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COMMENTS

VIDEOTAPED REENACTMENTS¹ IN CIVIL TRIALS: PROTECTING PROBATIVE EVIDENCE FROM THE TRIAL JUDGE'S UNBRIDLED DISCRETION

INTRODUCTION

Using videotaped² reenactments as evidence has become increasingly common in both civil and criminal courts.³ Its frequent

1. A videotaped reenactment reconstructs an accident or event that gives rise to a lawsuit. Heller, *Using Videotape to Effectively Prepare and Present Your Case*, in PRACTISING LAW INSTITUTE, VIDEO TECHNOLOGY: ITS USE AND APPLICATION IN LAW 1, 25 (1984). It purports to give the judge and jury an opportunity to visualize the factors that the proponent of the videotape, or the proponent's expert, considers to be the causative factors of an accident. *Id.* As a consequence of its purpose to prove causation, litigants often employ the videotaped reenactment when movement is relevant to the establishment of causation. Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235, 268 (1965).

For a more detailed explanation of how litigants use the videotaped reenactment to prove causation, see *infra* note 6 and accompanying text.

2. Motion pictures and videotape are technically different. The former is a series of photographic images projected on a screen, and the latter is the product of electronic impulses that reproduce the image on a television monitor. Dombroff, *Innovative Developments in Demonstrative Evidence Techniques and Associated Problems of Admissibility*, 45 J. AIR L. & COM. 139, 140 (1979); see also 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1294 (2d ed. 1969) (videotape recordings are actually motion pictures made by electronically recording sight and sound on magnetic tape but without series of still pictures). One advantage of using a videotaped reenactment over motion pictures is the ability to review the videotape immediately after taping it and before leaving the taping site, which is a tremendous time-saving advantage. Bray, *Oh! . . . Now I See!*, in PRACTISING LAW INSTITUTE, USING DEMONSTRATIVE EVIDENCE IN CIVIL TRIALS 135, 148 (1982).

"Videotape" includes motion pictures and videotape for purposes of this paper. Courts treat motion pictures and videotape identically for evidentiary purposes. Kornblum, *Videotape in Civil Cases*, 24 HASTINGS L.J. 9, 32 (1972). Compare, e.g., *Hall v. General Motors Corp.*, 647 F.2d 175, 180 (D.C. Cir. 1980) (quoting *Illinois Central Gulf R.R. v. Ishee*, 317 So.2d 923, 926 (Miss. 1975)) (motion picture is not admissible unless conditions are "so nearly the same in substantial particulars . . . as those involved in the episode in litigation . . .") with *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1278 (8th Cir. 1987) (admissibility rests with trial judge's discretion, and court may properly admit videotape if conducted under conditions substantially similar to actual conditions).

3. Videotaped evidence is increasingly prevalent in lawsuits for many purposes other than for reenacting an event leading up to the lawsuit. Among its

presence in products liability and negligence litigation⁴ during the 1980's demonstrates that the federal courts do not categorically exclude the videotaped reenactment⁵ as proof of causation⁶ and are,

uses today, the "day-in-the-life" videotape undoubtedly is the most common. Lawyers use such films to prove the element of damages in negligence and products liability cases. For an excellent discussion of the evidentiary issues involved with the admissibility of "day-in-the-life" videos, see Comment, *Beyond Words: The Evidentiary Status of "Day-in-the-Life" Films*, 66 B.U.L. REV. 133 (1986). Litigants also use videotaped evidence for experiments illustrating scientific principles. For a discussion of the evidentiary difficulties with experimental scientific evidence, see Joseph, *Videotape Evidence in the Courts: 1983*, 1983 A.B.A. Sec. Lit. 1, reprinted in PRACTISING LAW INSTITUTE, VIDEO TECHNOLOGY: ITS USE AND APPLICATION IN LAW 105 (1984).

Litigants also employ videotape to record depositions in lieu of live testimony. Kornblum, *supra* note 2, at 13. The videotaped deposition is beneficial when a witness is unable to testify in court. *Id.* This use of videotape recently received great attention as a result of the impact of videotaped depositions of the allegedly abused children in the *McMartin* "daycare child abuse" case in Southern California. The New York Times, Jan. 19, 1990, at 1, col. 2. Additionally, attorneys conducted a videotaped deposition of former President Reagan on February 16-17, 1990, for use in John Poindexter's "Iran-Contra Affair" trial. Chicago Tribune, Feb. 23, 1990, § 1, at 1; Chicago Tribune, Feb. 10, 1990, § 1, at 1. For a detailed discussion of the advantages and drawbacks of videotaped depositions, see generally Kornblum, *supra* note 2.

Finally, many scholars have advocated, and some courts have utilized, the videotape to record entire trials. See generally G. MILLER & N. FONTES, VIDEOTAPE ON TRIAL: A VIEW FROM THE JURY BOX (1979) (discussing use of videotape to record and present whole trials). The videotaped trial is submitted to the jury to view uninterrupted by objections, recesses, and prejudicial outbursts by the attorneys. For a detailed description of the potential for videotaped trials, see generally *id.*; McCrystal, *The Promise of Prerecorded Videotape Trials*, 63 A.B.A. J. 977 (1977).

For a discussion of the use of the videotaped reenactment in criminal cases, see Niehaus, *Videotape and the Courtroom Process*, 18 A.F. L. REV. 87 (1976). Due to the wealth of information on videotaped evidence, this comment will only discuss the use of the videotaped reenactment in the civil litigation context, focusing primarily on products liability and negligence.

4. The "day-in-the-life" videotape is even more commonly present in products liability and negligence cases today than the videotaped reenactment. For a discussion of the use of day-in-the-life videos in tort trials, see generally Comment, *supra* note 3.

5. No case exists in which a judge excluded videotaped evidence simply based on the form of the evidence. Paradis, *supra* note 1, at 235. The closest a court has come to excluding categorically filmed evidence was in *Gibson v. Gunn*, 206 A.D. 464, 202 N.Y.S. 19 (1923). In *Gibson*, the New York Supreme Court reversed the admission of a motion picture that depicted the plaintiff as a vaudeville dancer in order to prove his subsequent loss of enjoyment and mobility as a result of an accident. *Id.* at 464, 202 N.Y.S. at 19. The court did not admit the evidence due to the circus atmosphere that the motion picture caused in the courtroom. *Id.* at 465, 202 N.Y.S. at 20. In reversing, the court said: "Aside from the fact that motion pictures present a fertile field for exaggeration of any emotion or action, and the absence of evidence as to how this particular motion picture was prepared, we think the picture . . . tended to make a farce of the trial. . . ." *Id.*; see also Paradis, *supra* note 1, at 235-36 (discussing the *Gibson* decision).

6. Litigants use the videotaped reenactment in civil trials exclusively to prove the causation element of tort liability. Joseph, *supra* note 3, at 24. A videotape reenactment may demonstrate a theory of causation in two ways.

with increasing consistency, grappling with its logistical and evidentiary difficulties.⁷ Logistical problems that the videotaped reenactment and other forms of videotaped demonstrative evidence⁸ present include the proper placement of projection equipment,⁹ the necessity of standard interchangeable equipment,¹⁰ the cost of installing standard equipment in all courtrooms,¹¹ and the proper storage of videotape as a court record in courthouses.¹² Additionally, there are three evidentiary considerations that may hinder the admissibility, and consequently the impact, of a videotaped reenactment.¹³ First, a videotaped reenactment must be authenticated

First, the videotape may show the scene of an accident and the general location of relevant objects at the scene. *Id.* at 15. Second, a videotaped reenactment can recreate the accident from the proponent's vantage point which, consequently, presents only one of the litigants' theories of how the accident occurred. Paradis, *supra* note 1, at 266; see also Joseph, *supra* note 3, at 24 (when litigant introduces videotape to reconstruct scene or to recreate accident, courts view videotape skeptically due to potential for confusion, misconception, and manipulation). Depending on the purpose for which a litigant uses a videotaped reenactment, different accuracy tests for relevance apply to the event depicted. For a discussion of the different standards of relevance, see *infra* notes 51-52 and accompanying text.

7. For a detailed discussion of how courts approach admissibility of the videotaped reenactment, see *infra* notes 43-56 and accompanying text.

8. Demonstrative evidence is "addressed directly to the senses of the court and jury" through a "physical illustration of a fact presented," rather than through a verbal description. Heffernan, *Effective Use of Demonstrative Evidence: "Seeing Is Believing,"* 5 AM. J. TRIAL ADVOC. 427, 427 (1982).

9. For a detailed discussion of the importance of architectural adaptations in the courtroom to accommodate the placement and use of videotaped evidence in the courtroom, see G. COLEMAN, VIDEO TECHNOLOGY IN THE COURTS 10-11 (National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, Oct. 1977).

10. For a detailed discussion of suggestions for standardizing video equipment in the courts, see *id.* at 8-10; see also J. EBERSOLE, THE POTENTIAL FOR VIDEO TECHNOLOGY IN THE COURTS 11-12 (Federal Judicial Center, Aug. 1972) (standard equipment is most cumbersome logistical barrier to implementing technology in courts because technological quality of video equipment changes very rapidly).

11. For a detailed discussion of the cost and cost-effectiveness of videotaped evidence in civil litigation, see J. EBERSOLE, *supra* note 10, at 17-22.

12. For a detailed discussion of the security problems with storage of videotaped evidence in the courthouse, such as preventing tampering with content or quality of the videotape, see *id.* at 13.

13. Some scholars and lawyers suggest two additional admissibility hurdles that a videotaped reenactment introduced as demonstrative evidence may encounter. First, a videotaped reenactment constitutes inadmissible hearsay. FED. R. EVID. 802; see also Paradis, *supra* note 1, at 262 (discussing hearsay objection to filmed evidence and explaining how courts nonetheless usually admit filmed evidence). FRE 803(24) provides that a hearsay statement is admissible, though not specified as an exception under any other exception,

but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and interests of justice will be best served by admission of the statement into evidence.

properly.¹⁴ Second, a videotaped reenactment must be relevant to the issues in the case.¹⁵ Third, a videotaped reenactment must be more probative than prejudicial on a relevant issue.¹⁶

Increased use of the videotaped reenactment improves the American judicial system. Its ability to communicate with the jury more effectively than oral testimony¹⁷ by presenting testimony in a

FED. R. EVID. 803(24).

Nevertheless, courts that have addressed this admissibility issue conclude that while the videotaped reenactment has the potential to serve as proof of the matter asserted in the videotape, thereby constituting hearsay, such evidence falls under the general hearsay exception for statements with sufficient guarantees for trustworthiness. Paradis, *supra* note 1, at 262; *see also* Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 610-11 (D. Alaska 1977). The Grimes court held that a day-in-the-life video constitutes admissible hearsay under FRE 803(24). *Id.* The Grimes decision was based on the court's opinion that the video was more probative on the material issues of pain and suffering and loss of enjoyment than any other evidence, and that the trustworthiness of the matter asserted in the video was guaranteed by subjecting the plaintiff and authenticating witness to cross-examination. *Id.*

Second, the common law "ultimate opinion rule," which applies in states that have not adopted a form of FRE 704 regarding opinion evidence on an ultimate issue, may bar admissibility of a videotaped reenactment. Under the ultimate opinion rule, testimony expressing an opinion on the ultimate issue for the jury's determination is inadmissible. Joseph, *supra* note 3, at 26 n.*. Consequently, in a state court that follows the ultimate opinion rule rather than a form of FRE 704, if the trial court determines that the proponent of a videotaped reenactment introduced the evidence as an opinion on the ultimate issue of liability, the videotaped reenactment would be inadmissible regardless of its relevancy to the issue of causation. *Id.*

14. FED. R. EVID. 901. For a more detailed discussion of the problems with authentication of a videotaped reenactment, see *infra* notes 42-48 and accompanying text.

