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Lex, Lies & Videotape

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Gregory T. Jones*

Once viewed as the cutting edge of courtroom technology, videotape has become an increasingly prevalent arrow in the trial lawyer's quiver. Yet while trial lawyers brandish videotape frequently, many trip over questions of procedure, admissibility, and technique. Still others fail to take full advantage of the medium as a high-impact litigation tool.

This article is designed to serve as a practitioner's guide for negotiating the evidentiary shoals that lie between the attorney and the jury box. After Part I charts the myriad uses to which videotapes are put, Part II of the article describes the evolving procedural requirements that apply to courtroom use. Part III then describes the varying evidentiary considerations that arise both in civil and criminal cases and analyzes the oversimplified "re-creation"/ "demonstration" dichotomy that has been employed to control admissibility of reconstruction videos. Finally, Parts IV and V of the article explore the various discovery and admissibility issues associated with surveillance films and Day-in-the-Life documentaries, and the recovery of costs incurred in producing and replaying videotaped depositions.

I. USES OF VIDEOTAPE

A. Preserving Testimony for Trial

While employed in a whole host of contexts, videotapes are most often used to present testimony from a witness who cannot attend trial.¹ The rationale is simple: Since a videotape enables the trier of fact to monitor voice inflection, pauses in testimony, facial expressions, and other visual cues that are otherwise unavailable from a mere written transcript, videotapes outstrip the conventional stenographically produced transcript as a medium for presenting testimony.² Thus, as a means for offering testimony from one's own witness, videotapes normally are the medium of choice.

However, a videotape can be a two-edged sword. An inopportune expression, an extended pause, or an ill-conceived demonstration by the

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1. See, e.g., *United States v. Trucis*, 89 F.R.D. 671, 674 (E.D. Pa. 1981); *In re Daniels*, 69 F.R.D. 579, 581 (N.D. Ga. 1975).

2. See *Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 & n.6 (5th Cir. 1985); *Riley v. Murdock*, 156 F.R.D. 130, 131 & n.3 (E.D.N.C. 1994); *Meredith v. Schreiner Transp., Inc.*, 814 F. Supp. 1004, 1006 (D. Kan. 1993); *King v. Westlake*, 264 Ark. 555, 558, 572 S.W.2d 841, 843 (1978).

witness that would be undetectable in a transcript can prove devastating when captured on film.³ Thus, the very strengths sought through the use of video can turn into a liability for the party sponsoring the witness.⁴

This potential for undermining the witness's credibility creates a second rationale for videotaping depositions. Nothing satisfies the trial lawyer more than catching an adverse witness in a lie. Compared to written transcripts, videotapes can more accurately memorialize impeachment material or admissions for use at trial. While a stenographic record of a prior inconsistent statement or admission can be valuable, even the most artfully crafted questions recorded in a sterile transcript can lose force when read back to the jury. By contrast, the video replay places the jurors at the very scene where (and time when) the damaging statements were originally uttered. With videotape, jurors effectively become eyewitnesses to the event, rather than mere members of a temporally and visually detached audience.

B. To Substitute for a Jury View

Videotapes play an equally useful role in the courtroom beyond the recordation of testimony. They can depict a witness's demonstration of a sequence of events or movements associated with a fact at issue.⁵ Likewise,

3. While as a technical matter, film and videotape considerably differ, the two recordation media share numerous similarities; consequently, for purposes of this article, the terms are used interchangeably.

4. In federal and many state courts, if one attorney notices a non-video evidentiary deposition, nothing prevents opposing counsel from attempting to videotape it so long as advance notice is given. *See* FED. R. CIV. P. 30(b)(3); *see infra* text accompanying note 25. This may prove strategically wise if the adverse witness is expected to have a poor "live" appearance. *See* Weiss v. Waynes, 132 F.R.D. 152, 153 (M.D. Pa. 1990) (plaintiff entitled to videotape defendant's expert for use at trial over defendant's objection). *See also* Riley v. Murdock, 156 F.R.D. 130, 130-31 (E.D.N.C. 1994) (permitting resumption of deposition to be videotaped even though initial session was not; video deemed to be superior method of conveying credibility of witness). Likewise, if one party videotapes a deposition but later seeks to forgo the testimony due to surprise testimony, the adverse party may still be able to use the video at trial. *See, e.g.,* Reber v. General Motors Corp., 669 F. Supp. 717, 720 (E.D. Pa. 1987).

