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ENTER — THE VIDEO TAPE TRIAL

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One day very soon now, a courtroom somewhere in this illustrious land will introduce a sweeping change in the present system of trial by jury. It is doubtful that this ineluctable transformation will be strikingly recognized as such at the time. The event will probably provoke no more than an impassive article or two from the local newspapers, and some of the publications serving the law profession will volunteer a commentary if this novel endeavor is brought to their attention. It will be an occurrence of which comparatively few people will have cause to contemplate. A jury will have decided the issues of a law suit by merely viewing and hearing the entire proceedings of a trial on a television screen, or what is more accurately described as a monitor. The lawyers who conducted the trial probably will have been in the presence of the jury only during the jury selection. Many lawyers engaged in the distinctive business of persuading juries probably will give no more than a passing thought to this isolated experiment. After all, they will reason, a cold, impersonal TV will never take the place of the real thing. People want live action — sweating, snorting witnesses, trumpet-tongued, articulate, forceful lawyers, and a trial judge making on-the-spot rulings much like a referee at a prize fight. The excitement and glamour of jury trials have provided copious material over the years for the news media as well as for all forms of entertainment. Many nescient trial lawyers will be reasonably confident that this seemingly sterile method of deciding the issues will never be a challenge to a method that has established its virtues these past centuries. The present jury trial arrangement is as American as baseball and apple pie. Regardless of the domain,

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this destined event will take place — be it in one of the large cities or in a remote county seat — that location will be recorded in history as the place where it all began. This unique modification in the resolving of law suits will spread rapidly over the length and breadth of our nation notwithstanding entrenched attitudes of a portion of the trial bar. The reason that this new concept will be an overnight success can be condensed into a few words — trial by television is superior to our present system. This treatise will attempt to lay before the reader the compelling reasons that make this change inevitable and imminent in terms of legal evolution.

All have heard the ominous drums of revolution threatening the right to trial by jury in civil cases. Uncompromising rhetoric spews forth from those who would disembowel the protectorate but who make no effort to find solutions within the framework of the existing system.[1] Proponents of revolution weave a rope of sand by advancing superficial schemes that are repugnant to our deep-rooted faith in the soundness of trial by jury. The dilemma is that these ill-advised proponents are gathering support because of problems present within the judicial system that

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[1] The Keeton-O'Connell or Basic Protection Plan, the New York plan, and the AIA plan are but three no-fault automobile-victim reparation plans frequently mentioned today. These plans replace the traditional concepts of tort liability in the handling of automobile claims. Under any of these plans automobile accident victims would be compensated without regard to fault. Each victim would submit a claim, as a first party claim, to his own company, and be compensated for actual expenses incurred, less such expense covered by other insurance, but without compensation for pain and suffering (though under the New York plan optional pain and suffering coverage is available).

One need only look at various insurance trade journals over the past few months to see that the tort system is under a withering attack. *See First Party Tort Liability Offers "Sounder" System in Auto Reparations,* INS. ADVOCATE, May 23, 1970 at 11; *Hart Offers Some Advance Views on Legislation to Solve Auto Insurance Crisis,* INS. ADVOCATE, May 16, 1970 at 3; *A New Auto Insurance System,* J. INS. INFORMATION, Jan.-Feb. '69 at 2; *National Press Eyes New York No-Fault Plan,* NAT. UNDERWRITER, March 6, 1970 at 1; *Hearings Examine "No-Fault" Auto Reparations Plan Proponents: "Cuts, Premiums"; Critics: "Un-American,"* INS. ADVOCATE, May 9, 1970 at 3; *"Startling and Shocking" Picture of Auto Accident System Revealed: Dot 2 Volume Study Released,* INS. ADVOCATE, May 9, 1970 at 5; *Jones Sees Dot Public Opinion Survey on "No Fault" Supporting Acceptance of Concept,* INS. ADVOCATE, April 18, 1970 at 8; *Stewart "No Fault" Proposal Attacked at Hearing, Feeling Mixed on Need for Revolutionary Change,* INS. ADVOCATE, Mar. 14, 1970 at 5; *AIA No-Fault Compared with N.Y. Dept. Proposal,* INS. ADVOCATE, Mar. 7, 1970 at 5; *Legislators Hear Pros & Cons of N.Y. Auto Plan,* NAT. UNDERWRITER, Mar. 20, 1970 at 1; *National Press Eyes No-Fault Plan,* NAT. UNDERWRITER, Mar. 6, 1970 at 1; *Fault Backers Glum over Dot Findings? There May Be Cause,* NAT. UNDERWRITER, May 8, 1970 at 1; *Main Dot Study: The Auto System Is Not Working,* NAT. UNDERWRITER, May 1, 1970 at 1; *Traveler's Head Pushes Modified "Fault" Auto Plan,* NAT. UNDERWRITER, April 17, 1970 at 1; *N.Y. No-Fault Plan Gets Cautious Press Approval,* NAT. UNDERWRITER, Feb. 27, 1970 at 1; *No-Fault Auto Program for N.Y. Urged by Gov., Insurance Dept.,* NAT. UNDERWRITER Feb. 20, 1970 at 1.

are soluble but neglected.[2] It is imperative that methods of modern technology be introduced into the judicial system and be exploited as in every successful business or profession. Methods that served our grandfathers well are not necessarily suitable to the strikingly more complex society in which the courts must function today. The courts have been traditionally conservative in accepting change, and this is understandably correct. But electronics is now universally accepted as evidenced by the fact that almost every American family now owns a television set. No procedure, no matter how long it has been used, can withstand the strength of a new procedure when its time has come. Twelve compelling reasons, (synonymously similar to the traditional number of jurors), follow that herald the impending acceptance of TV in the courts.

I. Witnesses Will Testify at the Convenience of Everyone by the Scheduling of Definite Future Appointments.

It is virtually impossible, in a major predominance of trial courts, to set aside a future date for the purpose of commencing trial of a designated case. A primary reason for this dilemma is that there are always unpredictable cases preceding that are awaiting trial. These earlier cases may consume considerably more time to try than predicted or they may suddenly be settled quite rapidly. When an unexpected settlement occurs, a pending case must commence trial immediately or a courtroom will go unutilized. Because of this unpredictability of the commencement of trials, lawyers are frustrated in that they cannot advise witnesses when their presence will be required in court. Witnesses cannot be expected to hold their everyday pursuits in abeyance in order to be in constant readiness to appear for a few moments before a jury for the purpose of giving their testimony. Under today's modus operandi, when trial lawyers suddenly find themselves on trial, witnesses, otherwise cooperative, are irritated when they must cancel their commitments, vacations or scheduled surgery or drag themselves to court with a bad case of the flu. How much more rational and convenient it will be to schedule, well in advance, the giving of testimony by a busy surgeon or businessman before a television camera. An occurrence witness will certainly

[2] The average delay before trial of a civil case in Cook County is 59.6 months. Study by Institute of Judicial Administration, Calendar Status Study vi-vii, State Trial Courts of General Jurisdiction — Personal Injury cases 1969.

See also O'Connell, *Jury Trials in Civil Cases?* 58 ILL. B. J. 796 (1970). Professor O'Connell, co-author of the Keeton-O'Connell or Basic Protection plan, recommends, that, as one method of reducing the current backlog of civil cases in Illinois, art. II, §5 of the Illinois Constitution which provides for the right to "trial by jury" be changed. He recommends bench trials instead of jury trials since bench trials take approximately half to a third as much time as a jury trial. *Id.*

be more cooperative when he can appear before the camera at a time that does not interfere with his personal activities, rather than being unexpectedly dragged from his job at a most inconvenient time by threat of subpoena. The present trial system is terribly inconvenient to almost everyone.

The typical trial lawyer finds himself constantly attempting to explain to irritated witnesses why greater notice could not have been given in order that schedules could have been arranged. Small wonder that many doctors have refused to treat injured patients who might become involved in litigation. Every other business or profession has certainly made better use of modern technology than has the legal profession. We are still trying law suits by the methods Abe Lincoln followed, as did generations before him, when all the witnesses lived within an easy horse and buggy ride of the courthouse. There were few law suits to be tried by a jury, and this made it quite convenient to schedule future trials. In the complex, fast-moving society of today, it is no longer convenient to try law suits as our fathers did in the horse and buggy days.