15. FED. R. EVID. 401 & 402. In the civil context, the proponent uses the videotaped reenactment to prove her theory of causation in a negligence or products liability case. Joseph, *supra* note 3, at 24. However, various factors determine whether the video is relevant. For a detailed discussion of the relevancy analysis, see *infra* notes 49-53 and accompanying text.

16. FED. R. EVID. 403. For a discussion of FRE 403's application in the videotaped reenactment context, see *infra* notes 54-56 and accompanying text.

17. Proponents of videotaped demonstrative evidence often assert that "a picture is worth a thousand words," or that "seeing is believing." Dombroff, *supra* note 2, at 139. However, these catch phrases drastically understate the impact that videotaped evidence can have in the litigation setting. *Id.* Listening to oral testimony only permits a juror to utilize one sense, hearing, when considering the evidence presented at trial. On the other hand, if an attorney submits a videotape into evidence, she increases the juror's exposure to the evidence, and the result should be increased understanding of the point that she wishes to demonstrate through the videotaped evidence. Heffernan, *supra* note 8, at 428; *see also* Dombroff, *Videotape: An Innovative Evidentiary Use of an Emerging Technology*, in PRACTISING LAW INSTITUTE, USING DEMONSTRATIVE EVIDENCE IN CIVIL TRIALS 155, 162 (1981) (persuasive potential of videotaped reenactment is because technique does not rely on juror's mental capacity to assimilate various components incorporated in videotape). For example, as scholar Fred Heller opined, how can an attorney be certain that each individual juror grasps the full and correct meaning and significance of a witness' testimony?

concise, digestible form¹⁸ may increase discovery of the truth and efficiency of the judicial process.¹⁹ Nevertheless, as use of the videotaped reenactment and other forms of videotaped evidence expands, courts²⁰ fail to regulate its admission consistently.²¹ To prevent the extensive use of videotaped reenactments from outpac-

If you ask ten people to describe what you mean by the word 'house,' you will usually get ten different responses. Mere words leave *much* to the imagination of the listener, based upon his or her own experiences If you ask ten people to describe the word 'house,' but also show them a photograph of a house, their descriptions will be similar If a photograph can create more uniform juror understanding, then a video should further ensure uniform juror response, since a videotape is a series of electronic 'pictures' in motion.

Heller, *supra* note 1, at 10-11 (emphasis in original). See generally G. MILLER & N. FONTES, *supra* note 3, at 57-99 (intensive comparison and analysis of juror response to videotape versus live testimony).

18. Videotape can present testimony more concisely than oral direct and cross-examination due to the availability of editing techniques. For a more detailed discussion on the virtues and vices of editing the videotaped reenactment, see *infra* notes 34-35 and accompanying text.

19. The videotaped reenactment helps the jury return a verdict based on evidence that more clearly illustrates the event in question. This increases the probability that the jury's verdict represents ascertainment of the truth behind the lawsuit. Heller, *supra* note 1, at 11. Additionally, videotape potentially reduces docket congestion, which presently contributes to judicial inefficiency. Comment, *Videotape: Its Use and Potential Use*, 24 DRAKE L. REV. 419, 419 (1975). Videotaped evidence also may prevent a mistrial or appellate review due to the attorneys' prejudicial remarks and misconduct. *Id.* at 419; see also Kornblum, *supra* note 2, at 9 ("[e]fficiency and flexibility of videotape has promoted its use as a time-saving device and as a means of increasing communication between lawyers, witnesses, judges and juries"); Heller, *supra* note 1, at 23 (trials become battleground for experts to testify about incomprehensible subjects with unintelligible language, rendering evidence useless to jury, but videotape may aid jury in comprehending complicated evidence and reduce jury's deliberation time).

20. Virtually all circuits of the federal courts of appeals, and many state courts that apply an evidentiary prejudice rule identical to FRE 403, are evaluating the rules of admissibility for the videotaped reenactment. See, e.g., *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988) (videotape depicting ice accumulation and deicing process on airplane in products liability action); *Champeau v. Fruehauf Corp.*, 814 F.2d 1271 (8th Cir. 1987) (videotape demonstrating deceleration abilities of truck involved in accident); *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1984) (videotape of braking tests on automobile in products liability action); *Szeliga v. General Motors Corp.*, 728 F.2d 566 (1st Cir. 1984) (videotape of impact of speeding car wheel on cement culvert in products liability action); *Brandt v. French*, 638 F.2d 209 (10th Cir. 1981) (videotape showing motorcycle passing in front of car in negligence action); *Hall v. General Motors Corp.*, 647 F.2d 175 (D.C. Cir. 1980) (videotape tests to disprove defect in products liability action); *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950 (5th Cir. 1979) (videotape showing normal action of compress in products liability action), *modified on other grounds*, 609 F.2d 820 (1980); *Loevsky v. Carter*, 773 P.2d 1120 (Haw. 1989) (videotaped reenactment of accident in negligence action); *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983) (videotape of motorcycle functioning with one and two shock absorbers in products liability action).

21. For a detailed discussion of the inconsistent methods of admissibility that the federal courts apply, see *infra* notes 66-103 and accompanying text.

ing the courts' ability to monitor their impact in the litigation setting,²² federal trial judges should regulate use through their authority to determine admissibility.²³

Currently, the greatest danger in regard to admissibility of such evidence is that the federal courts inconsistently apply the pertinent Federal Rules of Evidence ("FRE").²⁴ This is particularly so with the admissibility standard for relevant but prejudicial evidence under FRE 403.²⁵ Despite how ill-suited FRE 403's admissibility standard is for videotaped evidence, the federal courts continue to apply this conventional rule. Because admissibility of the videotaped reenactment continues to confront federal and state courts with increasing frequency, this ill-suited admissibility standard must be reevaluated.

This comment will illustrate the incompatibility of the standard of admissibility under FRE 403²⁶ with the videotaped reenactment.²⁷ Part I briefly sets forth how a videotaped reenactment

22. Because videotaped evidence is likely to be a permanent part of the judicial process, judges should not fear videotape or avoid availing themselves of its efficient and truth-promoting benefits. Therefore, judges must treat videotape as a tool to "learn and master." Heller, *supra* note 1, at 15. Otherwise, the use of videotaped reenactment evidence will outpace the courts' understanding, which will make this technology dangerous. *Id.*

23. Trial judges have discretion to determine admissibility of a videotaped reenactment through FRE 403. FED. R. EVID. 403 ("[a]lthough relevant, evidence *may be excluded* . . .") (emphasis added); *see also, e.g.,* Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1278 (7th Cir. 1988) (admissibility is decision committed to broad discretion of the trial court); Loevsky v. Carter, 773 P.2d 1120, 1125 (Haw. 1989) (admissibility determination of videotaped reenactment rests largely in trial court's discretion).

24. *Compare, e.g.,* Champeau v. Fruehauf Corp., 814 F.2d 1271 (8th Cir. 1987) (not abuse of discretion to admit videotape depicting truck trying to stop with locked brakes at scene of accident when videotape not reenactment but "experiment" demonstrating general laws of physics) with Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984) (though prepared at location of actual accident, error to admit videotape of braking test on car of same model when videotape is prejudicial reenactment substantially outweighing its probativeness) and Brandt v. French, 638 F.2d 209 (10th Cir. 1981) (not abuse of discretion to admit videotape of motorcycle passing in front of car from various angles at various speeds when videotape was not reenactment but experiment) with Loevsky v. Carter, 773 P.2d 1120 (Haw. 1989) (abuse of discretion to admit videotape of motorcycle approaching stretch of road on which actual accident occurred, from various angles at various speeds, when videotape not experiment to illustrate principles of physics but prejudicial reenactment substantially outweighing probative value).

25. *See infra* notes 54-56 and accompanying text for a discussion of the admissibility standard under FRE 403.

26. FRE 403 is the most significant evidentiary rule regulating admissibility of the videotaped reenactment. *See, e.g.,* Carr v. Suzuki Motor Co., 280 Ark. 1, 4, 655 S.W.2d 364, 365 (1983) (even assuming relevancy of videotaped reenactment, exclusion was proper under Rule 403 due to substantial prejudice and its misleading effects).

27. Although this comment is a critical analysis of FRE 403 as it applies to the videotaped reenactment, the criticisms and suggestions herein are intended

benefits litigation and the problems that trial judges create by applying the current discretion standard of admissibility under FRE 403. Part II discusses the rules of evidence that govern admissibility of the videotaped reenactment and concludes that the current standard of admissibility cannot be applied successfully to videotaped reenactments.²⁸ Part III examines federal cases²⁹ discussing admissibility of the videotaped reenactment and illustrates that FRE 403's "discretion" standard of admissibility thwarts the need for a consistent approach to regulate use of the videotaped reenactment. Part IV proposes a modified standard of admissibility, the "limited discretion" standard,³⁰ which would better integrate today's technologically advanced evidence into the judicial system than the current ambiguous "discretion" standard does.

I. ADVANTAGES OF THE VIDEOTAPED REENACTMENT IN THE COURTROOM

The videotaped reenactment can help the jury discover the truth and resolve conflict. It presents each party's version of the incident at issue in the lawsuit in a memorable and quick fashion.³¹ Additionally, juries are more attentive to visual rather than verbal

to apply to other forms of videotaped evidence. For a description of other uses of videotaped evidence, see *supra* note 3 and accompanying text.

28. Pursuant to FRE 102, the Federal Rules of Evidence are designed to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

29. State court cases from states that have adopted FRE 403 verbatim as their "prejudice rule" will also be discussed in this context. See, e.g., ARK. STAT. ANN. § 16-41-101, R. 403 (1987) (relevant evidence excludable if probative value substantially outweighed by risk of unfair prejudice, confusion of issues, or misleading jury, or by undue delay, waste of time, or needless presentation of cumulative evidence); HAW. REV. STAT. § 626-1, R. 403 (1988) (same); Joseph, *supra* note 3, at 14 (state laws generally in accord with FRE 403).

30. Required considerations under the proposed "limited discretion" standard of admissibility for videotaped evidence under FRE 403 are: mandatory presence of both parties' attorneys during the filming of the video; availability of pre-trial hearing for the judge and opponent to view the videotape and for the judge to determine admissibility; permissible cross-examination of the proponent to expose discrepancies between the event as depicted in the video and as actually occurred; and mandatory use of limiting instructions. For a more detailed description and discussion of the "limited discretion" standard of admissibility proposed herein, see *infra* notes 104-22 and accompanying text.