5. *Rapheld v. Ice*, 431 F. Supp. 343, 344-45 (E.D. Mo. 1977) (video showing lack of plaintiff's injuries). *See also* *Gillen v. Nissan Motor Corp. in U.S.A.*, 156 F.R.D. 120, 123 (E.D. Pa. 1994) (compelling plaintiff in automobile product liability suit to appear for videotaping with subject automobile to demonstrate alleged seatbelt defect); *Kiraly v. Berkel, Inc.*, 122 F.R.D. 186, 187-88 (E.D. Pa. 1988) (issuing order to videotape a reenactment of plaintiff's accident); *Montag v. Board of Educ.*, 446 N.E.2d 299, 304-05 (Ill. App. Ct. 1983) (admitting film showing gymnastic routine that "still pictures or oral testimony could never duplicate"); *Freeland v. Baker*, 422 S.E.2d 315, 315-16 (Ga. Ct. App. 1992) (video of arthroscopic surgical procedure admissible). *But see* *Stermer v. Superior Court*, 24 Cal. Rptr. 2d 577, 579-80 (Cal. Ct. App. 1993) (interpreting discovery statute narrowly to foreclose

videos can be used to portray the workings of equipment,⁶ to show the layout of terrain or visibility conditions,⁷ or to illustrate scientific principles⁸ that cannot be shown in the courtroom.

C. Case Evaluation and Settlement

Videotapes can also serve as vital litigation tools outside the courtroom. They can assist in trial preparation by familiarizing the witness with (or refreshing the witness's recollection of) an important process or event.⁹ Videotapes can also enable parties to evaluate the demeanor and estimate the impact that witnesses would have at trial. The plaintiff's bar has made excellent use of the medium in producing settlement brochures to be shared with defense counsel and their clients.¹⁰ If credibility or effectiveness of a witness is critical, the attorney can show portions of videotaped depositions

court from compelling plaintiff to demonstrate during videotaped deposition how child was placed in car seat); *Lamendola v. Slocum*, 538 N.Y.S.2d 116, 117-18 (N.Y. App. Div. 1989) (barring plaintiff's attorney from videotaping independent medical examination commissioned by defendant, but recognizing that videotaping might be permissible if plaintiff's condition rendered her unable to testify about manner in which examination was conducted).

6. *See Bellinger v. Deere & Co.*, 881 F. Supp. 813, 816 (N.D.N.Y. 1995) (video admitted to show mechanical principles involved in operation of cornpicker); *Potlach Corp. v. Missouri Pac. R.R.*, 321 Ark. 314, 326, 902 S.W.2d 217, 224-25 (1995) (video of railroad car dumper admissible to show how equipment operated); *Beers v. Western Auto Supply Co.*, 646 S.W.2d 812, 815-16 (Mo. Ct. App. 1982) (use of videos to explain complex mechanical operations); *Roberts v. Homelite Div. of Textron*, 109 F.R.D. 664, 667-68 (N.D. Ind. 1986); *Carson v. Burlington Northern*, 52 F.R.D. 492, 492-93 (D. Neb. 1971). *But see In re Air Crash Disaster at Sioux City, Iowa*, 131 F.R.D. 127, 128-29 (N.D. Ill. 1990) (barring plaintiff from videotaping defendant's crew members inside flight simulator). Even where the equipment *can* be brought to the courtroom, the video camera can be used to circumvent visualization problems inherent in fast-moving or particularly miniaturized operations. Close up or slow motion settings can be used to demonstrate operations that the jury cannot otherwise readily see. Moreover, still photographs may be extracted from videotape and introduced upon proper authentication. *See Mobbs v. State*, 307 Ark. 505, 512, 821 S.W.2d 769, 774 (1991).

7. *Karl v. Burlington N. Ry.*, 880 F.2d 68, 77 (8th Cir. 1989) (video of railroad crossing and warning lights); *Vinke v. Artim Transp. Sys., Inc.*, 408 N.E.2d 1112, 1120 (Ill. App. Ct. 1980) (film used to show approach to accident scene and to show distances along highway); *Mize v. Skeen*, 468 S.W.2d 733, 737 (Tenn. Ct. App. 1971) (video used to depict visibility at accident scene).

8. *Millers' Nat'l Ins. Co. v. Wichita Flour Mills Co.*, 257 F.2d 93, 98-99 (10th Cir. 1958) (film used to show certain principles upon which expert based his opinion); *Loven v. State*, 831 S.W.2d 387, 392-97 (Tex. Ct. App. 1992) (medical school training film about seizure disorders used as a learned treatise).

9. *But see James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 146 (D. Del. 1982) (work product privilege waived by showing written documents to witness in preparation for deposition).

10. *See Fred I. Heller, Videotaped Settlement Brochure*, in 43 AM. JUR. TRIALS 239 (1991).

or day-in-the-life documentaries to the client, the insurer, a jury consultant, or even a focus group.¹¹ This can often yield far more accurate case appraisals by the ultimate decision makers than if the client or others were to rely solely on the attorney's interpretation and description of the witness.