II. The Prejudicial, Impromptu Remark Will No Longer Plague the Trial.

Often after the litigants, lawyers, witnesses, judge and jury have devoted a great deal of time to a trial, the entire case is suddenly "blown out of the water" by some unfortunate, impromptu remark made by someone in the presence of the jury. These remarks, which occur with alarming frequency, are often innocently made by a witness, lawyer or judge. It has long been recognized that prejudicial utterances compel the court to scrap everything and start all over again.[3] If a motion for mistrial is denied by the trial court, often there is further litigation in the courts of review, with an appellant seeking a new trial on the ground that

[3] Words or conduct can, at the discretion of the trial judge, be grounds for a new trial. The question of prejudicial conduct depends upon how material the effect of the conduct is to the case. Often conduct will be reversible error and often mere harmless error. *See* Ellison v. Sinclair Refining Co., 41 Ill. App. 2d 436, 190 N.E.2d 635 (1963); Friar v. Webb, 394 S.W.2d 583 (Ky. Ct. App. 1965); Felgner v. Anderson, 375 Mich. 23, 133 N.W.2d 136 (1965); Gray v. Gardiner, 92 Ariz. 208, 375 P.2d 562 (1962); Bradbury v. New York Cent. R.R., 180 N.E.2d 839 (Ohio Ct. App. 1962); Dickinson v. Koenig, 133 So.2d 721 (Miss. 1961); Nero v. Duffy, 194 Pa. Super. 174, 166 A.2d 69 (1961); Begnaud v. Texas & N.O.R.R., 136 So.2d 123 (La. Ct. App. 1961); Karmen Soap Prod. Co. v. Prusansky & Prusansky, Inc., 11 A.D.2d 676, 201 N.Y.S. 2d 875 (1960); Giglio v. Valdez, 114 So. 2d 305 (Fla. Ct. App. 1959); Robinson v. Lunsford, 330 S.W.2d 423 (Ky. Ct. App. 1959); Ismail v. City of New York, 181 N.Y.S.2d 848 (Sup. Ct. 1959); Garrison v. Ryno, 328 S.W.2d 557 (Mo. 1959); Northrop v. Kay, 5 A.D.2d 957, 171 N.Y.S. 2d 660 (1958); Gaito v. City of Pittsburgh, 309 Pa. 409, 135 A.2d 746 (1957); Forte v. Schiebe, 302 P.2d 336 (Cal. Ct. App. 1956); Texas Emp. Ins. Ass'n v. Walker, 284 S.W.2d 795 (Tex. Civ. App. 1955), *aff'd* 155 Tex. 617, 291 S.W.2d 298 (1956); Gardner v. Metropolitan Util. Dist., 134 Neb. 163, 278 N.W. 137 (1938).

his case was prejudiced. Reams of opinions from courts of review are being ground out daily addressing themselves to this problem.[4] Untold millions of dollars are lost each year because of the impromptu remark that was immaterial, irrelevant, or incompetent. The only "eraser" the law provides at the present time is the trial judge's admonishing the jury to disregard those unfortunate remarks. The law of practicality recognizes that this admonishment is not always sufficient to remove the damage, the only acceptable solution being a new trial. On the other hand, some highly tainted jury verdicts are upheld in courts of review notwithstanding such remarks.[5] This is so because of the great desire and ever-growing need to terminate litigation in many of our overworked courts.[6] However, there is a feasible solution. By means of editing a video tape, all such remarks can be deleted in a matter of seconds. No one need be concerned with underhanded editing or the obliteration of testimony. Retention of the court reporter's transcript or an independent sound recording of the entire testimony will insure against that deception and as a side benefit, it will be possible to exclude the usually harmless but continual annoyance of unresponsive answers that clutter up a record.

III. Incorrect Rulings by the Trial Judge Will Be Materially Reduced Because the Hasty Ruling Will Be a Thing of the Past.

During the taking of evidence in our present-day system, the trial judge is called upon to make immediate rulings from the

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[4] See note 3 *supra*. It is interesting to note that a significant number of cases were reversed because of error in instructions before pattern jury instructions were developed. The figure is significant in showing the tremendous number of cases that must be returned to the trial level and, hence, contributing to the glut in the courts.

> In 1954 the ILLINOIS JUDICIAL CONFERENCE undertook a study of the jury instruction problem. A Committee was appointed and under the leadership of Judge Robert F. Cotton it diligently investigated the whole subject of instructions. The Committee found, among other things, that 38% of all cases reversed within the 25 year period, 1930 to 1955, were reversed in whole or in part by reason of errors in instructions.

Foreward to ILL. SUP. CT. COMM. JURY INSTR., ILL. PATTERN JURY INSTR. CIVIL at xi (1961).

[5] Skelly v. Boland, 78 Ill. 438 (1875). The court said in this case:

> [w]hilst expressing our disapprobation of any interference by the court, by remarks or otherwise within the hearing of the jury, unless they be in the form of instructions, the remark here excepted to, in the view of the testimony then before the jury, could not have prejudiced the defendant's case, and we would not, therefore, set aside the verdict.

Id. at 439.

In Mitchell v. Four States Mach. Co., 74 Ill. App. 2d 59, 220 N.E.2d 109 (1966), the court held that although defendant's counsel made improper remarks during closing argument they did not reverse on that ground because the remark was not sufficiently prejudicial. The court took the same position regarding an admonishment by the court (*i.e.* a harmless error).

[6] See note 2 *supra*.

bench. Even in the more involved situations where the trial judge and lawyers retire to chambers to discuss a point of law outside the presence of the jury, a decision must be made rapidly by the judge. The judge and lawyers know that the jury will become impatient, finding delays irritating, and feel that the Court and lawyers are being inconsiderate of their time. Even a most able, experienced judge will commit reversible error from time to time by erroneously ruling out competent evidence or admitting incompetent evidence. An impossible burden is placed upon trial judges by compelling them to "shoot from the hip" in making rulings on oftentimes complex questions of law. Trial lawyers, too, are frequently caught off balance when unexpected objections to the admissibility of important evidence find the lawyer without ready authority to demonstrate that the evidence is, in fact, admissible. With the use of video tape, hurried, unfortunate rulings will be things of the past because the trial judge will have ample time to reflect upon the question of law as well as to listen to the arguments of trial lawyers who, in turn, have had time to research the law. With the pressures for immediate rulings absent, the judicial system will receive an added bonus in that there will be less work for the appellate courts. The procedures for taking evidence by the video-tape recorder will be the same as those for the present practice of taking evidence depositions. Objections can be ruled upon and the video tape edited in conformance with those rulings. The entire case will be edited and put together in a carefully planned manner, in the courtroom, or in chambers, at the convenience of all, before the court makes a finding that the tape is ready to be viewed by a jury sworn to try the issues. The trial lawyer, if he chooses, can be working on other cases while the TV monitor tries the case for him. This same lawyer can be secure in the knowledge that the case is very likely being presented in a better manner than if he had been there in person, sitting on the edge of his chair, waiting for the unexpected.

IV. Video Tape Will Insure against the Loss of Vital Evidence.

Every trial lawyer can recall at least one occasion when justice was aborted because an essential witness was not available at the time of trial. This unavailability could have been the result of several possibilities, such as death, serious illness, absence from the jurisdiction by reason of a vacation or business, deliberate avoidance of a subpoena, or some other circumstance that made it impossible for the witness to appear before the jury for the purpose of giving testimony at that precise time. Lawyers are not unduly concerned when a jury decides a case contrary to what they, the lawyers, might have decided if they were the

triers of the facts. However, if a jury arrives at a grievously unjustified verdict because it was not in possession of all the evidence, then lawyers become very much concerned. An unfair verdict based on omission of vital evidence will virtually never again be rendered once preservation of testimony on video tape becomes general practice. In this way, a litigant can be insured against an unexpected collapse of his case.