31. Comment, *supra* note 3, at 139 (recognizing the ease in comprehending evidence presented in videotaped form). In addition, videotaped evidence may help salvage an integral part of the American judicial process — the jury system. Eliminating the jury system has received attention in recent years due to the inability of jurors to adequately understand and efficiently analyze evidence in a case, which prevents the jury from discovering the truth. Heller, *supra* note 1, at 9. On the other hand, demonstrative evidence such as the videotaped reenactment can "heighten the jury's usefulness, understanding, and interest in the trial process," thereby achieving the jury's primary responsibility — discovery of the truth. *Id.*

testimony.³² Therefore, the parties' videotaped versions of the incident in question will more likely assure that the jury accurately reaches the truth than would the parties' oral testimony.³³ Furthermore, editing³⁴ before presenting it to the jury would present a more concise version of the event than conventional oral testimony, which increases the efficiency of the judicial process.³⁵

As a result of these advantages, the videotaped reenactment more effectively can achieve the goals of truth, efficiency, and de-

32. Ciccone, *Demonstrative Evidence: A Visual Aid Is Worth 10,000 Words*, in PRACTISING LAW INSTITUTE, USING DEMONSTRATIVE EVIDENCE IN CIVIL TRIALS 59, 63 (1982) (adapted from a presentation published by Graham Associates, Inc., 1982). Ciccone asserts that as issues in a lawsuit become more complex, the listener's attention span and retention level to oral testimony diminish. *Id.* Furthermore, Ciccone argues that visual evidence can help to improve juror comprehension and retention. *Id.* Ciccone supports these assertion with the following data:

<u>Method of Presentation</u>	<u>Retention Level (%)</u>	
	<u>After 3 hours</u>	<u>After 72 Hours</u>
Telling	70%	10%
Showing	72%	20%
Telling and Showing	85%	65%

Id. at 62 (Weiss-McGrath Report prepared by McGraw-Hill). Consequently, enhanced understanding and retention of testimony presented in videotaped form may augment the impact of the proponent's argument. *Id.* at 65.

33. Comment, *supra* note 3, at 139; see also G. MILLER & N. FONTES, *supra* note 3, at 87-99 (discussing benefits of video testimony over oral testimony in capturing and retaining jury's attention); Ciccone, *supra* note 32, at 62-63 (people are visually-oriented due to television, movies, books, road signs, and advertising, so visual presentation in litigation is natural extension that can improve jurors' understanding and retention of complex data).

34. One court warned that "because of the skill and development in the fabrication of moving pictures and the possibilities of producing desired effects by cutting and other devices, a jury might receive misleading and prejudicial impressions . . ." Paradis, *supra* note 1, at 254 (quoting Owens v. Hagenback-Wallace Shows Co., 58 R.I. 162, 165, 192 A. 158, 161 (1937)). Nonetheless, the issue of editing a videotaped reenactment only affects the weight of the evidence rather than its admissibility. *Id.* Furthermore, some recognize that editing should not be considered misleading because trial lawyers edit all types of evidence prior to the trial. Heller, *supra* note 1, at 13. For example, a trial lawyer may select only a few photographs of many available to prove a material issue in a case. In her selection, the trial lawyer will choose the few photographs that most effectively illustrate the relevant point. *Id.* Regardless, if the editing job on the videotaped reenactment distorts the event portrayed, such distortion will be uncovered through cross-examination of the proponent of the videotape and would diminish the weight that the jury ascribes to the videotape. *Id.* at 13. For a detailed discussion of the importance of cross-examination to ensure the accuracy of a videotaped reenactment, thereby increasing the potential weight allocable to the videotape by the jury, see *infra* notes 115-19 and accompanying text.

35. G. MILLER & N. FONTES, *supra* note 3, at 101. In addition, editing reduces prejudice that may be injected into the videotape before the jury is exposed to the prejudice. *Id.*

velopment of evidence law under the FRE³⁶ than conventional oral testimony. More frequent admissibility also would demonstrate the superiority of the videotaped reenactment over conventional testimony. Nevertheless, attempts to use the videotaped reenactment in actual cases have failed to achieve these goals.³⁷ This failure is due to the trial courts' subjective admissibility determination under the "discretion" standard of FRE 403. This subjective determination thwarts effective use of the videotaped reenactment as evidence because litigants do not have standards to follow when preparing the videotape. Standards for advocating or contesting admissibility at trial are also unavailable.³⁸ More importantly, the trial judge's subjective ruling circumvents realization of truth, promotion of judicial efficiency, and growth in the law of evidence.

II. THE VIDEOTAPED REENACTMENT: EVIDENTIARY HURDLES

There are three evidentiary components to the admissibility of a videotaped reenactment. First, the proponent of the video must authenticate it.³⁹ Second, the video must be relevant to a material issue of the lawsuit.⁴⁰ Third, and most significantly, the video must survive the trial judge's scrutiny regarding its potential prejudice against a party, which could improperly affect the outcome of the lawsuit.⁴¹

A. FRE 901: Authentication

Initially, a videotaped reenactment must receive the mark of authenticity by proper foundation under FRE 901. Under FRE 901(a), authentication is a condition precedent to admissibility, and the proponent meets the requirement with evidence adequate to support that the videotape is what its proponent claims.⁴² Accordingly, to authenticate a videotaped reenactment, the authenticating witness⁴³ must assert under oath that the videotape accurately⁴⁴

36. FED. R. EVID. 102.

37. See *infra*, notes 66-103 (discussing cases involving videotaped reenactments).

38. See *Cisarik v. Palos Community Hosp.*, 193 Ill. App. 3d 41, 49, 549 N.E.2d 840, 842 (1989) ("with the extensive use of video . . . [w]e need—but do not have—systematic, organized discovery procedures that insure disclosure of trial videotapes far enough in advance of trial so that information can be gathered and an effective rebuttal planned' ") (quoting Chernow, *Videotape in the Courtroom: More than a Talking Head*, 15 LITIGATION 3, 6 (1988)), *appeal allowed*, 131 Ill. 2d 558, 553 N.E.2d 394 (1990).

39. FED. R. EVID. 901.

40. FED. R. EVID. 402.

41. FED. R. EVID. 403.

42. FED. R. EVID. 901.

43. The proponent of a videotaped reenactment can meet the authentication requirements through testimony of the videotape machine operator or of

portrays what she observed during the taping process.⁴⁵ This testimony authenticates the videotaped reenactment through a series of questions establishing the accuracy of the tape and linking the event depicted to the causation issue in the lawsuit.⁴⁶ Although authentication is the initial obstacle to admissibility and involves a tedious process,⁴⁷ it rarely is the basis for the trial judge's exclusion of a videotaped reenactment.⁴⁸

B. FRE 402: Relevancy

The next evidentiary hurdle that a videotaped reenactment must overcome is relevancy. Pursuant to FRE 402, "[a]ll relevant evidence is admissible, except as otherwise provided . . . Evidence which is not relevant is not admissible."⁴⁹ FRE 401 qualifies admissibility of evidence under FRE 402 by defining relevant evidence as "[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more prob-

an observer of the taping process. *Paradis, supra* note 1, at 236. To qualify as an authenticating witness, the person who videotaped the reenactment need not be a "professional," since the label "professional" in the fields of photography and videography denotes the percentage of income earned from the activity rather than the person's skill. *Id.* at 237.

44. There is some disagreement among the federal courts as to whether accuracy affects the admissibility or the weight of a videotaped reenactment. For a detailed analysis of this conflict, see *infra* note 52 and accompanying text.

45. *Hendricks v. Swenson*, 456 F.2d 503, 506 (8th Cir. 1972).

46. *Paradis, supra* note 1, at 237. The authenticating witness must indicate when, where, and under what conditions the videotape was prepared. Kornblum, *supra* note 2, at 32-33 (quoting *State v. Newman*, 4 Wash. App. 588, 593, 484 P.2d 473, 476-77 (1971)). To achieve authentication, the authenticating witness need not explain the technical process of videotaping. As *Paradis* aptly noted, "few [jurors] and fewer judges are really interested in hearing an involved description of the equipment that your witness used . . . after the witness has said, in plain English, that the pictures are accurate representations of what he [or she] saw. Let opposing counsel step into that quagmire on cross-examination if he [or she] so desires." *Paradis, supra* note 1, at 238. *But see* K. HUGHES & B. CANTOR, PHOTOGRAPHS IN CIVIL LITIGATION 181 (1973) (explaining in detail a four-part analysis for authentication that courts should apply).

47. *See supra* notes 42-46 and accompanying text for a description of the authentication process.

48. Of the numerous cases examined for purposes of this comment, only one case mentioned an objection to the admissibility of videotaped demonstrative evidence on the basis of insufficient or improper foundation, and the appellate court upheld without further comment the trial court's decision to overrule the objection. *See Randall v. Warnaco, Inc., Hirsch-Weis Div.*, 677 F.2d 1226, 1233-34 (8th Cir. 1982) (trial court did not abuse discretion in admitting defendant's videotaped "experimental" evidence over plaintiff's objection of insufficient foundation). *But see* *McGoorty v. Benhart*, 305 Ill. App. 458, 468, 27 N.E.2d 289, 295 (1940) (strict approach to authentication of photographic evidence).

49. FED. R. EVID. 402. The "except as otherwise provided" part of FRE 402 refers to the limitations on admissibility of relevant evidence that the rules following FRE 402 establish, such as FRE 403 (prejudice), FRE 404 (character evidence regarding the accused), FRE 608 (character evidence of the witness), and FRE 802 (hearsay). *Id.*

able or less probable than it would be without the evidence."⁵⁰ To survive a relevancy objection, the proponent of a videotaped reenactment must show that the event portrayed in the reenactment is substantially similar to the actual event.⁵¹ This "substantial similarity" test directly conflicts with the well-accepted rule that differences between the actual event and the videotaped event affect the weight of the evidence rather than its admissibility.⁵² Nonetheless,

50. FED. R. EVID. 401. A videotaped reenactment is relevant evidence to prove the causation element of tort liability. Heller, *supra* note 1, at 25; see also W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 41, at 263 (5th ed. 1984) (proof of causation is necessary element in products liability or negligence cases).

51. The major difficulty with proving the relevancy of and attaining admissibility of a videotaped reenactment is meeting the "substantial similarity test." This test requires that the conditions surrounding the taping process of the reenactment were substantially similar to the conditions existing at the time of the accident. Loevsky v. Carter, 773 P.2d 1120, 1125 (Haw. 1989). The basis for this requirement is that without substantial similarity between the actual and portrayed circumstances, the videotaped evidence would be irrelevant or so prejudicial as to substantially outweigh the videotape's probative value. Heller, *supra* note 1, at 25. Therefore, the substantial similarity test intertwines the rules of relevancy and prejudice under FRE 402 and 403.

Substantial similarity does not require precise recreation of the circumstances existing at the time of the accident or event because duplication is practically impossible. *Id.*; see also Randall v. Warnaco, Inc., Hirsch-Weis Div., 677 F.2d 1226, 1233-34 (8th Cir. 1982) (admissibility does not depend on "perfect identity" between actual and videotaped conditions); K. HUGHES & B. CANTOR, *supra* note 46, at 204 (exact reproduction of original occurrence would require rejection of all photographic evidence taken after actual event).

Courts consider six factors to determine substantial similarity. First, the time of day when the accident occurred compared to time of day when the proponent taped the reenactment is a consideration. Gladhill v. General Motors Corp., 743 F.2d 1049, 1051 (4th Cir. 1984). A second consideration is the comparative road and traffic conditions. Loevsky, 773 P.2d at 1125. Third, the comparative speed affects substantial similarity. Paradis, *supra* note 1, at 243-45. Fourth, the comparative angle of vision during the event and during the reenactment affects substantial similarity. Loevsky, 773 P.2d at 1125 n.9. The fifth consideration is the comparative angle at which the accident occurred. Brandt v. French, 638 F.2d 209, 211 (10th Cir. 1981). Finally, the comparative skill level of the drivers in the actual accident and in the reenactment helps determine substantial similarity. Carr v. Suzuki Motor Co., 280 Ark. 1, 4, 655 S.W.2d 364, 365 (1983).