D. Cost Reduction

As noted below, authorization for videotaped depositions in civil cases arises under language in both state and federal rules that was designed, at least initially, to help reduce the cost of depositions. Dispensing with a court reporter¹² (who would otherwise stenographically record testimony) can cut discovery costs dramatically. Videoconferencing can also be used as an alternative to telephonic depositions when travel costs for the parties or witnesses or when time pressures make in-person depositions impractical.¹³ Moreover, when proof at trial would require brief testimony from numerous experts,¹⁴ video presentation can minimize the hassle and expense of scheduling and presenting such proof.

E. Other Uses

At least one court has ordered videotaping to rein in unduly confrontational or obstreperous lawyers.¹⁵ Some parties have taken video depositions of expert witnesses for information-sharing purposes. When, for example, a particular expert, *i.e.*, a "hired gun," is expected to be used repeatedly by a party, some attorneys have successfully argued that information sharing, standing alone, creates sufficient justification for videotaping.¹⁶ Moreover, in those limited situations in which deposition

11. *Cf. Kiraly v. Berkel, Inc.*, 122 F.R.D. 186, 187 (E.D. Pa. 1988) (defendant permitted to videotape reenactment of machinery accident since it would aid in the evaluation of the case).

12. *See infra* text accompanying note 39.

13. *See* FED. R. CIV. P. 30(b)(7) (authorizing depositions to be taken *inter alia* by "other remote electronic means").

14. *Cf. Borchardt v. United States*, 133 F.R.D. 547, 547-48 (E.D. Wis. 1991) (permitting plaintiff to call physician by deposition rather than in person due to cost savings).

15. *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc.*, 140 F.R.D. 373, 379-80 (E.D. Wis. 1991). *See also* *Riley v. Murdock*, 156 F.R.D. 130, 131 (E.D.N.C. 1994) (video is more likely to expose coaching by counsel). Unfortunately, not all attorneys are cowed by the presence of the camera, but if counsel unduly interferes with the videotaped deposition, remedies exist. *See Kelly v. GAF Corp.*, 115 F.R.D. 257, 257-59 (E.D. Pa. 1987) (ordering new trial due to counsel's unjustified antics during videotaped evidentiary deposition).

16. *See Burlington City Bd. of Educ. v. United States Mineral Prods. Co.*, 115 F.R.D. 188, 189 (M.D.N.C. 1987) (denying protective order sought on behalf of defendant's expert

testimony is given in a foreign language, videotapes can act as a backup resource for refereeing disputes over translations and transcriptions.¹⁷ Videos are also increasingly used to memorialize a testator's execution of a will.¹⁸

II. PROCEDURAL CONSIDERATIONS IN VIDEOTAPING DEPOSITIONS

A. Authorization for Videotaped Depositions

While as early as 1970 the Advisory Committee on Civil Rules strongly considered allowing depositions to be recorded by videotape as a matter of course,¹⁹ it was not until 1993 that the practice was ultimately sanctioned at the federal court level. During the intervening years, appellate courts adopted varying approaches to the issue, some indirectly encouraging use of videotapes by circumscribing the lower courts' discretion to deny non-stenographically recorded depositions, others adopting a less hospitable stance.²⁰ A hesitance to encourage the new technology can be seen even in relatively recent cases that, while recognizing the attributes of videotaping, curiously refuse to embrace the practice.²¹

Notwithstanding the delay in fully implementing the videotaping of depositions, the promulgation of the 1993 Amendments to Rule 30 of the *Federal Rules of Civil Procedure* firmly heralded the acceptance of videotaping as a bona fide, reliable recordation medium. Pursuant to those amendments, under the current language of Rule 30(b)(2), a party may take a deposition by video recordation without leave of the court and, in fact, without stipulation from opposing counsel.²²

witness who did not want to be videotaped). *See also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 235, 110 Stat. 1214, 1246-47 (1996) (authorizing closed circuit televising of criminal trials to provide greater public access by persons having compelling interest in wake of change of venue).

17. *See, e.g.*, *United States v. Drogoul*, 1 F.3d 1546, 1554-55 (11th Cir. 1993).

18. *See Videotaped Wills: Ready for Prime Time*, 9 PROB. L.J. 139 (1989); *Hammer v. Powers*, 819 S.W.2d 669, 671 (Tex. App. 1991) (videotaped signing of will was used to help establish testatrix's testamentary capacity).

19. *See* 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.09[1] (2d ed. 1996).

20. *Compare* *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 521-22 (D.C. Cir. 1975) with *UAW v. National Caucus of Labor Comms.*, 525 F.2d 323, 326 (2d Cir. 1975). *See also* 4A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 30.09[2] (2d ed. 1996).

21. *See, e.g.*, *Windsor Shirt Co. v. New Jersey Nat'l Bank*, 793 F. Supp. 589, 607-11 (E.D. Pa. 1992), *aff'd mem.*, 989 F.2d 490 (3d Cir. 1993); *Bogan v. Northwestern Mut. Life Ins. Co.*, 145 F.R.D. 642, 642-43 (S.D.N.Y. 1993).