All of the safeguards and protections enjoyed by the parties today during evidence depositions will be observed during the TV taping. There are those who may protest that ample insurance against the loss of evidence is provided now by statutes authorizing the taking of evidence depositions. Evidence depositions are not the answer since they are not routinely taken unless it is known that a key witness is dying or is not likely to be in the jurisdiction at the time of trial. The new approach in preparing a case for trial will be simply to tape the testimony of all witnesses as a matter of course, thereby significantly reducing the likelihood of losing valuable evidence.

V. Video Tape Will Reduce the Cost of Expert Testimony.

Trial lawyers well know the oftentimes prohibitive expense of obtaining expert testimony. It is simply impracticable to arrange for an expert, eminent in his field, to consume time in traveling to the courtroom in order to testify in person before a jury. Often, even considerable money cannot induce a busy professional to cancel existing commitments and travel to another city. It will now be practical to tape the testimony of a nationally renowned expert right in his office by appointment. Many more law suits will have the benefit of evidence that heretofore would have been unobtainable because of the prohibitive expense, and, even local experts will be more cooperative as a result of the scheduling of testimony since conflicts with scheduled appointments of their own will be eliminated.

VI. A Better Examination of the Witness will be Conducted by the Lawyers.

Juries will have the benefit of observing a better and more comprehensive examination of the witnesses before judging the facts. Lawyers will be better prepared, knowing that at a specific time a witness will appear before a video tape camera for the purpose of giving testimony on a specific segment of the case, and each lawyer will have the benefit of sufficient time to analyze preceding evidence. The quality of justice will improve as juries benefit from a thorough probing for the truth. The conditions that exist today forcing busy trial lawyers to learn the facts of a case by means of a "crash program" shortly before and during

the course of the trial will be eliminated as they are provided more time. The video tape will reduce the number of tragic verdicts that result where there is inadequate time for the lawyer to reflect upon the testimony of each witness. As much as we admire the clairvoyant lawyer who can adroitly reveal the opponent's weaknesses while obscuring the weak points of his own case, in the final analysis, we are concerned only with the quality of justice. The video tape does not remove the need for skilled trial advocacy, but an end result of its use will, no doubt, be an enhanced likelihood of a jury decision based on truth and not on Machiavellism.

VII. More Lawyers Will Be Able To Participate in Trial Practice.

Learning trial advocacy is painful. The hazards for the novice of making suicidal technical errors are ever present, to say nothing of taking on the demeanor of a flounder in the presence of the jury. The problems of introducing essential evidence in the face of changing conditions during the progress of a trial impregnated with an array of other problems make it extremely uninviting to pursue this specialty. As the years pass, to apprentice oneself as a trial advocate becomes even less appealing. Though powerful motivation may cause a determined young lawyer to buffet the waves, for the older lawyer such an experience has become an unnecessary ordeal. As a consequence, intervolved with the fact that law schools abstain from adequately disseminating the art of trial practice,[7] there is a deficiency of competent trial specialists. Video tape will make it convenient for a lawyer to penetrate the heretofore preposterous world of trial advocacy. He will now be able to manage some of the less vexing sectors of the trial gradually intensifying his participation as he gains proficiency. If the trial lawyer responsible for the case does not feel qualified to conduct a direct or cross examination of a specific expert witness, he will now be able to assign that portion of the trial to a lawyer more experienced in that area. Busy trial lawyers will be able to make advance commitments to tape an examination of a witness; this they cannot now do because of indefinite time scheduling. Lawyers will learn to walk before they are required to run. The organized bar can look forward to greater participation by lawyers in this field, with an overall upgrading that is long overdue.

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[7] Dean Robert F. Boden of the Marquette University Law School has recently commented with respect to the type of legal education being dispensed at law schools today and the need for developing technically proficient young attorneys. See Boden, *Is Legal Education Deserting the Bar?* 3 JOHN MAR. J. PRAC. & PROC. 179 (1970). See also M. MAYER, THE LAWYERS (1966).

VIII. The Facts Will Be Recorded for the Jury When Fresh in the Mind of the Witness.

Video tape will be a prodigious blessing in the more populated counties that have an inordinate time delay between the filing of the law suit and the trial itself. In these ailing counties, the casual occurrence witness is often called upon to testify in court as to facts that he witnessed three, four, or perhaps as many as six years before.[8] The passage of time erases from the mind of the witness many of the less vivid details. This protracted delay does not confer upon our juries the benefit of begetting decisions based upon the testimony of decisive witnesses. Veteran trial lawyers know that too many of these witnesses are not testifying from their recollection of the facts, but merely from what they assume occurred or want to believe occurred. Future generations will someday deride our absurd failure to record and preserve the testimony of these witnesses on video tape when the details were fresh in their minds.

IX. Video Tape Will Prevent a "Circus Atmosphere" by Individuals in the Presence of the Jury.

The video tape procedure will thwart a party or witness who is intent on throwing courtroom decorum "up for grabs." As a result of the recent political trials,[9] it has become apparent that a new judicial problem has emerged. A party or witness, by deliberately creating chaos in the presence of the jury, can impede or destroy the orderly process of a trial. This provocative conduct leaves the validity of the trial in doubt as to the offender, if he is a party, and similarly, as to any non-offending parties. This disruptive conduct can force mistrials for ulterior motives such as delay or overt contempt for the judicial system.

X. Video Tape Will Reduce the Dangers Resulting from a Nervous Witness.

It is indeed unfortunate when a party to a law suit has an independent, honest witness who becomes paralyzed with fear on the witness stand in the presence of the jury. To testify in a courtroom before a jury can be a pretty unnerving experience for almost everyone. To some of our more timid citizens, the mere thought of it produces a cold sweat. A witness answering this description may erroneously give an impression to the jury that he is unsure of his testimony. Such a witness can easily be led into inconsistencies or ridiculous assertions, not because

[8] See note 2 *supra.*

[9] 69 C.R. 180 (N.D. Ill. 1970). Appeal docket No. 18295, 7th Cir., Feb. 26, 1970. This case is popularly referred to as the "Conspiracy Seven" case and is an excellent example of why video tape could present a more orderly trial.

he is dishonest, but simply as the result of a temporarily malfunctioning brain brought about by intense nervousness. The party offering this witness has literally been cheated by this uncontrolled fear, making it possible for the other side to filch an undeserved victory. This same witness would probably be able to control his nervousness before a TV camera within his own home, a law office, or perhaps a TV studio. The TV camera itself, being small and unobtrusive, goes almost unnoticed in a typical video taping.[10]

XI. Video Tape Trials Will Produce the "Super Specialist."

As only lawyers can know, there is no occupation or profession on the face of the earth that requires its members to attain as much expertise in such a vast number of divergent subjects as they may outlandishly find themselves immersed in every day of their lives. This is intrinsic because litigation is the inevitable result of disagreements between persons from every sphere of society. Lawyers consent to act and speak for one of the parties to a dispute in a field in which the client may have spent a lifetime acquiring knowledge. In order to effectively represent the client's interests, they must frequently have more than a casual acquaintance with the subject matter — sometimes even to the point of acquiring superior knowledge. Obviously, in highly complex suits involving drugs, electronics, medicine, engineering specialties, and other specialized fields, the lawyer cannot equal the attainment of a sapient client or opponent. Expert witnesses must be called and examined, as it will be their opinions that will influence the jury. The lawyer with an intensive familiarity in the expert's field obviously will be more effective than the lawyer who has never had a similar problem and, in all likelihood, will never have a similar case.

With video taping, when a difficult law suit arises, it will no longer be necessary to have disparate direct or cross examination of the experts. Highly informed lawyers will be readily available to extricate disguised or veiled facts through the resources of an exquisite examination. The examiner retained for this limited purpose can also maintain a tight rein on the opponent's expert, who might otherwise, with little compunction, inflate or distort the facts. The video tape trial will nurture the development of lawyers preeminent in specified or circumscribed areas.

[10] *See* Sullivan, *Court Record by Videotape — Tape Experiment — A Success*, 50 CHI. B. REC. 336 (1969). Judge Sullivan, in this article, discusses the video-taping of actual trials in the Skokie branch of the Cook County Circuit Court. This was done as an experiment and apparently a highly successful one. The taping was merely for the purpose of preserving the record of the Court proceedings and was not used as a substitute for the personal appearance of witnesses.

The reason this species of lawyer is not now a reality is simply that it is not feasible within our existing system.[11] The present insurmountable problem of indefinite future trial dates renders advance scheduling impossible. Such a lawyer could be utilized only spasmodically and this makes it financially impossible to saturate himself in a homogeneous or isolated specialty. The "super specialist" will travel the country managing video tape testimony by definite appointments arranged well in advance. Many cases will be able to bear the costs of this specialist because of a certainty of future dates that can be scheduled so as to insure a continuity of engagements with minimal time consumed per case.

XII. Much of the Doubt Will Be Removed in Evaluating the Outcome of Jury Verdicts.

One of the difficulties trial lawyers, as well as many other persons concerned, now encounter in evaluating the possibilities of a jury verdict is the degree of effectiveness the witnesses will have in the delivery of their testimony. Many intangibles that are difficult to predict unfold only at the time each witness actually testifies before the jury. These intangibles include, just to mention a few, such things as physical appearance, show of sincerity, hesitancy or vacillation in answering questions, tendency to exaggerate, together with a variety of personality traits.[12] In addition to this, the cross examination may or may not bring out inconsistencies, prejudice, lack of opportunity to observe, or other notable factors.[13] With video tape, much of the guesswork in evaluating the possibility of recovery or potential exposure will be removed and the parties can anticipate settlements on the basis of realistic evaluation rather than getting deep into the trial before an accurate picture begins to emerge. Video tape, therefore, is going to become a useful tool in removing much of the guesswork in the evaluation of a case and arriving at accurate settlements. Tragic disappointments that occur daily throughout our nation will become a rarity. Even more important will be the proclivity to hasten settlements, thereby reducing the cancerous backlog of cases awaiting trial.

There may well be an unforeseen provincial hypothesis listed in one or more of the twelve assigned ostensible improvements. This being a conceded fact, however, should not cause a flitter of timidity on the part of the courts or legislatures to initiate neces-

[11] *See* Fasan, *Thoughts on Specialization and the English Experience*, 3 JOHN MAR. J. PRAC. & PROC. 66 (1969). See also M. MAYER, THE LAWYERS 380 (1966).

[12] A. MORRILL, ANATOMY OF A TRIAL 79 (1968).

[13] ANATOMY OF A TRIAL, *supra* note 12, at 117.

sary rules or legislation to adopt this new procedure.[14] Video

[14] It is the author's opinion that the inherent power of the courts is sufficient to promulgate the change from the present system to trial by video tape. In the case of Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952), the Illinois Supreme Court confirmed this inherent power by declaring a legislative enactment, requiring the clerk to give attorneys five days notice before *ex parte* action could be taken to dismiss a case for want of prosecution, unconstitutional. The court held this legislative enactment was an encroachment upon judicial prerogative. The court said:

> This departure from the time honored methods of rule-making has not left the legislature without limitations in this field. The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary.

Id. at 149, 105 N.E.2d at 715.

The questions of inherent judicial power and separation of powers are not clearly resolved in Illinois.

> The Constitution of 1870 is silent as to whether the Supreme Court or the General Assembly has the predominant power in prescribing rules of practice and procedure. Article III divides all powers of government into the three distinct departments and prohibits the exercise by one department of the powers properly belonging to either of the others. Article VI, the present judicial article, provides in Section I thereof:
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> "The judicial power, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns."
>
> The Constitution does not define the judicial power and reference to the common law and decisions of the Supreme Court interpreting the Constitution as necessary in attempting to determine the distribution of rule-making powers.
>
> Historically and according to the common law, courts exercised complete power in the control of their own procedure and promulgated rules as an attribute of their judicial powers. The superior courts of England regulated by rules the practice and procedure in those courts and in the trial courts, and had the power to review rules promulgated by lower courts to determine their reasonableness and consistency with the rules of the superior courts. As the judicial system developed in this country, a modification of the courts' rule-making power was introduced by the adoption of legislative codes of practice and, either through acquiescence on the part of the courts or a determination that a co-ordinate rule-making power existed in the legislature, the role of the legislature in this function became well established.

Crowe, *Power of the Supreme Court To Prescribe Rules of Practice and Procedure under the Proposed Judicial Amendment*, 39 CHI. B. J. 295 (1958). In City of Chicago v. Coleman, 254 Ill. 338, 98 N.E. 521 (1912), the Illinois Supreme Court made it clear that the power to make rules for the functioning and procedures of the courts was a judiciary function and not a legislative function.

Likewise it should be pointed out that the Civil Practice Act makes provision for this same rule making power in the courts. Section 2 of the Act provides:

> (1) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in respect of small claims, including service of process in connection therewith. Unless otherwise indicated by the text, references in this Act to rules are to rules of the Supreme Court.
>
> (2) Subject to rules the circuit and Appellate Courts may make rules regulating their dockets, calendars, and business.

ILL. REV. STAT. ch. 110, §2 (1969). It might well be argued that this legislative grant to the courts is mere surplusage since the courts already possess inherent power to propagate procedural rules. It likewise could be argued that such grant of power is a violation of the doctrine of separation of pow-

tape recordings are used extensively in business,[15] medicine,[16] and government. It is not possible for our judicial system to neglect any longer the benefits that can be obtained from the utilization of this electronic device.

Development of the video tape recorder began in the early

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ers clearly set forth in Art. III of the Illinois state constitution of 1870. It is not the author's intent in this thesis to discuss this problem. It is rather his intent to point out that under whichever theory is chosen — inherent rule making power of the courts or a grant of such power by the legislature — the courts in Illinois, and the Supreme Court in particular, have the power to establish trial by video tape.

[15] *The May Company*, Los Angeles, California, uses videotaped recordings to demonstrate the latest women's wear, furniture, appliances, and other products to their sales people at 16 southern California stores. The vieotapes provide a means for the company's buyers to be contacted by the salesmen in one presentation instead of repeating the information at each store.

The Columbia Gas System Service Corp., Columbus, Ohio, is training 800 servicemen a year using videotaped programs. The videotaped programs also keep employees informed of new changes in home appliances.

The Budd Company, Philadelphia, a major supplier of industrial automotive parts, has reduced the training time of its 16,000 labor and management personnel by using videotaped programs. Courses that were presented 25 times are taped once and replayed as often as needed reducing speaker time and increasing uniformity.

Humble Oil and Refining Company executives in Houston have eliminated some business trips with transcontinental meetings via videotaped records and telephone. Executives in Houston taped their report and sent it to New York where other company executives viewed the tape. The two groups discussed the videotaped report via telephone saving travel costs.

Republic Steel Corp., Cleveland, Ohio, has prepared 41 half-hour videotaped programs on economics, government, and management development as an education service to the public to be used by the Chamber of Commerce, schools, and professional societies.

The First National Bank of Fort Collins, Colorado, is the only bank in the United States that has a subsidiary in computer software, uses videotapes to introduce prospective customers to its software.

The Carborundum Company, Niagara Falls, New York, records executives' messages on videotapes for employees' viewing, to observe customers' reactions to new products and instant replay is possible.

The Gibbings and Lewis Machine Tool Company, Fond du Lac, Wisconsin, uses close circuit videotaped recordings in training salesmen and customers to operate machinery that requires detailed knowledge of its operation.

The Memphis Building Maintenance Company, Memphis, Tennessee, uses videotaped recordings to train beginning janitors by showing instant replays of their cleaning tasks, this results in improved performances.

The Michigan Credit Union League, Southfield, Michigan, assists credit unions with their operations by showing videotaped programs to credit union officials throughout the state.

Miehle-Goss-Dexter, Inc., Chicago, Illinois, one of the world's largest manufacturers of printing presses, uses videotaped recordings to help train hundreds of manufacturing personnel in Chicago and servicemen at a dozen company service centers throughout the United States and Canada. The program includes training speeches by Miehle Officials.

Interoffice Memorandum of Ampex Corp. from Perry dated Dec. 1, 1969 and maintained in the files of *The John Marshall Journal of Practice & Procedure*.

[16] *Southern College of Optometry*, Memphis, Tennessee, has found videotape recording to be a valuable aid in three areas of study. Clinical

1950's in response to the rapid growth of television broadcasting.[17] It records images and sound on magnetic tape[18] and per-

studies, patient progress reports, and information tapes are used for immediate study or may be saved for future reference.

Medical University of South Carolina Department of Pediatrics, provides videotaped presentations of patients' cases, histories, and treatment films to four other hospitals in the state about the treatment of child cancer, X-rays, microscope slides, and other information. Using a special telephone network, doctors discuss patients and procedures while viewing video tapes. A conference in Charleston, South Carolina was videotaped to add information to a growing library on pediatric cancer treatment and research.

Sacred Heart Hospital, Pensacola, Florida, has put videotape recordings to work for both the hospital staff and the patients. The hospital's staff education program is videotaped and played back to staff members who could not attend. Patient education and entertainment is videotaped for viewing on TV sets throughout the hospital.

Hopkins County Hospital, Madisonville, Kentucky, uses videotapes to instruct postoperative orthopedic patients to teach and train attending physicians, nurses, and allied health workers in all hospital departments. The hospital maintains a library containing videotapes of lectures, medical subjects, and is available for staff viewing.

Id.

[17] The first network use of videotape recording was a news program broadcast over CBS on November 30, 1956. The program was originated in New York City, recorded at Television City in Hollywood, and played back later the same night for the West Coast.

Producers quickly began utilizing videotape to record much of the programming on network television. Today, approximately 50 per cent of all programs are aired via tape, retaining the live quality frequently lacking in filmed presentations.

When videotape was still considered in its infancy, it was practically indistinguishable from live shows on TV and only a few months after the first videotape recorder was introduced, a technical expert from Television magazine remarked that the tape image on the video screen was practically perfect and hardly identifiable as a tape-cast rather than a live show.

The original videotape recorder was a relatively simple device compared with the evolutionary products available today.

The early models lacked flexibility for wider uses in the production of television programs.

In 1958 the first conversion units for color recording and playback were brought out. Today, taped commercials, syndication of programs by non-network producers, and on-the-spot taping of news and other events are becoming more and more common.

In the years since 1956 videotape recording has expanded and consolidated its role in broadcasting and other fields through a series of technical improvements. The technique of recording movies and sound for playback is used in a wide range of fields including education, medicine, business and industry, government and law.

Id.

[18] An audio tape recorder picks up sounds from a microphone radio receiver, or direct pick up from another sound recording. In the same way, the video tape recorders are capable of recording pictures from a television camera, from a television receiver or by direct pick-up from another recording. Sound tracks on video tracks on video tapes permit audio recording from microphone or television sets which result in sound motion pictures.

Audio tape recording frequency responses move at rates up to 18,000 cycles per second (*e.g.* in the production of stereophonic music) with the tape moving past the recorder's static heads. In such audio tape recording, a tape speed of 7½ inches per second is the standard for high quality performance. But, television pictures require much higher frequencies and to achieve this requires moving the tape past rotating heads. This increases the frequency response, permitting the recording of picture information. Wortman, ELECTRONICS WORLD, May 7, 1966 at 32.

mits instant replay of recorded material.[19] Today there are two types of video tape recording systems in common use: transverse and helical.[20]

Video tape has become an invaluable aid in assisting juries charged with the duty to decide if an accused defendant is guilty of driving an antomobile under the influence of alcohol.[21] Any lawyer who has had the experience of representing such a defendant is well aware that the testimony of the arresting police officer is usually the only evidence available for a jury to consider. Most jurisdictions provide the arresting police officer with a form to complete pertaining to his visual observations of the accused.[22] The typical report calls upon the officer to describe the manner in which the accused picked up coins from the floor, performed a finger-to-nose test, or other such tests based upon

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[19] Transverse recording, which was developed in 1956 by the Ampex Corporation, is presently the standard used in the broadcasting industry. This system, a two inch wide video tape is moved past recording heads at 15 or 7½ inches, was introduced at the National Association of Broadcasters Convention in Chicago. This transverse system has since been developed and is now a sophisticated technique. . . .

In 1963 smaller recorders for closed circuit use were introduced. These recorders use a helical recording technique. The helical recording technique takes its name from the following method of operation: one or two records — playback heads are mounted on a moving drum and record across the moving tape in a diagonal curve known as a helix. There are full helical and half helical systems, the helical system using a single transducer of a drum around which tape is wrapped on a scanning assembly. Audio and control tracks occupy narrow spaces near the edge of the videotape. The drawback is that the head must have the tape for a short instant during which no signal will be available. The half-helical utilizes two head transducers on the drum to scan the videotape signal with sufficient overlap so that the electronic switching will permit sequencing the signal from the tape into continuous form with only switching time transient from one head to the next.

Interoffice memorandum of Ampex Corp. from Kane, dated Nov. 7, 1969 and maintained in the files of *The John Marshall Journal of Practice & Procedure.*

[20] Most closed circuit video tape recorders are used for producing and playing original video tapes. The minimum equipment necessary to produce a video tape is a camera for converting visual images into electrical signals, a tripod, a microphone for picking up sound, a videotape recorder for recording the signals, a reel of magnetic tape for providing the recording surface, and a television set for viewing the picture. The simple, less sophisticated systems range in price from $1,150 to $22,000. Other larger and more complicated systems may cost up to $100,000.

Documents may be recorded by video tape recorder when desirable by placing the document face down on a glass plate. Underneath the plate is a high resolution television camera which scans and televises the document. The image is shown on a television screen in front of the operator to assure that the document is being televised properly. The camera converts the image to television signals that are guided by the system control section to a tape recording and playback machine and recorded on magnetic video tape. This type of video recording is known to many people as instant replay.

Interoffice Memorandum of Ampex Corp., dated Dec. 1, 1969 and maintained in the files of *The John Marshall Journal of Practice & Procedure.*

[21] See note 10 *supra.*

[22] Alcoholic Influence Report Form published by the National Safety Council as form Rep. 50 M 25801. See also R. ERWIN, DEFENSE OF DRUNK DRIVING CASES (2d ed. 1966).

multiple choice answers. This type of procedure appreciably increases the percentage of convictions. The problem is that the police officer, in actuality, becomes the judge of the facts. It would not be an impotent conclusion to assume that a self-seeking police officer might tend to give the accused a failing grade in order to justify the arrest. However, with these tests recorded on video tape, the trier of the facts can judge the performance rather than rely upon the interpretation of the facts as given by the police officer.

Furthermore, it can be decisively stated that exciting new business opportunities will be created with the advent of trial by video tape. A great demand will burst forth for inexpensive units from lawyers who will want to have equipment of their own.[23] Positions will become available in the manufacture, sale, and servicing of this essential innovation. There will be a need for the rental of this equipment, with or without personnel to operate it while taping evidence. Undoubtedly, TV studios will be needed with sophisticated equipment for the professional preparation of the more momentous trials. Court reporters will be cheered to discover that this electronic device does not supercede the need for their services. Transcripts of testimony will still be needed in the event of an appeal, as it would be impractical to expect a court of review to monitor a video tape in order to hear certain portions of the testimony. The written transcript will always be indispensable for quick reference to exact testimony on a specific page at all levels of litigation.

The novice is usually astonished at the simplicity of operation when taping the voice and image of a witness. The small, lightweight, inexpensive units are easily carried to the desired location and set up for taping in a matter of seconds. The cost factor in video taping is appreciably less than filming as the tape can be reused numerous times. The most significant advantage in video taping as opposed to filming is the instant replay feature. Parties can be certain that a technical defect was not present during the examination of a witness rather than make that unhappy discovery later if movie film had been employed.

As an added bonus, the life expectancy of the trial lawyer will be increased. As every trial lawyer is aware, when he is on trial, he is as deeply involved in the proceedings as though en-

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[23] The Sony Corporation, a large manufacturer of electonric component equipment and the supplier of the equipment used by Judge Sullivan in the Skokie experiment report (*supra* note 10) lists the following retail prices:
Sony AL 3600 recorder — $695
Sony ACU 3200 camera — $350
Sony CUM 180U (18") monitor — $250 (any commercial television set could be used)
Tapes (reusable) per hour — $39.50

gaged in mortal combat. Successful trial work demands unswerving devotion and attention to every detail. A momentary laxity or failure on his part can immediately result in dismal failure, since even most damaging unexpected events must take place in the presence of the jury. A few careless words uttered by him or a witness over the space of a few seconds may, by themselves, result in an adverse verdict. Immediate decisions must constantly be made during the course of a trial without the benefit of legal research or consideration. Having to arrange time schedules for the testimony of irritated, busy witnesses, while at the same time handling numerous other problems, some very unexpected, can precipitate heart palpitations in even the most stolid. It is small wonder that a trial exacts its toll from the lawyer. To compound this hectic situation, the busy trial lawyer will likely be attempting to alert other witnesses for the next hectic trial and explain to them why definite scheduling cannot be arranged. There can be no dispute that the video tape trial will remove much of the unnecessary tension that our present system bestows upon the trial bar. The public may not consider this a particular benefit, perhaps feeling that lawyers are expendable, but at least one segment of our society will commend the change.

One might logically inquire as to what clear distinctions there are between sound movie films and video tapes insofar as their adaptability to jury trials is concerned. If video tape is going to modify trial procedure, why was it not done long ago with sound movies? The flagrant answer is that movie films could well have been used to film testimony as a complete substitute for the personal appearance of a witness in court who was otherwise available. Our courts have recognized the reliability of motion pictures, and their admissibility into evidence is well established.[24] In 1937 a leading California case[25] stated that it

[24] Miles Lab., Inc. v. Frolich, 296 F.2d 740 (9th Cir. 1961); Millers Nat. Ins. Co. v. Wichita Flour Mills Co., 257 F.2d 93 (10th Cir. 1958); Mirabile v. New York Cent. R.R., 230 F.2d 498 (2d Cir. 1956); Witt v. Merrill, 210 F.2d 132 (4th Cir. 1954); Kortz v. Guardian Life Ins. Co., 144 F.2d 676 (10th Cir. 1944), *cert. denied*, 323 U.S. 728 (1944); Maryland Cas. Co. v. Coker, 118 F.2d 43 (5th Cir. 1941); Chicago, G. W. R. Co. v. Robinson, 101 F.2d 994 (8th Cir. 1939), *cert. denied*, 307 U.S. 640 (1939); Feather River Lumber Co. v. United States, 30 F.2d 642 (9th Cir. 1929); Department Pub. Works & Bldgs. v. Oberlander, 92 Ill. App. 2d 174, 235 N.E.2d 3 (1968); Eizerman v. Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); McGoorty v. Behnard, 305 Ill. App. 458, 27 N.E.2d 289 (1940); International U.A.A. & A.I.W. v. Russell, 264 Ala. 456, 88 So.2d 175 (1956), *aff'd* 356 U.S. 634 (1958); People v. Lindsey, 56 Cal. 2d 324, 363 P.2d 910, 14 Cal. Rptr. 678 (1961); Lehmuth v. Long Beach Unified School Dist., 53 Cal. 2d 544, 348 P.2d 887, 2 Cal. Rptr. 279 (1960); Harmon v. San Joaquin Light & Power Corp., 37 Cal. App. 2d 169, 98 P.2d 1064 (1940); Heiman v. Market St. R.R., 21 Cal. App. 2d 311, 69 P.2d 178 (1937); Gulf Line Ins. Co. v. Stossel, 131 Fla. 127, 179 So. 163 (1938), *modified*, 131 Fla. 268, 175 So. 804 (1937); Johnson v. State Highway Comm'n, 188 Kan. 683, 366 P.2d 282

was established beyond question that photographs should be admitted in evidence in asserting that, "[m]oving pictures are but a series of single pictures, and that if single pictures may be received in evidence, there is no reason why moving pictures may not be admitted. . . ."[26]

There is general agreement that the admission of moving pictures should be largely within the discretion of the trial court.[27] However, the exclusion of motion pictures which are properly authenticated and relevant has been held to be an abuse of discretion and is reversible error. Certainly, the differences between sound movie film and video tape in laying of a proper foundation can be no more than a nuisance. There is only one case[28] in the United States in which a court of review has passed upon the admissibility of a video tape displayed to a jury. This was a Florida Supreme Court case involving a question of whether a video tape confession should be allowed in evidence. The court stated: "The rule governing admissibility into evidence of pho-

(1961); Equitable Life Assur. Soc'y v. McDonald, 280 Ky. 825, 134 S.W.2d 953 (1939); Barham v. Nowell, 243 Miss. 441, 138 So.2d 493 (1962); Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 199 So. 289 (1940); Wren v. St. Louis Pub. Serv. Co., 333 S.W.2d 92 (Mo. 1960); Phillipi v. New York C. & St. L. R.R., 136 S.W.2d 339 (Mo. App. 1940); Harris v. St. Louis Pub. Serv. Co., 270 S.W.2d 850 (Mo. 1954); Williamson v. St. Louis Pub. Serv. Co., 363 Mo. 508, 252 S.W.2d 295 (1952); Snyder v. American Car & Foundry Co., 322 Mo. 147, 14 S.W.2d 603 (1922); Denison v. Omaha & C.B.S.R.R., 135 Neb. 307, 280 N.W. 905 (1938); Haley v. Hockey, 199 Misc. 512, 103 N.Y.S.2d 717 (1950); Boyarski v. G. A. Zimmerman Corp., 240 App. Div. 361, 270 N.Y.S. 134 (1934); Tice v. Mandel, 72 N.W.2d 124 (N.D. 1956); Streit v. Kestel, 108 Ohio App. 241, 9 Ohio Ops. 2d 245, 161 N.E.2d 409; De Tunno v. Shull, 75 Ohio L. Abs. 602, 144 N.E.2d 669, *aff'd* 166 Ohio St. 365, 2 Ohio Ops. 2d 281, 143 N.E.2d 301 (1956); North Am. Aviation, Inc. v. U.A.W., 69 Ohio L. Abs. 242, 124 N.E.2d 822 (1954); Bernardy v. O. K. Furn. & Rug. Co., 385 P.2d 909 (Okla. 1963); Hayward v. Ginn, 306 P.2d 320 (Okla. 1957); Alford v. Bailey, 202 Pa. Super. 324, 196 A.2d 393 (1963); DeBattiste v. A. Laudadio & Son, 167 Pa. Super. 38, 74 A.2d 784 (1950); State v. Clark, 383 S.W.2d 953 (Tex. Civ. App. 1964); Jones v. Texas Employer's Ins. Ass'n., 352 S.W.2d 318 (Tex. Civ. App. 1961); General Acc. Fire & Life Assur. Corp. v. Camp, 348 S.W.2d 782 (Tex. Civ. App. 1961); Richardson v. Missouri K. T. R.R., 205 S.W.2d 819 (Tex. Civ. App. 1947).

[25] Heiman v. Market St. Ry., 21 Cal. App. 2d 311, 69 P.2d 178 (1937).

[26] *Id.* at 315, 69 P.2d at 180.

[27] Luther v. Maple, 250 F.2d 916 (8th Cir. 1958); Finn v. Wood, 178 F.2d 583 (2d Cir. 1950); Kortz v. Guardian Life Ins. Co., 144 F.2d 676 (10th Cir. 1944); *cert. denied,* 323 U.S. 728 (1944); Sprinkel v. Davis, 111 F.2d 925 (4th Cir. 1940); Chicago G. W. R.R. v. Robinson, 101 F.2d 994 (8th Cir. 1939), *cert. denied.* 307 U.S. 640 (1939); Eizerman v. Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956); International U. A. A. & A. I. W. v. Russell, 264 Ala. 456, 88 So.2d 175 (1956), *aff'd* 356 U.S. 634 (1958); Heiman v. Market St. R.R., 21 Cal App. 311, 69 P.2d 178 (1937); Rogers v. Detroit, 289 Mich. 86, 286 N.W. 167 (1939); Morris v. E. I. Du pont de Nemours & Co., 346 Mo. 126, 139 S.W.2d 984 (1940); Philippi v. New York, C. & St. L. R.R., 136 S.W.2d 339 (Mo. Ct. App. 1940); Denison v. Omaha & C. B. St. R.R., 135 Neb. 307, 280 N.W. 905 (1938); Boyarski v. G. A. Zimmerman Corp., 240 App. Div. 361, 270 N.Y.S. 134 (1934); De Tunno v. Shull, 144 N.E.2d 669 (1956); Metropolitan Life Ins. Co. v. Wright, 190 Miss. 53, 199 So. 289 (1940).

[28] Paramore v. State, 229 So.2d 855 (Fla. 1969).

tographs applies with equal force to the admission of motion pictures and video tapes."[29] The court went on to adopt language from an earlier California case[30] and quoted as follows:

> This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts.
> . . .
> We are satisfied that it should, and that it stands on the same basis as the presentation in court of a confession through any orthodox mechanical medium, that is, there is a preliminary question to be determined by the trial judge as to whether or not the sound moving picture is an accurate reproduction of that which it is alleged occurred. If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done, and the other requirements relative to the admissibility of a confession are present, i.e., it was freely and voluntarily made without hope of immunity or promise of reward, then, not only should the preliminary foundation and the sound moving picture go to the jury, but, in keeping with the policy of the courts to avail themselves of each and every aid of science for the purpose of ascertaining the truth, such practice is to be commended as an inestimable value to triers of fact in reaching accurate conclusions.[31]

The courts are almost completely in accord in holding that voice recordings are admissible in evidence provided a proper foundation is laid.[32] Some courts have gone so far as to say that

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[29] *Id.* at 859.

[30] People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321 (1937).

[31] Paramore v. State, 229 So.2d 855, 859 (Fla. 1969).

[32] Monroe v. United States, 234 F.2d 49 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 873 (1957); Burgman v. United States, 188 F.2d 637 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 838 (1951); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956); Fikes v. State, 263 Ala. 89, 81 So.2d 303 (1955), *rev'd on other grounds*, 352 U.S. 191 (1955); Wright v. State, 38 Ala. App. 64, 79 So.2d 66 (1954), *cert. denied*, 262 Ala. 420, 79 So.2d 74 (1954); People v. Mackenzie, 144 Cal. App. 2d 100, 300 P.2d 700 (1956); People v. Avas, 144 Cal. App. 2d 91, 300 P.2d 695 (1956); People v. Fratianno, 132 Cal. App. 2d 610, 282 P.2d 1002 (1955); People v. Jackson, 125 Cal. App. 2d 776, 271 P.2d 196 (1954); People v. Eads, 124 Cal. App. 2d 393, 268 P.2d 561 (1954); People v. Sica, 112 Cal. App. 2d 574, 247 P.2d 72 (1952); People v. Porter, 105 Cal. App. 2d 324, 233 P.2d 102 (1951); Wilms v. Hano, 101 Cal. App. 2d 811, 226 P.2d 728 (1951); People v. Hayes, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); People v. Dabb, 32 Cal. 2d 491, 197 P.2d 1 (1948); State v. Lorain, 141 Conn. 694, 109 A.2d 504 (1954); Kilpatrick v. Kilpatrick, 123 Conn. 218, 193 A. 765 (1937); Gulf Life Ins. Co. v. Stossel, 131 Fla. 127, 179 So. 163 (1938); Steve M. Soloman Jr., Inc. v. Edgar, 92 Ga. App. 207, 88 So.2d 167 (1955); State v. Sutton, 273 Ind. 305, 145 N.E.2d 425 (1957); State v. Triplett, 248 Ia. 339, 79 N.W.2d 391 (1956); State v. Alleman, 218 La. 821, 51 So.2d 83 (1950); McGuire v. State, 700 Mo. 601, 92 A.2d 582 (1952), *cert. denied*, 344 U.S. 928 (1953); State v. Gensmer, 235 Minn. 72, N.W.2d 680 (1951), *cert. denied*, 344 U.S. 824 (1952); State v. Raasch, 201 Minn. 158, 275 N.W. 620 (1937); Ray v. State, 213 Miss. 650, 57 So.2d 469 (1952); State v. Perkins, 355 Mo. 851, 198 S.W.2d 704 (1946); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1952); Epstein v. Epstein, 285 App. Div. 1128, 141 N.Y.S.2d (1955); Frank v. Cossitt Cement Prod., 197 Misc. 670, 97 N.Y.S.2d 337 (1950); People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (1950); People v. Miller, 270 App. Div. 107, 58 N.Y.S.2d 525 (1945); State v. Reyes, 209 Or. 607, 308 P.2d 182 (1957); Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955); Commonwealth v. Clark, 123 Pa. Super. 277,

sound recordings are more trustworthy than the testimony of human witnesses.[33] The cases admitting sound recordings have done so on the basis that the recordings are independent direct evidence.[34]

It is readily apparent that the courts have laid down some stringent requirements that must be established before a sound recording can be admitted into evidence.[35] These tests, as generally agreed upon by the courts, are reasonable and should certainly negate any fears that the courts would relax the customary requirement that a reliable foundation be established before the video tape would be received into evidence.

Paradoxically, in spite of the court's complete stamp of approval upon the reliability of these mechanical devices to accurately reproduce sound and sight, their use is severely restricted. There is complete agreement among the jurisdictions that an evidence deposition or the testimony in the course of former proceedings between the parties cannot be admitted in evidence if the witness himself is available.[36] This substituted

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187 A. 237 (1936); Kirkendoll v. State, 198 Tenn. 497, 281 S.W.2d 243; State v. Williams, 49 Wash. 2d 354, 301 P.2d 769 (1956); State v. Lyskoski, 47 Wash. 2d 102, 287 P.2d 114 (1955); State v. Slater, 36 Wash. 2d 357, 218 P.2d 329 (1950); State v. Salk, 34 Wash. 2d 183, 708 P.2d 872 (1949); Paulson v. Scott, 260 Wis. 141, 50 N.W.2d 376 (1951).

[33] United States v. Lewis (D.C. Dist. Col.), 87 F. Supp. 970 (1950); People v. Kulwin, 102 Cal. App. 2d 104, 226 P.2d 672 (1951).

[34] See note 32 *supra*.

[35] Steve M. Toloman Jr., Inc. v. Edgar, 92 Ga. App. 207, 88 S.E.2d 167 (1955); State v. Williams, 49 Wash. 2d 354, 301 P.2d 769 (1956); United States v. McKeever, 169 F. Supp. 426 (S.D.N.Y. 1958); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963). Requirements are as follows:

(1) a showing that the recording device was capable of taking testimony,
(2) a showing that the operator of the device was competent,
(3) establishment of the authenticity and correctness of the recording,
(4) a showing that changes, additions, or deletions have not been made,
(5) a showing of the manner of the preservation of the recording,
(6) identification of the speakers, and
(7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

[36] Wigmore indicates that in discussing the use of former testimony or depositions there is no reason to distinguish the two.

> (a) There is on principle no distinction between a *deposition* and *former testimony* as to the conditions upon which either may be used at trial.
>
> So far as the circumstances make it impossible to obtain the witness' personal presence for testifying, by reason of his death, illness, absence from the jurisdiction, and the like, that impossibility exists in precisely the same degree for a deposition and for former testimony to a jury, — supposing, of course, that in each case there has been cross-examination. There is on principle not the slightest ground for failing to recognize all the dispensing circumstances as equally sufficient for both kinds of testimony.

5 J. WIGMORE, EVIDENCE §1401 at 146 (3d ed. 1940).

In *Ruhala v. Roby* the court, quoting Wigmore, stressed the rule that if the witness is present in court his deposition may not be used as direct testimony: " 'It is clear, therefore, that if the witness is present in the courtroom at the time when his deposition is offered, the deposition is inadmissi-

testimony can be used only if the witness is dead, ill, or out of the jurisdiction, or is kept away from the trial by the opposing party.[37] There is, therefore, a complete roadblock set up in the

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ble, because there is no necessity for resorting to it.'" 2 Mich. App. 557, 563, 140 N.W.2d 785, 787-88 (1966).