As previously mentioned, the videotaped reenactment may illustrate the proponent's theory of causation or add support to the opinion of the proponent's expert regarding the cause of the accident. See *supra* note 6 (discussing uses made of videotaped reenactments). Accordingly, the substantial similarity test does not apply as rigidly when the proponent's expert uses the videotaped reenactment to illustrate her opinion. Heller, *supra* note 1, at 27. Relaxing the accuracy standard for a videotaped reenactment offered to illustrate an expert's opinion allows her to assume certain facts are true, regardless of their existence during the actual event. *Id.* In such a situation, the test for the videotape's accuracy, and consequent relevancy, is whether the circumstances are "at least similar" to the conditions that existed at the time of the event, and whether admission of the evidence will assist the witness to communicate effectively her opinion to the jury with reasonable accuracy and expediency. Brandt, 638 F.2d at 212; Heller, *supra* note 1, at 27.

52. Heller, *supra* note 1, at 12. Federal and state courts have yet to recognize, let alone reconcile, the conflict that these bare assertions cause. See, e.g.,

federal judges employ the latter rule to determine admissibility of a videotaped reenactment as frequently as they employ the substantial similarity test.⁵³

C. FRE 403: Prejudice

To be admitted in evidence, a videotaped reenactment must survive a prejudice objection under FRE 403. Relevant evidence is admissible under FRE 403 unless risks of prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence substantially outweigh its probative value.⁵⁴ Furthermore, under FRE 403, the trial judge

Champeau v. Fruehauf, 814 F.2d 1271, 1278 (8th Cir. 1987) (experimental evidence admissible if tests conducted under conditions substantially similar to actual conditions, but dissimilarities affect weight of evidence rather than admissibility); *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir. 1984) (dissimilarities between conditions in videotape and in actual event affect weight of evidence, not admissibility, but acknowledgement of substantial similarity test); *Randall v. Warnaco, Inc., Hirsch-Weis Div.*, 677 F.2d 1226, 1233-34 (8th Cir. 1982) (conditions in videotaped experiment must be substantially similar to those existing at time of accident, and dissimilarities affect weight of evidence rather than admissibility). These cases leave the lawyer attempting to follow cases on admissibility of the videotaped reenactment with the distinct impression that the courts do not understand these principles, although they continue to apply them to the videotaped reenactment.

Nevertheless, reconciling these two principles is not difficult. While the substantial similarity test governs admissibility of the videotaped reenactment, the principle that dissimilarities affect the weight of the evidence applies only after the trial judge admits the videotape under the substantial similarity test. *Paradis*, *supra* note 1, at 261. The answer regarding how much weight to be conferred on a videotaped reenactment should depend on the extent to which the videotape distorts the physical facts relevant to an issue before the fact finder. *Id.* The more distortion a videotaped reenactment presents, the less weight a jury should give it. *Id.* Nevertheless, this principle only applies to the portions of the videotape that are relevant. Consequently, distortion of an irrelevant representation in a videotaped reenactment should not affect the weight that the jury accords the evidence. *Id.* However, it is impracticable to believe that distorted irrelevant facts in a videotaped reenactment do not affect the amount of weight that the jury gives the evidence.

53. For a discussion of the federal courts' application of these two principles in videotaped reenactment cases, see *supra* note 52 and accompanying text.

54. FED. R. EVID. 403. It is worth mentioning briefly the arguments for and against admitting a videotaped reenactment based on a cumulative evidence objection. In the past, courts have rejected the admissibility of videotaped evidence on the ground that it was cumulative. This decision usually rests on a finding that oral testimony already has presented evidence of the general event that the videotape portrays. *Paradis*, *supra* note 1, at 258; see also *Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 958 (5th Cir. 1979) (all motion picture evidence is "basically cumulative in nature" and should be excluded). But see 3 C. SCOTT, *supra* note 2, § 1022, at 332 (photographic evidence only cumulative of other photographic evidence of same kind). Some argue that the *Johnson* approach fails to analyze the videotape in terms of specific, non-cumulative pieces of information that the videotape may contribute: "Even though the general event has been testified to . . . and other demonstrative evidence has been admitted concerning it, if the motion picture [or videotape] adds

must balance these considerations through her discretion.⁵⁵ Videotaped reenactments most commonly cause unfair prejudice, surprise, or confusion that substantially outweighs the probative value of the videotape.⁵⁶

D. Criticisms of the "Discretion" Standard of Admissibility

To determine whether the risk of prejudice, surprise or confusion from a videotaped reenactment substantially outweighs its probativeness under FRE 403, federal courts⁵⁷ apply a subjective

a relevant detail, it should not be ruled out as cumulative." *Paradis, supra* note 1, at 258.

55. FED. R. EVID. 403 advisory committee's note (excluding evidence due to unfair prejudice requires balancing probative value and need for evidence against "harm likely to result from its admission," consideration of probable effectiveness of limiting jury instruction, and whether less prejudicial evidence is available to make same point). Significantly, upholding admission of a videotaped reenactment underscores the deference that appellate courts give to the trial court's exercise of discretion to determine whether the videotape is more confusing than helpful. *Joseph, supra* note 3, at 25. The rationale for reliance on the trial court's exercise of discretion is that because videotape is merely a new method for presenting evidence, it is subject to the existing principles and rules that govern admissibility. Consequently, the trial court's discretion, conferred because the judge is the only impartial figure in a trial, controls admissibility of the videotaped reenactment. *Kornblum, supra* note 2, at 14.

56. Some courts assert that there is a great probability that such evidence misleads the jury. Jurors often have difficulty remembering that a videotaped reenactment is used only to demonstrate a litigant's theory of causation and is not a documentation of the actual event. *Loevsky v. Carter*, 773 P.2d 1120, 1126 (Haw. 1989) (important to convey illustrative nature of videotaped reenactment to jury in order to allow admission without substantial prejudice); *see also* K. HUGHES & B. CANTOR, *supra* note 46, at 178 ("undeniable tendency of fact-finders to uncritically accept as truth, all that the motion picture [videotape] is claimed to represent by its proponent"); *Comment, supra* note 3, at 140 (discussing split among circuits regarding use of videotape as demonstrative or real evidence). Furthermore, the jury may place a disproportionate amount of weight on such evidence. *K. HUGHES & B. CANTOR, supra* note 46, at 177-78. This risk results from the inflammatory potential of a video reenactment of a personal injury accident, which may leave a stronger impression on the jury than oral testimony, and the jury's propensity to view all forms of demonstrative evidence as more significant than conventional evidence, due to the unique method of presentation. *Id.* Additionally, the proponent's awareness during the taping process that her conduct is the subject of evidentiary evaluation may affect her behavior as recorded in the videotaped reenactment. *Id.* at 206. Consequently, the videotape may prejudice the opponent by misleading the jurors. *Id.*

As the language and advisory comments suggest, FRE 403 demands that in seeking the truth through probative evidence, the jury must not reach its decision based on possibly untrue components of a piece of probative evidence or on probative evidence that needlessly impedes expeditious resolution of the conflict. FED. R. EVID. 403 advisory committee's note. As a consequence of these dangers, the videotaped reenactment is the only type of videotaped evidence to which the rule of exclusion rather than admission is the norm. *Joseph, supra* note 3, at 24.

57. These criticisms apply to state courts following a state version of FRE 403 with equal force. For a discussion of one state court's application of a state version of FRE 403, *see infra* notes 82-90 and accompanying text.

standard of admissibility.⁵⁸ Judicial application of FRE 403's subjective standard necessarily causes inconsistent decisions among and within the circuits of the federal courts.⁵⁹ Haphazard application of FRE 403's discretion standard of admissibility to the videotaped reenactment⁶⁰ demonstrates that FRE 403 does not regulate sufficiently the special evidentiary considerations that this medium presents.⁶¹ Consequently, applying FRE 403 to videotaped evidence neither develops the laws of evidence nor resolves conflicts, in the most efficient manner, to discover the truth underlying the conflict.⁶²

III. JUDICIAL APPLICATION OF THE DISCRETION STANDARD OF FRE 403

Case law regarding the admissibility of videotaped reenactments has developed in three directions. In one line of cases, appellate courts review the trial court's ruling on admissibility under the "abuse of discretion" standard of review. These courts consistently find no abuse and avoid reexamining the trial court's exercise of discretion.⁶³ In the second line of authority, the reviewing courts reverse the trial courts' admission of the videotaped reenactment and find an abuse of discretion because there is no substantial similarity between the videotaped reenactment and the actual occur-

58. The subjective "discretion" standard of admissibility applies pursuant to the advisory committee's note to FRE 403. FED. R. EVID. 403 advisory committee's note.

59. *Compare, e.g.,* *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1278 (7th Cir. 1988) (court refused to reverse district court's decision to admit videotaped reenactment because not "unduly prejudicial") *with* *Randall v. Warnaco, Inc.*, *Hirsch-Weis Div.*, 677 F.2d 1226, 1234 (8th Cir. 1982) (if videotaped experimental evidence closely resembles reenactment, admitting could be "unduly prejudicial") *and* *Loevsky v. Carter*, 773 P.2d 1120, 1126 (Haw. 1989) (prejudicial and misleading effect of videotape's contents "far outweighed" probative value) *with* *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 3-4, 655 S.W.2d 364, 365 (1983) (variation between events in videotaped reenactment and actual occurrence must not be "likely" to confuse and mislead jury).

60. For a detailed analysis of trial judges' failure to consider the factors that the advisory committee's note to FRE 403 *requires* them to consider, see *infra* notes 63-103 and accompanying text.

61. For a description of the special evidentiary considerations that a videotaped reenactment may present, see *supra* notes 42-56. Regardless of whether the FRE were designed to apply to evidence more technologically advanced than oral and written testimony, the practical effect of applying the FRE to videotaped evidence patently offends the intended purpose of the rules: to discover truth through an efficient and constantly improving judicial process. FED. R. EVID. 102 advisory committee's note.

62. FED. R. EVID. 102.

63. See *infra* notes 66-79 and accompanying text for extensive coverage of case law following the abuse of discretion standard of review.

rence.⁶⁴ In the third line of cases, courts review the admissibility of the videotaped reenactment without acknowledging the standard of admissibility or the standard of review. Thus, the third line of case law has no precedential value whatsoever.⁶⁵ This variety of authority demonstrates that the FRE should adopt a "limited discretion" standard of admissibility based on certain objective factors. This standard would promote uniformity in law by: (1) restricting the trial court's exercise of discretion; (2) establishing a consistent approach for courts and litigants to follow; and (3) accomplishing more effectively the FRE's goals of truth, efficiency, and development of evidence law.

A. No Abuse of Discretion

The first line of case authority supports establishing a "limited discretion" standard of admissibility for videotaped reenactments. Because the discretion standard is inherently subjective, reversal on appeal is virtually impossible.⁶⁶ The appellate courts' hesitancy to reverse on appeal is empirically evidenced by the decidedly more numerous cases where the reviewing court affirmed the trial court's admissibility determination.⁶⁷ The appellate court often affirms the trial court based on an independent determination that the videotape's proponent introduced it as a scientific experiment rather than as a reenactment of the event in question.⁶⁸ The appel-

64. For a detailed discussion of the line of cases finding abuse of discretion due to lack of substantial similarity, see *infra* notes 80-90 and accompanying text.

65. For a thorough analysis of cases failing to follow a clear admissibility standard, see *infra* notes 91-103 and accompanying text.

66. Paradis, *supra* note 1, at 245-46. Paradis recognized 15 years ago that fewer than 6 of 120 then-existing appellate court cases involving the use of motion picture evidence were reversed on appeal and that when reversal occurred it was due to several factors rather than the admission of the motion picture alone. *Id.* "The handful of reversals only serve to underline how hard it is for the judge to abuse his discretion and the resulting corollary that . . . you get the films in at trial or you don't get them in at all." *Id.* at 246. While the number of appellate court cases since 1965 has increased, the affirm-reverse ratio on appeal persists in favor of affirming the trial court's exercise of discretion, which further underscores the power of the trial court's subjectively-based discretion. See *infra* note 68 and accompanying text (comparing cases where appellate courts affirmed or reversed trial court's exercise of discretion).

67. In the context of federal appellate court cases involving videotaped reenactments, research for this comment revealed eight cases in which the appellate court deferred to the trial court's discretion regarding the admissibility of a videotaped reenactment and only two where the appellate court found an abuse of discretion. See *infra* notes 72-103 and accompanying text for an examination of these cases.

68. See, e.g., *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261 (7th Cir. 1988); *Randall v. Warnaco Inc.*, Hirsch-Weis Div., 677 F.2d 1226 (8th Cir. 1982). The *Nachtsheim* court held that admitting a videotape that an airplane manufacturer introduced to show ice accumulation and removal by deicing equipment on airplane was proper and not unduly prejudicial. *Nachtsheim*, 847 F.2d

late court's independent finding facilitates more frequent admissibility of a videotaped reenactment because the test for admissibility of experimental evidence is less stringent than the test for admissibility of a videotaped reenactment.⁶⁹ More importantly, the appellate court's independent finding that the videotape is an experiment instead of a reenactment often is unsupported by the videotape it-

at 1278. The court reasoned that the videotape was presented to show normal operation of the plane in icy conditions and to determine whether the plane could fly safely in icy conditions, rather than to reenact the accident. *Id.* However, the court failed to acknowledge the lack of evidence in the videotape regarding ice accumulation and proper deicing equipment operations on the portion of the plane that allegedly malfunctioned due to icing and caused the crash.

In *Randall*, the Eighth Circuit Court of Appeals found that a videotape that the tent manufacturer offered was properly admitted as experimental evidence to support the manufacturer's theory that the plaintiff caught fire when fuel ran off the log onto the tent, which demonstrated the absorption properties of the log. *Randall*, 677 F.2d at 1234. The video depicted five women individually pouring varying amounts of fuel on a log similar to the one that ignited a tent fire in the actual accident. *Id.* The court specifically pointed out that the videotape was a reenactment because the tent manufacturer carefully reproduced the conditions. *Id.* The videotape was inadmissible as a reenactment because the women who portrayed the plaintiff poured fuel on themselves and on the floor of the tent, which did not happen in the actual accident. *Id.* Despite this finding, the appellate court affirmed the admissibility of the videotape because the plaintiff failed to challenge admissibility on a prejudice argument. *Id.*

69. If a litigant offers a videotape to reenact the accident at issue in the lawsuit, the standard of accuracy, and therefore of relevancy, is that the conditions portrayed in the video must be substantially similar to the conditions that existed at the time of the accident. *Heller*, *supra* note 1, at 25 (citing *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977)); *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1984) (citing *Hall v. General Motors Corp.*, 647 F.2d 175, 180 (D.C. Cir. 1980)). Nevertheless, the federal courts are inconsistent in regard to an articulation of the substantial similarity test. *See, e.g.*, *Sanchez v. Denver & Rio Grande Western R.R. Co.*, 538 F.2d 304, 306 n.1 (10th Cir. 1976) (where motion pictures purport to reenact human conduct, court should examine foundation "with great care as to detail"), *cert. denied*, 429 U.S. 1042 (1977).

When a litigant offers a videotape for experimental rather than reenactment purposes, the standard of accuracy is more relaxed. *Heller*, *supra* note 1, at 24. Experimental videotape must show merely similar conditions to the conditions that existed at the time of the accident. *Id.*; *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981) (admission of videotaped experiments requires showing that experiments conducted under conditions "at least similar" to those existing at time of accident). Like the federal courts' misapplication of the substantial similarity test to the videotaped reenactment, judicial application of the appropriate test for the accuracy of a videotaped experiment is inconsistent. *See, e.g.*, *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1278 (8th Cir. 1987) (level of accuracy required for videotaped experiment is substantial similarity, but similar accuracy required for admissibility of videotaped experiment because experiment was demonstration of "general principles of physics"); *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir. 1984) (failing to acknowledge requirement of similarity of conditions to admit videotaped experiment and asserting that dissimilarities only affect weight of evidence); *Hall v. General Motors Corp.*, 647 F.2d 175, 180 (D.C. Cir. 1980) (accuracy required for admissibility of videotaped experiment is "sufficiently comparable," "sufficiently similar," or "so nearly the same in substantial particulars") (citations omitted).

self or by the trial court's record.⁷⁰ Hence, this results in admitting highly prejudicial evidence.⁷¹

A case illustrating the approach of the courts in the first line of authority is *Szeliga v. General Motors Corp.*⁷² In *Szeliga*, an automobile purchaser sued the auto's manufacturer for injuries received in a car accident.⁷³ The defendant's expert witness used a videotape to illustrate his opinion that the car's impact with a cement culvert, rather than a product defect, caused the wheel to tear away from the steering column.⁷⁴ The trial court admitted the evidence over the plaintiff's objections,⁷⁵ and the jury found that the defendants were not negligent.⁷⁶

The First Circuit Court of Appeals affirmed the trial court's admission of the videotape in evidence and found that the trial judge did not abuse his discretion in determining that the probative value of the evidence outweighed any prejudicial effect the video-

70. *E.g.*, *Brandt v. French*, 638 F.2d 209 (10th Cir. 1981). In *Brandt*, the defendant's expert introduced in evidence a videotape of a motorcycle in motion at various speeds and angles. *Id.* at 211. The expert, whose specialty was accident reconstruction, expressly asserted that the video was to "give an accurate picture of the sequence of events immediately preceding" the motorcycle accident. *Id.* Nevertheless, the court of appeals held that the videotape was an experiment to "show mechanical principles relative to two vehicles" instead of a reenactment. *Id.* at 212. For other examples of the lack of support for appellate courts finding a videotape to represent an experiment rather than a reenactment, see *supra* note 68 and accompanying text.

71. For cases where admission of a videotaped "experiment," which in fact was a reenactment, resulted in extreme prejudice, see *supra* notes 68-69 and accompanying text.

72. 728 F.2d 566 (1st Cir. 1984).

73. *Id.* at 567. While driving, the plaintiff's Chevrolet Citation went off the road, struck a cement culvert, and came to a stop in some trees. The plaintiff contended that the accident occurred because the left front wheel fell off prior to the impact with the culvert. *Id.* The plaintiff alleged that the wheel fell off either because the defendant negligently assembled the wheel or because the defendant defectively designed or constructed the wheel. *Id.* The defendant contended that the accident resulted from the plaintiff's careless driving and that the wheel disengaged from the car when the car hit the cement culvert. *Id.*

74. *Id.* In two films, the defendant's expert used a wheel attached to an axle mounted onto a wagon, which moved along a track at high speed until the wheel struck a concrete block barrier. *Id.* In both films, the impact caused the wheel to "peel off" the axle over the lug and nuts that secured the wheel. *Id.*

75. The plaintiff argued that the videotape represented a reenactment of the accident rather than an experiment to show that a concrete culvert can tear a wheel off a car. *Id.* Furthermore, the plaintiff argued that the videotape, as a reenactment, prejudiced the jury against him because the conditions in the videotape were not substantially similar to the actual occurrence. *Id.* Dissimilarities included that the videotape depicted only a wheel attached to an axle that was mounted on a wagon rather than the car model in question and that the contraption propelled along a track at high speeds before striking a concrete block barrier, instead of a culvert. *Id.* The plaintiff also objected to the videotape on the basis of unfair surprise because the defendant did not list it as a potential exhibit in the pre-trial memorandum, which was an express requirement in the district court's pre-trial order. *Id.* at 568.

76. *Id.*

tape might have had.⁷⁷ The court of appeals determined that the defendant did not introduce the videotape to reenact the accident, but instead introduced it to depict an "experiment."⁷⁸ As an experiment, the court asserted that any dissimilarities between conditions of the actual event and those in the videotapes had no bearing on admissibility, but instead affected the weight of the evidence.⁷⁹

The *Szeliga* case represents a situation in which the trial court's unbridled discretion regarding admissibility of a videotaped reenactment was the decisive factor to the jury's liability determination. Reviewing courts currently have no concrete factors to determine whether the trial court abused its discretion. Therefore, they must cling to any shred of reason which the trial court *may* have considered in admitting the videotaped reenactment to find no abuse of discretion. As a result, an improper ruling on the admissibility of a videotaped reenactment at the trial level is irreversible on appeal, regardless of whether the ruling promotes growth in the law of evidence through technologically advanced evidence, increased efficiency of the judicial process, or more objective jury verdicts. Standards for the reviewing court to determine the basis for the trial judge's exercise of discretion would vitiate the need for the reviewing court to independently find the purpose of the videotape. Consequently, standards would bestow upon the "abuse of discretion" standard of review a more concrete and useful meaning.

77. *Szeliga*, 728 F.2d at 567-68. To reach this finding, the appellate court analyzed the facts under FRE 403 and acknowledged that the trial judge has broad discretion to determine admissibility of videotaped evidence. *Id.* at 567. Furthermore, the court asserted that each case must be resolved on its own facts, "taking into account the specific purposes for which this type of evidence is submitted." *Id.* (citing *Robbins v. Whelan*, 653 F.2d 47, 49-50 (1st Cir. 1981), *cert. denied*, 454 U.S. 1123 (1981)). Because the judge viewed the videotape before presenting it to the jury and the jury received instructions limiting the purpose for which they could consider the evidence, the appellate court determined that the trial court's admission of the videotape was not an abuse of discretion. *Id.* at 567-68.

78. *Id.* at 567. The court conceded that the videotape demonstrated the theory of the defendant's expert regarding the cause of the accident, which is precisely the purpose of a videotaped reenactment. *Id.*; see also *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1052 (4th Cir. 1984) (any videotaped reenactment can be labelled "a demonstration to illustrate a principle" when videotape physically represents how automobile reacts to certain circumstances).

79. *Szeliga*, 728 F.2d at 567. While the *Szeliga* court's assertion is correct insofar as dissimilarities affect the weight of evidence once admitted, initial admissibility of a videotaped experiment requires that the conditions must be similar to those existing at the time of the actual event. *Gladhill*, 743 F.2d at 1051. The federal courts have not attempted to reconcile the conflict between applying the similarity element to admissibility and to the weight of videotaped evidence. See *supra* note 52 and accompanying text.

B. Abuse of Discretion

Cases where the appellate court reverses the trial court's admissibility ruling by finding that the trial judge abused her discretion exemplify the second line of authority. In these cases, the reviewing court determines that the videotaped reenactment lacks the requisite "substantial similarity" to the actual event.⁸⁰ These cases represent the inefficient results that the discretion standard of admissibility generate; determining liability may take three times longer due to the need for an appeal and the possibility of reversal and remand for a new trial.

The Hawaii State Supreme Court case of *Loevsky v. Carter*⁸¹ illustrates the inefficiencies that the current "discretion" standard of admissibility for the videotaped reenactment presents. In *Loevsky*, a pedestrian sued a motorcyclist and the County of Hawaii as third party defendant for negligently causing a motorcycle-pedestrian collision that permanently injured the plaintiff pedestrian.⁸² The third party defendant's expert witness testified at trial with various videotaped test runs of the actual motorcycle involved in the accident.⁸³ The trial court admitted the videotape in evidence over the plaintiff's objections.⁸⁴

On appeal, the Supreme Court of Hawaii reversed the trial court's admission of the videotaped test runs, holding that the trial court abused its discretion.⁸⁵ The supreme court reasoned that the videotape was admitted to reenact the accident rather than as ex-

80. See *supra* note 51 and accompanying text (describing "substantial similarity" test for admissibility of content of a videotaped reenactment).

81. 773 P.2d 1120 (Haw. 1989). The State of Hawaii adopted its Rules of Evidence based on the Federal Rules of Evidence. HAW. REV. STAT. § 626-1, R. 403 (1988).

82. *Loevsky*, 773 P.2d at 1122. The County of Hawaii defended against charges of negligent design, repair and maintenance of the public roadway on which the collision occurred. *Id.* at 1123.

83. *Id.* at 1125. The videotapes consisted of four separate test runs taped at the exact location where the accident occurred. *Id.* The first test run depicted a solo driver traveling 32-34 m.p.h. around the curve where the collision occurred, near the shoulder of the traffic lane, on gravel that the videotape crew placed. The second run portrayed the solo driver travelling the same route under the same conditions, at 30-31 m.p.h. The third test run depicted the solo driver travelling the same route under the same conditions, at 29-30 m.p.h. The fourth run depicted the motorcycle's path from the angle of a passenger behind the driver, on a stretch of road without any gravel, at 30 m.p.h. *Id.*

84. *Id.* at 1124. The plaintiff objected based on prejudice, contending that the videotaped "tests" were actually reenactments of the accident and consequently failed to meet the substantial similarity requirement. *Id.* at 1125. The plaintiff argued that the circumstances under which the videotaped scenes were created were "so dissimilar" to the actual accident that the tapes were irrelevant, or if relevant substantially prejudicial, and should not be admitted. *Id.*

85. *Loevsky*, 773 P.2d at 1126.

perimental evidence.⁸⁶ Moreover, the court held that when a test is an attempt to reenact the original accident, the "essential elements"⁸⁷ of the experiment must be substantially similar to those existing at the time of the actual accident.⁸⁸ Applying this test, the supreme court found that the motorcycle tests depicted in the videotape neither duplicated the exact conditions nor substantially resembled the actual accident and, consequently, generated far greater prejudicial impact upon the jury's determination than any probative value that they supplied.⁸⁹

The *Loevsky* case illustrates the inefficient results that the discretion standard of admissibility under FRE 403 produces when applied to a videotaped reenactment. Because the trial court failed to carefully examine the conditions depicted in the videotape and determine the purpose of the videotape before ruling on its admissibility, the parties to the suit underwent an entire trial, an appeal, and

86. *Id.* The trial court did not articulate whether it admitted the videotapes as reenactments or as an experiments. The *Loevsky* court asserted that the videotape's "visual contents constitute a veiled attempt to successfully re-create the motorcycle ride under controlled conditions favorable to [the] County," and that its prejudicial impact on the jury "far outweighed" its probative value. *Id.* But see *Brandt v. French*, 638 F.2d 209 (10th Cir. 1981) (affirming trial court's decision to admit videotape depicting several test runs of motorcycle passing in front of car at various speeds and finding no abuse of discretion after *de novo* determination that defendant introduced videotape for purely illustrative purposes rather than to reenact automobile collision).

87. The court did not define the phrase "essential elements," but one may infer that this phrase refers to any condition relevant to the probativeness of the videotape on the issue for which the proponent introduces it. See *Paradis*, *supra* note 1, at 261 (discussing admissibility of videotaped evidence and importance of substantial similarity of all conditions relevant to determining issue for which videotape introduced).

88. *Loevsky*, 773 P.2d at 1125 (citing *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 3, 655 S.W.2d 364, 365 (1983)). The court pointed out that when a videotaped experiment is offered to demonstrate the principles used to form an opinion on principles of physics, the videotape need not adhere strictly to the facts to be admissible. *Id.* at 1126. So long as the videotape is not misleading and the court gives limiting instructions so the jury clearly understands that its purpose is only illustrative, the evidence is admissible. *Id.* (citing 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1317 (2d ed. Supp. 1987)).

In *Loevsky*, the discrepancies between the actual event and the depicted event included: the amount of gravel on the portion of the road where the collision occurred; the volume of traffic at the time of the actual event compared with that at the time of the taping; and that the test driver travelled solo during three of the four videotaped test runs, which affected the angle of the motorcycle on the turn where the actual accident took place (the plaintiff had a passenger on the motorcycle at the time of the accident). *Id.* at 1125 n.9.

89. *Id.* at 1126. The court asserted that "[t]he conclusion is inescapable that, after viewing the [tape], the mind-set of the jury was that . . . since the motorcycle did not slide down during the crucial test runs, one could safely travel around the curve and through the rock and gravel area." *Id.* (citing *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 4, 655 S.W.2d 364, 366 (1983)). Consequently, the videotapes suggested that the defendant's failure to negotiate the curve was not caused by the road conditions, which exculpated the County as third party defendant. *Id.*

a second trial to reach a determination on the liability issue. Furthermore, the lawsuit consumed valuable time from the court system and its judges. These consequences of the trial court's ill-advised exercise of discretion regarding admissibility of the videotaped reenactment circumvented the goal of expeditious resolution of conflict under the FRE. This line of authority clearly demonstrates the need for a "limited discretion" standard of admissibility. If trial judges were required to exercise discretion based on specific considerations and to base their reasoning on those considerations, the trial judge's determination on admissibility would be more sound and objective, and would reduce the need for appellate review. Reduced appellate review, in turn, would render the judicial process more efficient, which would serve the goal of the FRE.⁹⁰

90. Another case illustrating the inefficient and inequitable results that the discretion standard of admissibility produces when applied to the videotaped reenactment is *Sanchez v. Denver & Rio Grande Western R.R. Co.*, 538 F.2d 304 (10th Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). In *Sanchez*, the defendant railroad prepared a videotaped reenactment of the accident in which the plaintiff was injured when a 1000-pound door, which he and two other employees were removing, fell on the plaintiff. *Id.* at 305. The trial court admitted the reenactment exclusively for the defendant's use and prohibited the plaintiff from using the videotape. *Id.* at 306. The trial court made this ruling because it found that the videotape constituted the defendant attorney's work product. *Id.* Furthermore, the defendant did not offer the videotaped reenactment in evidence, which precluded the plaintiff from even indirectly using the videotape as demonstrative evidence on cross-examination. *Id.* Although the plaintiff recovered nearly \$100,000, the trial judge reduced his recovery by 25% because the jury found him 25% comparatively negligent. *Id.* at 305.

On appeal, the plaintiff asserted that the trial court's failure to allow him to use the defendant's videotaped reenactment was error resulting in the plaintiff's reduced recovery. *Id.* at 306. The Tenth Circuit Court of Appeals reversed the trial court's refusal to admit the evidence, finding that the "film bears every indicia of being prepared as a demonstrative evidentiary aid, was listed as a possible exhibit by the railroad, and, assuming a proper foundation, could probably have been effectively used by one party or the other." *Id.* Nevertheless, the court determined that the trial court's erroneous determination on admissibility only affected the jury's finding on comparative fault and that reinstating the jury's total verdict on the plaintiff's damages would suffice to correct the error. *Id.*

The *Sanchez* case illustrates the dangers that inconsistent standard considerations for the trial judge to follow can present to the litigant wishing to use a videotaped reenactment. The *Sanchez* trial court set forth a wholly subjective reason for not admitting the videotape for the plaintiff's purposes, which the appellate court scrutinized and reversed. Because the appellate court's reversal resulted in reinstatement of the jury's total verdict rather than a new trial, the trial court's initial exercise of discretion and the appellate court's secondary exercise of discretion deprived the plaintiff of a potentially larger verdict by introducing the defendant's videotaped reenactment in evidence. This result illustrates that the discretion standard of admissibility under FRE 403 fails to help the jury discern the truth in cases involving videotaped reenactments.

C. Failure to Acknowledge the Standard of Admissibility

Finally, a third line of authority demonstrates the need for a standard of admissibility under FRE 403 that limits the trial court's exercise of discretion to encourage growth in the laws of evidence. The third line of authority consists of cases that review the trial court's admissibility determination without acknowledging the proper standards of admissibility or review. In these cases, the reviewing court reviews the facts *de novo* to determine whether the trial court's admission of the videotaped reenactment was "appropriate" rather than whether it constituted an abuse of discretion.⁹¹ Thus, the reviewing courts create a line of cases with no precedential value. They only further confuse the law regarding admissibility of the videotaped reenactment in evidence, which obstructs progress in the laws of evidence.

In *Gladhill v. General Motors Corp.*,⁹² the appellate court followed this third line of authority. In *Gladhill*, an automobile accident victim sued the auto manufacturer under a products liability theory.⁹³ The plaintiff received injuries as a result of a one-car accident in which the plaintiff's car, which the defendant manufactured, collided with a utility pole after the brakes failed.⁹⁴ At trial, the defendant introduced a videotaped braking test depicting a professional test driver in a moving car of the same model as the plaintiff's car, and deliberately attempting to lock the car's rear brakes while still in motion.⁹⁵ The plaintiff objected to the videotape on the ground that the substance of the videotape amounted to a reenactment of the accident and, as such, the videotape was not substantially similar to the actual event.⁹⁶ Nevertheless, the trial court

91. For an account of federal court cases in which the appellate court ruled on the trial court's admissibility decision without acknowledging the initial discretion standard and the abuse of discretion standard of review, see *infra* notes 92-103 and accompanying text.

92. 743 F.2d 1049 (4th Cir. 1984).

93. *Id.* at 1050.

94. *Id.* The plaintiffs began to experience problems with the car's braking system immediately after delivery of the car from the dealership. *Id.* The car's brakes would lock occasionally, even with only slight pressure on the brake pedal, causing the car to skid. *Id.* Although the plaintiffs returned the car to the dealership for service on the brakes at least twice prior to the accident, the dealer's representatives failed to discover the mechanical flaws in the brakes during the service check-ups. *Id.*

95. *Id.* at 1051.