22. Since FED. R. CRIM. P. 15(d) permits depositions to "be taken . . . in the manner provided in civil actions," the liberalization in the use of videotaped depositions brought

Although the 1993 Amendments made videotaping a presumptively appropriate method, Rule 30 still carries a series of safeguards to protect against misuse. For example, it specifically proscribes distortion of the "appearance or demeanor of deponents or attorneys"²³ and requires the officer to recite identifying information about the deposition at the start of each new tape.²⁴ Rule 30 also permits parties to designate another method of recordation in addition to videotaping if they desire.²⁵ Moreover, the court retains discretion to bar the use of videotaping altogether.²⁶

While the federal courts and numerous states²⁷ permit videotaped depositions as a matter of course, *i.e.*, absent stipulation or court order, the *current* language²⁸ of the *Arkansas Rules of Civil Procedure* does not take such a liberal view. Indeed, the main text of Rule 30 of the *Arkansas Rules of Civil Procedure* makes no provision for videotaped depositions. Instead, authority for taking depositions by videotape is secreted in Arkansas Rule 30(b)(4), which provides in pertinent part that "testimony at a deposition [may] be recorded by other than stenographic means."²⁹ Technically, under Rule 30(b)(4), a videotaped deposition (or any other non-stenographic deposition) may be taken *only* by order of court.³⁰ By contrast, under the Federal Rule, non-stenographic depositions may be taken "unless the court orders otherwise."³¹

Practice in Arkansas frequently eschews the formality contemplated in the Rules. Yet compliance with the Arkansas Rule requires the court order to "designate the manner of recording, preserving and filing [of] the

about by the 1993 Amendments would apply also in the federal criminal law context. *But see* text accompanying note 94 *infra* (describing general reluctance to use depositions in the criminal court realm).

23. FED. R. CIV. P. 30(b)(4).

24. *Id.*

25. FED. R. CIV. P. 30(b)(3).

26. *See* FED. R. CIV. P. 30(b)(2).

27. *See, e.g.*, *Masinga v. Whittington*, 792 S.W.2d 940, 940-41 (Tex. 1990) (to prevent videotaping of deposition, party "must show particular, specific and demonstrable injury").

28. On November 13, 1995, the Supreme Court of Arkansas proposed to revise ARK. R. CIV. P. 30 to make it equivalent to FED. R. CIV. P. 30(b)(2) and (3). *See* 322 Ark. Appx. (delivered on November 13, 1995). If ultimately adopted, such changes will not take effect until after September 1, 1996.

29. The Reporter's Notes to ARK. R. CIV. P. 30 do, however, provide "[w]here proper safeguards are made, videotaped depositions are certainly proper." *Cf.* Ark. Code Ann. § 16-44-203 (Michie 1994) (authorizing videotaped depositions of child victims in sexual offense prosecutions).

30. Of course, ARK. R. CIV. P. 29 permits the parties to stipulate to modifications in the discovery process so an actual court order can usually be averted. *But see* *Transit Homes v. Bellamy*, 282 Ark. 453, 459-60, 671 S.W.2d 153, 157 (1984) (court retains power under ARK. R. CIV. P. 29 to overrule or reject counsel's discovery-related stipulation).

31. FED. R. CIV. P. 30(b)(2).

deposition.”³² Other provisions to encourage accuracy and trustworthiness are optional yet encouraged.

In recent years, courts have freely granted parties leave to videotape depositions. Nevertheless, practical considerations have sometimes led even the federal courts to refuse.³³ In still other cases, notwithstanding first amendment and common law rights of access to court records and documents, concerns over the possible non-litigation use of the videotaped depositions have impelled courts to circumscribe access and use outside the context of the case.³⁴ For example, in *United States v. McDougal*,³⁵ the trial court properly refused to allow the press (and a political organization) to duplicate the videotaped deposition of President Clinton, which had been played at the trial. In spite of the strong presumption of public access employed in the Second, Third, Seventh, and District of Columbia Circuit Courts of Appeals,³⁶ and the considerable public interest in the Whitewater

32. ARK. R. CIV. P. 30(b)(4).

33. See, e.g., *Hiatt v. Mazda Motor Corp.*, No. LR-C-92-574, slip op. at 1-2 (E.D. Ark. Jan. 21, 1994) (even in the wake of the 1993 Amendments to FED. R. CIV. P. 30(b), a request to videotape a deposition of a non-English speaking employee was denied since the witness planned to appear at trial, the request was somewhat untimely, and all normal advantages of observing a witness firsthand would be lost due to use of interpreter and cultural differences); *Bogan v. Northwestern Mut. Life Ins. Co.*, 145 F.R.D. 642, 642 (S.D.N.Y. 1993) (concern over cross-conversations/interruptions in absence of stenographic back up); *Bywaters v. Bywaters*, 123 F.R.D. 175, 176 (E.D. Pa. 1988) (telephonic deposition of plaintiff's expert would not be videotaped since the defendant would necessarily be unable to see the expert's physical reactions to questions posed during the deposition); *Westmoreland v. CBS*, 584 F. Supp. 1206, 1212-13 (D.D.C. 1984) (privacy interest of non-party deponent may outweigh party's interest in videotaping deposition), *rev'd on other grounds*, 770 F.2d 1168 (D.C. Cir. 1985). Likewise, some courts have granted one party leave to videotape an evidentiary deposition on condition that the other parties may take a preceding discovery deposition. See *FDIC v. Deloitte & Touche*, No. LR-C-90-520, slip op. at 4 (E.D. Ark. Feb. 18, 1992).