Similarly, in *Hewitt v. Maryland State Board of Censors*, the court indicated:

> Even depositions, where the witness (not a party) is sworn before testifying, where counsel for all parties are present, where cross-examination is permitted and where the testimony is transcribed and filed in court, are not admissible in evidence if the witness is present in court and available to testify, as were these jurors.

241 Md. 283, 292, 216 A.2d 557, 562 (1966). Legal scholars seem to concur that depositions may not be used when the witness is present. McCormick says:

> Depositions taken in the cause in which they are offered might be thought to stand in a better position than depositions or testimony taken in another suit, since in most instances there is no problem of identity of issues and parties. But the statutes and rules of court which regulate depositions almost universally impose this requirement of unavailability (with great variations among the states as to the particular grounds) both upon the permission to take the deposition and upon its actual use in evidence in criminal trials and civil actions at law.

C. McCORMICK, LAW OF EVIDENCE 495 (1954).

Illinois follows the rule that testimony of a witness from a former trial may not be used as direct evidence if the witness is available. Campbell v. Campbell, 138 Ill. 612, 28 N.E. 1080 (1891). *See* Stephens v. Hoffman, 275 Ill. 497, 114 N.E. 142 (1916); Delbridge v. Lake, Hyde Park & Chi. Bldg. & Loan Ass'n, 98 Ill. App. 96 (1901); Devine v. Chicago City Ry., 182 Ill. App. 366 (1913); Home Life Ins. Co. v. Franklin, 303 Ill. App. 146, 24 N.E.2d 874 (1940); John v. Tribune Co., 28 Ill. App. 2d 300, 171 N.E.2d 432 (1961), *rev'd on other grounds*, 24 Ill. 2d 437, 181 N.E.2d 105 (1962).

Accord, Schmitt v. Jenkins Truck Lines, Inc., 170 N.W.2d 632 (Ia. 1969); State v. Yates, 442 S.W.2d 21 (Mo. 1969); Warrington v. Employers Group Ins. Co., 207 So.2d 207 (La. Ct. App. 1968); Pyles v. Bos Lines, Inc., 427 S.W.2d 790 (Mo. Ct. App. 1968); Smith v. Wabash R.R., 416 S.W.2d 85 (Mo. 1967); Donald v. Bennett, 415 S.W.2d 450 (Tex. Civ. App. 1967); Hewitt v. Maryland State Bd. of Censors, 241 Md. 283, 216 A.2d 557 (1966); Ruhala v. Roby, 2 Mich. App. 557, 140 N.W.2d 785 (1966); Walsh-Anderson Co. v. Keller, 362 P.2d 533 (Mont. 1961); Angelowitz v. Nolet, 103 N.H. 347, 172 A.2d 103 (1961); Mobile Infirmary v. Eberlein, 119 So.2d 8 (Ala. 1960); Feldstein v. Harrington, 4 Wis. 2d 380, 90 N.W.2d 566 (1958); Underwood v. Smith, 261 Ala. 181, 73 So.2d 717 (1954); Donet v. Prudential Ins. Co., 23 S.W.2d 1104 (Mo. Ct. App. 1930); Gaul v. Baker, 108 Conn. 173, 143 A. 51 (1928). *See also*, 26A C.J.S. *Depositions* §92(2)(a) (1956).

[37] Testimony given in a former proceeding is admissible in a subsequent proceeding if certain conditions are met. These are: (1) the witness is dead; (2) is out of the jurisdiction; (3) cannot be found; or (4) is sick or insane. None of these factors exist here. As already set forth all the witnesses were present at all the hearings. The ruling excluding the introduction of the Curran record but permitting its use for cross-examination purposes was proper and did not in any way prejudice this appellant.

Mackintosh Hemphill Div. E. W. Bliss Co. v. Unemployment Comp. Bd. of Review, 205 Pa. Super. 489, 491, 211 A.2d 25-26 (1965). This statement by the Pennsylvania court aptly typifies the rule with respect to unavailability as a prerequisite to admission of former testimony or depositions. Perhaps a statement of this rule is best summarized by the Wisconsin case of *Feldstein v. Harrington* wherein the Wisconsin Supreme Court said:

> This is because no showing was made by the defendants as to the unavailability of such two doctors to testify in the instant action. Where depositions taken in a prior action are offered in a subsequent action as substantive testimony, such unavailability must be established as a condition to admitting the same, or any part thereof.

Feldstein v. Harrington, 4 Wis. 2d 380, 381, 90 N.W.2d 566, 570 (1958). *See also* DeVargas v. Brownell, 251 F.2d 869 (5th Cir. 1958); Anderson v.

path of a pressing need for change. Critics of the judicial system are quick to blame the courts for lagging behind other enlightened segments of our society that have accepted the advantages of modern technology. While much of the criticism may be true, it

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Evans, 168 Neb. 373, 96 N.W.2d 44 (1959).

Illinois courts have long recognized that former testimony is not admissible unless the witness is unavailable. Stout v. Cook, 47 Ill. 530 (1868); Hoffman v. Stephens, 269 Ill. 376, 109 N.E. 994 (1915); George v. Moorhead, 399 Ill. 497, 78 N.E.2d 216 (1948); Trunkey v. Hedstrom, 33 Ill. App. 397, *aff'd* 131 Ill. 204, 23 N.E. 587 (1889); Devine v. Chicago City Ry., 182 Ill. App. 366 (1913); Turner v. Chicago Housing Authority, 11 Ill. App. 2d 160, 136 N.E.2d 543 (1956).

The case law in this area seems well codified by Supreme Court rule in Illinois.

> (a) Purposes for Which Discovery Depositions May Be Used. Discovery depositions taken under the provisions of this rule may be used only:
>
> (1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;
>
> (2) as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;
>
> (3) if otherwise admissible as an exception to the hearsay rule; or
>
> (4) for any purpose for which an affidavit may be used.
>
> (b) Use of Evidence Depositions. All or any part of an evidence deposition may be used for any purpose for which a discovery deposition may be used, and may be used by any party for any purpose if the court finds that at the time of the trial:
>
> (1) the *deponent is dead or unable to attend or testify because of age, sickness, infirmity, or imprisonment;*
>
> (2) the *deponent is out of the county, unless it appears that the absence was procured by the party offering the deposition,* provided, that a party who is not a resident of this state may introduce his own deposition if he is absent from the county; or
>
> (3) the party offering the deposition has exercised reasonable diligence but has been unable to procure the attendance of the deponent by subpoena; or finds, upon notice and motion in advance of trial, that exceptional circumstances exist which make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.
>
> (c) Partial Use. If only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used.

ILL. REV. STAT. ch. 110A, §212 (1969) (emphasis added). A similar provision is contained in the Federal Rules of Civil Procedure, though it is more liberal than the Illinois provision.

> (d) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:
>
> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> (2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles

nevertheless, remains for the legislature as well as the courts[38] to lead the way for innovation. The departure from the long-established system of requiring competent available witnesses to appear only in person before a jury is significant enough to compel the legislature to act where the courts are timid or are without authority to act. Courts should not be called upon to outflank the legislature if they feel the need for legislative guidance. Because the need for change is so immense, we can reasonably anticipate that the responsible bodies of the various states must and will act with dispatch.

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from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

FED. R. CIV. P. 26(d). *See also* E. CLEARY, HANDBOOK OF ILLINOIS EVIDENCE §§17.7-17.8 (2d ed. 1963); S. GARD, ILLINOIS EVIDENCE MANUAL rules 161 & 378 (1963).

[38] The implementation of the concept "trial by video tape" throughout the country would likely come through the courts as part of their inherent power. However, it is possible that in some states the courts have abdicated this power and only enforce such of it as is granted by the legislature. In such states legislation will be necessary to carry out the establishment of "trial by video tape." See note 14 *supra*.