96. *Id.* The plaintiff consumer contended that the videotape failed to conform to the substantial similarity test applicable to the videotaped reenactment as evidentiary proof of liability. *Id.* Differences between the actual accident and the scene depicted in the videotape included: that the actual accident occurred at night on a hill at a sharp curve; that the videotaped "tests" occurred during the day, on a flat, straight asphalt surface; and that an experienced test driver performed the tests. *Id.* The defendant manufacturer contended that the videotaped test drive was merely a "demonstration of certain operating

admitted the videotape in evidence.⁹⁷

On appeal, the Fourth Circuit Court of Appeals reversed the trial court's decision to admit the videotaped test drive and held that the substance of the test drive went "well beyond a mere demonstration of a physical principle."⁹⁸ Hence, the videotape was outside the scope of the relevancy test for videotaped experiments⁹⁹ and was within the scope of the substantial similarity test for relevancy of a videotaped reenactment.¹⁰⁰ The appellate court determined that the videotaped test drive failed to meet the substantial similarity test, and consequently the trial court erred in admitting it.¹⁰¹

Nowhere in the *Gladhill* opinion did the Court of Appeals refer to the standard of admissibility by which the trial court ruled to admit the videotaped test drive in evidence. Nor did the appellate court articulate the standard of review by which it determined that the trial court's admissibility ruling constituted reversible error. Consequently, *Gladhill* represents a third approach that the courts follow to analyze admissibility of the videotaped reenactment and a third reason why the FRE should accommodate a limited discretion standard of admissibility for to the videotaped reenactment. The *Gladhill* case exhibits the federal courts' inability to apply objectively the discretion standard of admissibility prescribed by FRE 403. The case is but one of several in which the appellate court failed to acknowledge a set standard for admissibility and a set standard for review of admissibility of a videotaped reenactment.¹⁰²

characteristics of the vehicle in question" offered to illustrate that when the rear wheel locks on the car model that the plaintiff owned, the car continues to travel in a straight line. *Id.* Consequently, the conditions under which the defendant prepared the videotape need not conform strictly to the facts of the actual event. *Id.* (citing *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981)).

97. *Gladhill*, 743 F.2d at 1051.

98. *Id.*

99. *Id.* The relevancy test for a videotaped experiment is "sufficient similarity." *Heller*, *supra* note 1, at 24. For a comprehensive explanation of the sufficient similarity test, see *supra* note 69 and accompanying text.

100. *Gladhill*, 743 F.2d at 1051. The court reasoned that the jury was unable to visualize the plaintiff's version of the events after viewing the defendant's version on videotape, which rendered the videotape unduly prejudicial. *Id.* at 1051-52. Furthermore, the court found that the videotape failed to measure up to the substantial similarity test, which rendered the videotape "largely irrelevant if not misleading." *Id.* at 1051.

101. *Id.* at 1052. The appellate court reversed the trial court's judgment and remanded for a new trial based on an entirely different ground. *Id.* However, the court of appeals made admissibility determinations regarding the videotaped evidence and other evidence, which would apply to the decision in the new trial. *Id.*

102. Two other cases illustrate the third line of authority. In *Chase v. General Motors Corp.*, 856 F.2d 17 (4th Cir. 1988), the appellate court reversed the trial court's admission of a videotape depicting brake tests on the automobile model that the plaintiff drove when the accident and injury occurred. *Id.* at 19-

These cases create a distinct line of authority devoid of precedential value. Lacking precedential value, these cases only hinder the expressed goal of developing the law of evidence under the FRE.¹⁰³

IV. THE "LIMITED DISCRETION" STANDARD OF ADMISSIBILITY

To further the objectives of the FRE, trial courts should impose four requirements to determine whether to admit a videotaped reenactment. These criteria include: (1) the presence of both parties' attorneys during the videotape process; (2) a pre-trial admissibility hearing pursuant to FRE 104; (3) cross-examination of the proponent of the videotaped reenactment; and (4) assignment of jury in-

20. The *Chase* court determined that the plaintiff introduced the videotape to prove how the automobile behaves under certain conditions, rather than to reenact the accident. *Id.* at 19. The court found that the dissimilarities between the videotaped tests and the actual accident caused prejudice against the defendant that outweighed, by a mere preponderance, the probative value of the videotape. *Id.* at 20.

The *Chase* court failed to follow the substantive language of FRE 403. FRE 403 requires relevant but prejudicial evidence to *substantially* outweigh its probative value in order to warrant exclusion. FED. R. EVID. 403. Consequently, the *Chase* decision is worthless as authority for a litigant to learn the judicial approach to admitting a videotaped reenactment and contributes to the undermining of growth in the laws of evidence.

Second, in *Conti v. Ford Motor Co.*, 578 F. Supp. 1429 (E.D. PA 1983), *cert. denied*, 470 U.S. 1028 (1985), the plaintiffs introduced in evidence a videotaped reenactment of an accident in which the plaintiff husband started their automobile as the plaintiff wife simultaneously opened the passenger seat door. *Id.* at 1431-32. When the husband started the engine, he failed to depress the clutch, which caused the car to lurch backward, and his wife sustained serious injuries. *Id.* at 1432. The defendant auto manufacturer objected to the videotape based on undue prejudice, arguing that the physical impact of the car on the wife as portrayed in the videotape caused the jury to render an excessive verdict in favor of the plaintiffs. *Id.* The trial court admitted the videotape without explanation. *Id.*

On a motion for a new trial, the District Court for the Eastern District of Pennsylvania found no error in permitting the jury to consider the videotaped reenactment of the accident, and determined that the tape was "merely helpful demonstrative evidence." *Id.* Further, the *Conti* court asserted that any discrepancies between the actual accident and the reenactment were "clearly and repeatedly explained" to the jury. *Id.* On this basis, and without further explanation of the basis for the admissibility decision, the *Conti* court denied the motion for a new trial and ordered the jury's verdict and judgment to be entered for the plaintiffs. *Id.* at 1435.

The *Conti* case clearly illustrates the ambiguity that courts create in reviewing a trial judge's subjective determination on admissibility of a videotaped reenactment under FRE 403's discretion standard. Because the trial judge in *Conti* failed to announce the standard he used to admit the plaintiffs' videotape, let alone which rules of evidence he used to determine admissibility, appellate review would have necessitated a guessing game. As the *Conti* case demonstrates, continuation of the discretion standard of admissibility under FRE 403, as applied to videotaped reenactments, will frustrate controlled evolution of the use of such technologically advanced demonstrative evidence and will circumvent more consistent achievement of the primary purpose of the FRE: discovery of the truth.

103. FED. R. EVID. 102.

structions that clearly limit the purposes for which the jury may consider the videotaped reenactment. These four criteria minimize the prejudicial and misleading effects that a videotaped reenactment may have on the jury and create an objective standard of admissibility for the trial court and litigants to follow and for the appellate court to examine in reviewing the trial court's admissibility ruling. In turn, these effects will increase dramatically the admission of videotaped reenactments within the scope of FRE 403 and will promote discovery of the truth, efficient resolution, and growth in the law of evidence.¹⁰⁴

A. Presence of Counsel During the Videotape Process

First, prior to determining admissibility of a videotaped reenactment, courts should determine whether the proponent's counsel and the opposing party's counsel were present during the videotape process.¹⁰⁵ Requiring presence of both parties' legal representatives during the taping process would assure that the videotaped reenactment represents both parties' perspectives on the event. Moreover, both parties would have the opportunity to effectuate "substantial similarity" between the actual event and the event as portrayed in the videotape.¹⁰⁶ The ability of the parties to control the substance of the videotape would reduce the risk that the videotaped reenactment substantially prejudices one party by misleading the jury.¹⁰⁷ Concomitantly, reduced risk of prejudice would in-

104. Implementing the "limited discretion" standard of admissibility for the videotaped reenactment and other forms of videotaped evidence would not necessarily require creating a new rule of evidence. Instead, implementation could be accomplished through a division of FRE 403 into two separate and distinct subsections. For example, in a revised version of FRE 403, the current version of FRE 403 would be in subdivision (a), and the "limited discretion" version of the rule would occupy subsection (b). This approach is similar to the method that the Advisory Committee used in FRE 405 regarding methods of proving character. In FRE 405, subdivision (a) governs admissibility of evidence to prove character through testimony of opinion and reputation, while subdivision (b) governs admissibility of evidence to prove character through testimony of specific instances of conduct. FED. R. EVID. 405. Dividing FRE 403 into two subsections would be less cumbersome than adopting a new prejudice rule applicable to videotaped evidence only. Revising FRE 403 also would avoid the need to renumber the existing relevancy rules under Article IV of the FRE and would keep the two prejudice rules in sequence with each other.

105. Comment, *supra* note 3, at 153 (proponent and opponent of "day-in-the-life" videotape should have legal counsel present during videotaping). *But see* Cisarik v. Palos Community Hospital, 193 Ill. App. 3d 41, 549 N.E.2d 840 (1989) (opposing counsel has no right to be present for taping of "day-in-the-life" videotape because until offered and admitted in evidence, videotape does not constitute evidence), *appeal allowed*, 131 Ill. 2d 558, 553 N.E.2d 394 (1990).

106. *But see* Paradis, *supra* note 1, at 254 (most jurisdictions do not require notification of opposing counsel regarding plans to prepare videotaped demonstrative evidence, citing impracticality as reason for rejection).

107. Discussion led by the Honorable Harlington Wood, Circuit Judge for the Seventh Circuit of the United States Court of Appeals at the John Marshall

crease the probative value of the videotaped reenactment.¹⁰⁸

Additionally, presence of both parties' attorneys would enable the parties to object to characterizations, conditions, and other factors that attend the substantial similarity requirement, at the time of the taping, as well as enabling them to object at trial. This benefit of the presence of both parties' attorneys would increase the speed with which the trial progresses and would further the FRE's goal of efficient resolution of conflict.¹⁰⁹

B. Pre-Trial Voir Dire and Admissibility Ruling

Second, a mandatory pre-trial hearing¹¹⁰ to view the videotape and determine admissibility would reduce significantly any preju-

Law School, Chicago, Illinois (Oct 31, 1989) (regarding the use of demonstrative evidence to determine tort liability).

108. See Comment, *supra* note 3, at 153 (presence of both parties' attorneys during taping process would better ensure accuracy of portrayals and reduce possibility of injecting prejudice into tape that could affect weight jury ascribes to such evidence). Presence of both parties would also serve the primary purpose of the FRE — discovery of the truth. FED. R. EVID. 102.

109. Applying the "presence of counsel" element of the limited discretion standard illustrates the utility of having counsel present during the videotaping process for the trial judge to determine admissibility of the videotaped reenactment. For example, in *Szeliga v. General Motors Corp.*, 728 F.2d 566 (1st Cir. 1984), described *supra* notes 72-79, presence of both parties' attorneys during the taping of the tests could have prevented the substantial dissimilarity between the videotaped circumstances and those existing at the time of the actual accident. The accident involved a car manufactured by the defendant that the plaintiff drove when it went off the road and hit a cement culvert. The plaintiff claimed the accident occurred because the left front wheel fell off the car due to negligent assembly or defective design and construction. *Id.* at 567. The defendant offered the videotape, which illustrated a makeshift contraption of a wheel attached to an axle and a wagon that was driven along a track at high speeds until it ran into a concrete block barrier. *Id.* The impact caused the wheel to strip off the axle. *Id.* Consequently, the defendant urged that the videotape represented experimental evidence to illustrate that the impact, rather than a defect or negligent assembly, caused the accident at issue. *Id.*

Admittedly, the trial court viewed the videotape prior to ruling on admissibility and gave the jury limiting instructions. *Id.* at 567-68. Nonetheless, if the defendant had been required to have its counsel and the plaintiff's counsel present during the videotaping process under the limited discretion standard, the resemblance between the videotaped tests and the actual event could have markedly improved. Presence of the attorneys would have permitted the attorneys initially to negotiate regarding the purpose for offering the videotape. Second, presence of both attorneys would have ensured that the videotape represented both parties' causation theories, which would augment the similarity between the videotape and the actual circumstances in accordance with the appropriate standard of accuracy. Finally, the presence of both parties' attorneys would have saved a substantial amount of time at trial spent determining the nature of the videotape (experiment or reenactment), compliance with the appropriate accuracy test (similarity or substantial similarity), and ruling on prejudice and relevancy objections, to determine admissibility.

110. Rule 104 of the FRE governs the rules of a pre-trial admissibility hearing: "(a) Preliminary questions concerning the . . . admissibility of evidence shall be determined by the court . . ." FED. R. EVID. 104(a).

dice problems by determining, before the jury views the videotape, which segments of the video should be removed as irrelevant or unduly prejudicial.¹¹¹ A corollary result of pre-trial *voir dire* of the videotaped reenactment and ruling on its admissibility is increased similarity between the actual event and the event as portrayed in the videotape.¹¹² Increased probativeness and reduced prejudice promote the discovery of truth and increased efficiency through fewer prejudice objections during the trial¹¹³ and through reduced need for appellate review of admissibility determinations.¹¹⁴

111. A motion *in limine* to test admissibility of a videotaped reenactment provides a practical method to resolve foundational problems with the evidence before the jury views the videotape, which would increase the probative value of the videotape. Joseph, *supra* note 3, at 10.

112. *Id.*

113. *Id.* at 8 (use of pretrial review of videotape by opposing counsel to determine whether videotape is technically or substantively objectionable would reduce trial time spent ruling on objections). Moreover, pre-trial *voir dire* by opposing counsel may eliminate the possibility of an objection to the videotape at trial based on surprise. Heffernan, *supra* note 8, at 431.

114. Applying the pre-trial *voir dire* element of the limited discretion standard to a case illustrates the advantages that pre-trial *voir dire*, as a limitation on the trial judge's discretion, can provide for the trial judge. In *Loevsky v. Carter*, 773 P.2d 1120 (Haw. 1989), discussed *supra* notes 82-90 and accompanying text, the plaintiff pedestrian received injuries as a result of a collision with the defendant's motorcycle. The County of Hawaii, as third party defendant, offered in evidence a videotape depicting several test runs of a motorcycle at the scene of the accident. The County denied that the videotape was a reenactment and alleged that the videotape was offered to illustrate that a person could negotiate the gravel-strewn curve and to rebut the defendant witness' testimony that gravel will cause a motorcycle to lose its footing and fall. *Id.* at 1125. The plaintiff contended that the videotape was a veiled attempt to recreate the accident to persuade the jury that the cause of the accident was not the road conditions, but instead must have been the primary defendant's alleged intoxication. *Id.* As a reenactment, the plaintiff urged that the videotape should not have been admitted in evidence because the conditions in the videotape were not substantially similar to those existing at the time of the accident. *Id.*

Had the trial court been required to view the videotape in a pre-trial hearing before ruling on admissibility, the trial judge would have discovered the patent dissimilarity between the videotape and the actual accident before presentation to the jury. Consequently, pre-trial *voir dire* of the videotape would have enabled the trial judge to order the proponent to edit out the dissimilar content, so that the relevant portions of the videotape could be admitted properly without causing substantial prejudice against the plaintiff. Moreover, pre-trial *voir dire* would have reduced the necessity of appellate review because the arguments raised on appeal could have been resolved before the trial began. Significantly, the supreme court in *Loevsky* directed the Hawaii trial courts to "undertake their best efforts" to view videotaped evidence prior to ruling on its admissibility. *Id.*; see also *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981) (trial judge should review videotape outside jury's presence prior to ruling on admissibility).

In practice, a mandatory pre-trial hearing for every lawsuit in which a litigant introduces a videotaped reenactment may slow down the judicial process, thereby circumventing the FRE goal of judicial efficiency. On the other hand, FRE 102 states the efficiency goal in terms of eliminating *unjustifiable* delay only; the use of a pre-trial *voir dire* and admissibility hearing to ascertain truth certainly justifies the additional time spent. FED. R. EVID. 102. Furthermore, a

C. Cross-Examination

Third, the trial judge should allow cross-examination of the party who presents the videotape.¹¹⁵ This would better ensure the accuracy of the evidence and prevent the jury from grounding its decision on inaccurate representations depicted in the reenactment.¹¹⁶ Furthermore, because the cross-examining attorney would reveal to the jury discrepancies between the actual event and the event as represented in the videotape, cross-examination also would help impute to the jury the demonstrative, rather than real, nature of the evidence.¹¹⁷ This consequence of mandatory cross-examination would reduce any lingering prejudice, which would increase the jury's ability to appropriately weigh the videotaped reenactment when deciding the liability issue.¹¹⁸ Finally, mandatory

pre-trial *voir dire* and admissibility hearing would effectuate the discovery of truth, which is the primary goal of the FRE; judicial efficiency is merely a subordinate goal. *Id.*

115. Heller, *supra* note 1, at 12.

116. *Id.* Additionally, cross-examining the proponent of the videotape would obviate the opportunity for a hearsay objection under FRE 802. FED. R. EVID. 802.

117. Heller, *supra* note 1, at 12. In the criminal context, cross-examination would protect the criminal defendant's constitutional right to confront her accuser. For a more detailed discussion of the effectiveness of cross-examining the proponent of a videotape reenacting a crime to protect the defendant's sixth amendment right to confront his or her accuser, see Comment, *The New Illinois Videotape Statute in Child Sexual Abuse Cases: Reconciling the Defendant's Constitutional Rights with the State's Interest in Prosecuting Offenders*, 22 J. MARSHALL L. REV. 331, 339-44 (1989).

118. Applying the cross-examination element of the proposed "limited discretion" standard to a case illustrates the potential consequences this factor can have on the admissibility and consequently, the furtherance of truth, efficiency and growth in the laws of evidence. In *Champeau v. Fruehauf Corp.*, 814 F.2d 1271 (8th Cir. 1987), the defendant manufacturer introduced a videotape depicting a tractor-trailer, similar to the one the plaintiff drove when the accident occurred, traveling at 35 miles per hour on a road. *Id.* at 1273. The videotape showed the driver take his foot off the accelerator one quarter mile from the curve where the accident occurred. *Id.* The defendant urged that the videotape was to rebut the plaintiff's testimony regarding his speed and distance from the curve when the accident occurred in order to prove that the applicable laws of physics precluded the accident from occurring as the plaintiff testified. *Id.* at 1278. The plaintiff argued that the videotape depicted a reenactment of the accident that failed to adhere to the substantial similarity test. *Id.* The trial court admitted the videotape as experimental evidence rather than as a reenactment, and the jury found for the defendant. *Id.* On appeal, the reviewing court affirmed. *Id.* The appellate court substantially relied on the fact that the trial judge read to the jury a list of differences between the actual event and the event in the videotape to find that the videotape met the sufficient similarity test for videotaped experiments. *Id.*

Although the trial judge alerted the jury in *Champeau* to the differences between the videotape and the actual accident, a reading of differences after presenting the evidence undoubtedly is less effective to impart the significance of these differences to the jury than cross-examination would be. Cross-examination allows the opponent of a videotape to dissect the suggestive nuances in the videotape and to convey to the jury that dissimilarities between the actual

cross-examination also would effectuate the efficiency objective of the FRE by reducing jury deliberation time.¹¹⁹

D. Limiting Jury Instructions

Finally, consistent application of jury instructions that delineate the limited admissibility of a videotaped reenactment would prevent the jury from considering the videotape for purposes other than the articulated purpose.¹²⁰ Consequently, limiting instructions would promote discovery of the truth by diminishing the risk of prejudice by or confusion among the jurors.¹²¹ Moreover, because limiting instructions facilitate limited admissibility of a videotaped reenactment, this element would promote truth and efficiency in the judicial process by providing the jury with a probative item of evidence.¹²²

event and the videotape are numerous and significant and that the jury should not place substantial weight on the videotape. Based on the jury's verdict in favor of the defendant on the liability issue in *Champeau*, the jury obviously assigned a significant amount of weight on the defendant's videotape. Had the plaintiff cross-examined the defendant regarding the dissimilarities between the actual event and the videotape, as well as the purpose for the videotape, the jury may have placed less weight on the videotape regarding the liability issue. Cross-examination would have helped the jury base its decision on more probative evidence and make a decision more reflective of the truth behind the controversy. Cross-examination also may have obviated the need for appellate review on the issue of admissibility of the videotape, which would have improved the efficiency of the judicial process.

119. Disclosing differences between the actual event and the reenacted event during cross-examination also may save jury deliberation time otherwise necessary for comparing the oral testimony regarding the actual event and the videotaped reenactment of the event so that the jury can discern the differences on its own.

120. The advisory committee's note to FRE 403 expressly suggests consideration of limiting instructions as a method to reduce prejudice and, consequently, to render inadmissible evidence admissible for a limited purpose. FED. R. EVID. 403 advisory committee's note.

121. See *Loevsky v. Carter*, 773 P.2d 1120, 1126 (Haw. 1989) (jury must be carefully instructed on extent to which they can use and consider videotapes so that they do not confuse issues for which videotape is relevant, thereby avoiding substantial prejudice against opponent of videotape).

122. Limited admissibility would provide the jury with probative evidence relating to an issue in the lawsuit, which may reduce the jury's deliberation time and render the judicial process more efficient. Additionally, limited admissibility may provide the jury with a piece of evidence more probative on an issue than any other evidence available, which increases the jury's ability to discover the truth underlying the facts of the lawsuit.

Applying the limiting jury instructions element of the proposed "limited discretion" standard demonstrates the benefits that accrue to the trial judge in determining the admissibility of a videotaped reenactment. For example, in *Loevsky v. Carter*, 773 P.2d 1120 (Haw. 1989), discussed *supra* notes 82-90 and accompanying text, the Hawaii Supreme Court directed Hawaii state trial courts regularly to employ limiting instructions in order to admit probative videotaped reenactments without risk of substantial prejudice. *Id.* at 1126 (citing 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1317 (2d ed. Supp. 1987)). The court specifically stated that limiting instructions are important to prevent the jury from

CONCLUSION

As technology progresses through the 1990's and into the Twenty-First Century, more pervasive use of the videotaped reenactment is inevitable. While the current inconsistent methods of admissibility for videotaped evidence circumvent the policies that underlie the FRE, the "limited discretion" approach would insure that admitting a videotaped reenactment in evidence reflects that the videotape has more probative value than prejudicial effect. Hence, admitting the videotaped reenactment would promote the FRE's goals of truth, efficiency, and growth of the laws of evidence. Because the use of all types of videotaped demonstrative evidence will continue, the legal profession and the judicial system cannot afford to avoid integrating technology with the judicial process any longer. Clinging to the traditional, yet ineffective, subjective standard of discretion for admissibility under FRE 403 must be abandoned.

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confusing the issues or misunderstanding the demonstrative, rather than real, nature of the evidence, which could cause substantial prejudice to the opponent of the evidence. *Id.* In *Loevsky*, if the trial court had used limiting instructions, the defendant County could have salvaged the videotaped reenactment for the limited purpose of demonstrating physical principles associated with the angle of "lean" of a motorcycle on a curve, in order to prove that the cause of the accident must have been something *other than* the poorly-maintained conditions on the road. *Id.* at 1125. Consequently, limiting instructions could have provided the jury with a probative piece of evidence on the causation issue without allowing the jury to consider the videotape as a reenactment. Additionally, had the trial judge implemented limiting instructions for the jury's benefit, appellate review may not have been necessary to challenge the trial judge's admissibility ruling, which would further the efficiency of the judicial process.