34. See, e.g., *In re American Broadcasting Companies, Inc.*, 537 F. Supp. 1168, 1172 (D.D.C. 1982) (press denied right to copy and broadcast videotaped deposition of actress Jodie Foster in case involving prosecution of John Hinckley); *Inhofe v. Wiseman*, 772 P.2d 389, 393-94 (Okla. 1989) (prohibiting non-litigation use of state senator's videotaped deposition due to concerns that political opponent would use it in media blitz). Cf. Ark. Code Ann. § 16-44-203(d) (Michie 1944) (videotaped depositions of child victims of sexual abuse subject to protective order to protect privacy).

35. See *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. June 11, 1996), *aff'd*, Nos. 96-2606 & 96-2671, 1996 U.S. App. LEXIS 2047 (8th Cir. Aug. 12, 1996) (per curiam) (affirming district court decision).

36. See *In re CBS, Inc.*, 828 F.2d 958, 959 (2d Cir. 1987) (right to inspect judicial records extends to videotaped depositions); *United States v. Guzzino*, 766 F.2d 302, 304 (7th Cir. 1985); *United States v. Martin*, 746 F.2d 964, 968 (3d Cir. 1984); *In re National Broadcasting Co.*, 653 F.2d 609, 618-21 (D.C. Cir. 1981) (holding that trial court abused its discretion in refusing to allow broadcaster to copy videotapes and audiotapes in criminal trial of former congressman); *United States v. Criden*, 648 F.2d 814, 821-24 (3d Cir. 1981).

prosecutions, the trial judge concluded that a variety of countervailing interests militated against releasing the video for copying and rebroadcast.³⁷

B. Who Runs the Camera?

While many attorneys employ independent operators to run the camera, such is not necessarily required.³⁸ In fact, the parties may stipulate that an employee of the attorney's office, or even the attorney, may operate the camera. This can yield considerable cost savings for the client.

C. Stenographic Transcription

When videotaping a deposition, most attorneys also employ a court reporter to stenographically record it. Such stenographic backup is not required by either the Federal or Arkansas Rules.³⁹ However, under both

37. The trial court found that release of the tape was unwarranted because the press attended trial, because a written transcript was made available, because of the potential for misuse, and because release could impede future attempts to obtain testimony from a President.

38. See *Rice's Toyota World, Inc. v. S.E. Toyota Distrib.*, 114 F.R.D. 647, 651 (M.D.N.C. 1987) (independent operator of video camera not required; attorney for party may run the equipment); 4A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 30.10, at 30-117 (2nd ed. 1996). Cf. *Colonial Times v. Gasch*, 509 F.2d 517, 522 (D.C. Cir. 1975) (audiotape operator need not be independent of the parties); *United States v. Hargro*, 104 F.R.D. 451, 452 (N.D. Ga. 1984) (attorney authorized to operate audio recording device over objection); *Marlboro Prods. Corp. v. North Am. Phillips Corp.*, 55 F.R.D. 487, 489 (S.D.N.Y. 1972) (notwithstanding Rule 28(a), use of an independent audiotape operator would not be required since such a blanket requirement would nullify the cost-savings objections behind Rule 30 and because numerous safeguards against abuse exist). *Contra Kallen v. Nexus Corp.*, 54 F.R.D. 610, 613-14 (N.D. Ill. 1972); see also *Bogan v. Northwestern Mut. Life Ins. Co.*, 145 F.R.D. 642, 643 (S.D.N.Y. 1993) (videotaping rejected due in part to concerns about who would operate camera). Close adherence to the dictates of Rule 28 (disqualifying persons having an interest in the proceedings from reporting depositions) seems necessary in the context of stenographically-produced depositions, but little compelling justification exists for such mandated "independence" in the context of video depositions. See *FED. R. CIV. P. 28(c)*. Whereas in the former situation, the stenographer by necessity must interpret what the participants say before recording the information, no such need for interpretation exists for the camera operator. Since no filtration or interpretation of the dialogue is performed by the video operator, the prospects for bias or prejudice to influence the preparation of the record are limited and, hence, the need for "independence" evaporates. Any concerns over the possibility of improper camera angles, lighting or sound enhancement can usually be easily alleviated through stipulation or monitoring.

39. See *FED. R. CIV. P. 30(b)(2)*. Nevertheless, in the past, some federal courts required simultaneous stenographic transcription as a condition of authorizing the videotaping. See, e.g., *Roberts v. Homelite Div. of Textron*, 109 F.R.D. 664, 668 (N.D. Ind. 1986). Such rulings seem to conflict with the intent of the rule. The 1993 amendments to the federal rules do not require such simultaneous transcription, but if the video is to be used at trial or

Rule 30(b)(4) of the *Arkansas Rules of Civil Procedure* and Rule 30(b)(3) of the *Federal Rules of Civil Procedure*, any party has an absolute right to have a stenographic transcription made. Such transcription must be prepared at the expense of the party requesting it.⁴⁰

Since a stenographic backup is usually optional, a litigant may be able to reduce costs, *i.e.*, court reporter fees, by dispensing with a stenographic backup. Such an approach particularly makes sense in the case of records custodians' depositions when, once the documents are produced, a transcript will often prove unnecessary since the parties can usually then stipulate to the documents' authenticity. In many instances, however, having the written transcript may prove necessary for trial preparation, for use in conjunction with various motions, for making poster-board enlargements for use at trial, and for seeking rulings on objections before the videotape is presented to a jury.⁴¹

III. ADMISSIBILITY OF VIDEOTAPE AT TRIAL

A. Civil Cases

1. *Videos as Demonstrative Evidence*

From an evidentiary standpoint, the same rules applying to admission of photographs or other related demonstrative evidence generally apply to the admission of videos.⁴² Although courts sometimes ignore or confuse the

in conjunction with a summary judgment motion, the party seeking to use the video must have a transcript made. *See* FED. R. CIV. P. 26(a)(3)(B) and 32(c); *see also* *Gillen v. Nissan Motor Corp. in U.S.A.*, 156 F.R.D. 120, 122 (E.D. Penn. 1994) (quoting from Federal Advisory Committee notes).

40. Under the federal rule, the court may order otherwise. *See, e.g., Roberts*, 109 F.R.D. at 668 (requiring the videotaping party to bear the cost of the stenographic backup); *Kiraly v. Berkel, Inc.*, 122 F.R.D. 186, 188 (E.D. Penn. 1988) (ordering stenographic recording at defendant's expense). *See also* *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Prods., Inc.*, 140 F.R.D. 373, 380 (E.D. Wis. 1991) (requiring party noticing deposition to pay for stenographic backup). The *recovery* of video-related costs is discussed *infra* part V.

41. For discussion of how the matter is handled under the 1993 amendments to FED. R. CIV. P. 30 and 32, *see supra* note 39.

42. *See* *Phiroopoulos v. Bi-State Dev. Agency*, 908 S.W.2d 712, 714 (Mo. Ct. App. 1995). *See also* *Williams v. State*, 316 Ark. 694, 696, 874 S.W.2d 369, 370 (1994); *Fisher v. State*, 7 Ark. App. 1, 4 n.1, 643 S.W.2d 571, 573 n.1 (1982) (videotapes and sound motion picture films are admissible on the same basis as photographs). Because videos present more opportunities for editing than do conventional photographs (and because they record sound in addition to visuals), authenticating videotape may require a relatively more rigorous analysis. Given the potential need to investigate the authenticity of the video, courts may foreclose use at trial if disclosure is untimely. *See, e.g., Saturn Mfg. v. Williams Patent Crusher & Pulverizer Co.*, 713 F.2d 1347, 1357 (8th Cir. 1983).

fact, two primary⁴³ theories exist for meeting foundational prerequisites. The two are contextually and procedurally different, yet both are equally valid means for gaining admission. Under the first—the pictorial testimony doctrine⁴⁴—the proponent must lay a foundation by showing through a competent witness⁴⁵ that the video accurately and fairly represents that which it purports to show.⁴⁶ Such a foundation is appropriate when the sponsoring witness is available to testify at trial that the images produced on the video replicate what the witness saw at the time of recordation. Thus, the video is offered to *illustrate* what the witness describes orally.

In a number of contexts, e.g., unmanned security monitoring, no such witness actually views the event at the time of recordation⁴⁷ and, conse-

43. See *United States v. Rembert*, 863 F.2d 1023, 1026-28 (D.C. Cir. 1988) (describing a third hybrid process for authenticating videotape of crime).

44. See 2 MCCORMICK ON EVIDENCE § 214, at 17 (John W. Strong et al. eds., 4th ed. 1992). See also FED. R. EVID. 901(b)(1); ARK. R. EVID. 901(b)(1).

45. Notwithstanding dictum in *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 292-94, 921 S.W.2d 954, 957-58 (1996), that could be construed to the contrary, unless there is evidence that the tape has been edited or its accuracy otherwise is subject to serious challenge, testimony from the actual camera operator or other technically trained witness should not normally be required in order to authenticate the video.

46. See *Saturn Mfg., Inc. v. Williams Patent Crusher & Pulverizer Co.*, 713 F.2d 1347, 1356-57 (8th Cir. 1983) (adequate foundation laid by witness who was present during filming); *Medité of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 787 (10th Cir. 1985) (excluding video of picket line in NLRB action because tape had been edited); *United States v. Roach*, 28 F.3d 729, 732-33 (8th Cir. 1994) (upholding admission in criminal prosecution since foundation properly laid and no proof of editing or alteration); *Large v. Board of Managers*, 623 So. 2d 1174, 1176-77 (Ala. Civ. App. 1993) (surveillance film property authenticated); *Freeland v. Baker*, 422 S.E.2d 315, 315-16 (Ga. Ct. App. 1992) (upholding admission of videotape of arthroscopic surgical procedure performed on plaintiff, including surgeon's narration, because foundation properly laid and because surgeon established it as a business record for purposes of hearsay concerns). Cf. *Wetherill v. University of Chicago*, 565 F. Supp. 1553, 1561-62 (N.D. Ill. 1983) (photos of other person's injuries properly admitted where proper foundation laid since photos were to be used for illustrative purposes). But see *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 294, 921 S.W.2d 954, 958 (1996) (upholding exclusion of videotapes in workers' compensation proceeding on authentication grounds since it was unclear "who made the tapes, and, in fact, even the witness by whom appellant sought to introduce the tapes was not sure who the people were who were on the tapes"). While videotape authentication issues primarily arise in the context of their visual content, the capacity for recording sound on videotape raises additional evidentiary concerns. Obviously, narrations accompanying the visual images are subject to challenge on hearsay grounds. See *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1329-30 (Or. 1978). But even nonspeaking audio can trigger serious authentication issues. See, e.g., *Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 968 (7th Cir. 1983) (defendant foreclosed from playing videotape of logging operation with sound on since microphone was not placed where plaintiff was located and reliability was therefore questioned).

47. Or, as in the case of fast moving action, a witness may see but be unable to comprehend the critical aspects of the event at the time it occurs. However, when reviewed later or when replayed in slow motion, action in the background, or a feature that was somehow otherwise missed, may become manifest.

quently, the pictorial testimony theory is inapposite. Notwithstanding the lack of a human witness, common sense teaches us that the event captured on film did in fact occur. This is where the second foundational theory proves helpful. Under the "silent witness" doctrine, the film is offered as *substantive* (as opposed to merely *illustrative*) evidence.⁴⁸ The touchstone for admissibility thus normally turns on the reliability of the filming process rather than on whether any witness can vouch for the accuracy of the video's contents.⁴⁹

Trial lawyers (and sometimes courts) periodically confuse the two categories of videographic evidence and muddle the respective foundational elements by contending (or assuming) erroneously that elements of the authentication litany required for one of the theories must also be proven when the alternative theory is being invoked.⁵⁰

48. See 2 MCCORMICK ON EVIDENCE, § 214, at 15 (John W. Strong et al. eds., 4th ed. 1992). See also *United States v. Gordon*, 548 F.2d 743, 744 (8th Cir. 1977); *Robinson v. State*, 621 So. 2d 389, 391-92 (Ala. Crim. App. 1993). FED. R. EVID. 901(b)(9); ARK. R. EVID. 901(b)(9).

49. One author notes that at least four different methods exist for authenticating a video under the "silent witness" theory:

These include (1) "[t]estimony of a photographic expert who [has] determined that the video tape had not been altered in any way and was not built-up or faked"; (2) testimony concerning the chain of custody with respect to the videotape; (3) testimony concerning the checking and use of the video camera along with adequate proof of the validity of the videotape process and its proper utilization in the case at hand; or (4) testimony that the videotape evidence introduced at trial was the same as what the witness had inspected immediately after the videotape had been recorded. Of course, using these methods in combination, along with any testimony by a percipient witness able to verify the fairness and accuracy of at least some portion of the subject matter of the videotape evidence, would tend to make a stronger showing.

Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, in 16 AM. JUR. PROOF OF FACTS 3d 493, 526-27 (1992) (quoting CHARLES C. SCOTT, 3 PHOTOGRAPHIC EVIDENCE § 1297 (2d ed. Supp. 1991)) (footnotes omitted).

Absent legitimate concerns about fabrication, it should normally be unnecessary for the proponent to pass a rigorous chain of custody analysis as a condition of authentication. Nevertheless, in most cases sole reliance on one of these four "methods" provides insufficient safeguards. As a general rule of thumb, authentication can be established if the sponsoring witness can testify (1) that within the relevant time frame the camera was capable of capturing the event in question, i.e., running and focused on the scene in question, and (2) that the video has not been altered. If alteration has occurred (or if there are lapses between frames) more detailed testimony will be required to establish the fidelity of the video. See, e.g., *Robinson v. State*, 621 So. 2d 389, 391-92 (Ala. Crim. App. 1993) (video properly admitted under silent witness theory despite existence of lapses between frames in surveillance film).

50. See *Mendite of New Mexico, Inc. v. NLRB*, 72 F.3d 780, 787 (10th Cir. 1995) (citing *United States v. Roach*, 28 F.3d. 729, 733 (8th Cir. 1994)); 29A AM. JUR. 2D *Evidence* § 982 (1994). Likewise, some authorities over-simplify the authentication analysis by implying that technical foundations regarding the equipment or methodology are

The differences in the two theories become important when addressing other points, such as the impact of editing or changed conditions. Courts almost uniformly hold that the mere fact that the video has been edited⁵¹ does not render it inadmissible.⁵² Likewise, courts often note that delays between the date of the incident involved and the date of filming or even some changes in conditions do not necessarily render the video inadmissible.⁵³ These are dangerous overstatements. While each of these propositions is true when the video is being used purely as *illustrative* evidence, the danger of such blanket statements becomes apparent when the video is offered as *substantive* evidence.⁵⁴ Likewise, differences in the evidentiary basis will affect whether the video may be reviewed during jury deliberations. For example, if the video is merely illustrative evidence, then it generally should not be provided to the jury; if it is substantive evidence,

irrelevant. See, e.g., *Videotape Evidence in the Courts - 1985*, 26 S. TEX. L.J. 453, 457 (1985).

51. Given advancements in digital editing, alteration of videotape evidence has been made easier and less detectable. The pixels of individual frames (which normally run at thirty per second) can be rearranged, thereby altering the frame. Digital editing permits such editing to be accomplished without the signal degradation that is a telltale sign of manipulation by conventional analog editing. Likewise, techniques exist to remove or to add date/time displays, and thereby obfuscate the fact that the video has been edited. For an excellent discussion of the editing process and the potential for alteration and fabrication, see Jordan S. Gruber, *Videotape Evidence*, in 44 AM. JUR. TRIALS 171, §§ 16-29 (1992).

52. *Pritchard v. Downie*, 326 F.2d 323, 326 (8th Cir. 1964) (fact of editing goes to weight of the evidence, not to admissibility); *Pease Co. v. Local Union 1787*, 393 N.E.2d 504, 506 (1978) (same); *Millers Nat'l Ins. Co. v. Wichita Flour Mill Co.*, 257 F.2d 93, 100 (10th Cir. 1958) (same). See also *Mercantile Bank v. Phillips*, 260 Ark. 129, 138-39, 538 S.W.2d 277, 282 (1976) (mere fact that film was edited or spliced without unbiased supervision does not render it inadmissible). Moreover, even the fact that the tape has been electronically enhanced to overcome poor sound or picture quality does not render it inadmissible if the process verifies the inherent reliability and fidelity of the final product. See, e.g., *English v. State*, 422 S.E.2d 924, 924-25 (Ga. Ct. App. 1992). But see *Utley v. Heckinger*, 235 Ark. 780, 786-87, 362 S.W.2d 13, 17 (1962) (on retrial, portions of film that appeared to distort actual conditions should not be played). However, other parties should be permitted to inspect all out takes to determine whether editing is subject to challenge and to offer any other portions of the film that had been deleted. *Mercantile Bank*, 260 Ark. at 138-39, 362 S.W.2d at 282. See also *Hotchkiss v. Sears, Roebuck & Co.*, 139 F.R.D. 313, 316 (M.D. Pa. 1991) (plaintiffs ordered to provide defendants with each video that they plan to use at trial).

53. See *Nash v. Stanley Magic Door, Inc.*, 863 S.W.2d 677, 681 (Mo. Ct. App. 1993); *Jones v. Halvorson-Berg*, 847 P.2d 945, 950 (Wash. Ct. App. 1993) (admitting demonstration video made ten years after incident held admissible since differences in circumstances between incident and demonstration were brought out during witness examination).

54. For instance, in the former instance, the sponsoring witness is subject to cross examination over the nature and extent of any changes and how they render the video different from actual conditions; in the latter situation, since by definition no human witness can attest to the conditions of the original scene, there is no basis for fruitful cross examination.

it may be given to the jury provided that the judge concludes that the jury would not give it undue weight.⁵⁵

Regardless of the foundational theory being used, in all cases the video must be probative and assist the jury in understanding the facts of the case.⁵⁶ Given the high impact inherent in videos,⁵⁷ courts are particularly receptive to claims of unfair prejudice.⁵⁸

An amalgam of evidentiary issues arises when the proponent seeks to use a video that is effectively a reenactment of the event at issue.⁵⁹ In this situation, the line between the video as *illustrative* evidence and the video as *substantive* evidence tends to blur.⁶⁰

55. See *Commonwealth v. