bar association will organize a program for its members in which depositions can be on videotape at the cost of the tape consumed. Lawyers would become accustomed to videotape and would soon change their attitude concerning its use.

In conclusion, I simply note reports I have heard that lawyers, particularly plaintiffs' trial lawyers, have been more resistant to videotape in the courts than judges themselves. If this is true, the proponents of videotaping can take hope from a recent comment by Judge Weis. The judge tells of his experience with a Pittsburgh attorney who "was initially rather adamantly opposed to the use of videotape depositions, but after seeing himself on the screen... became so enamoured of the technique that he is now one of its greatest advocates." What we need do, it seems, is get more trial lawyers on the video screen.

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5McCrystal, The Videotape Trial Comes of Age, 57 JUDICATURE 446, 449 (1974).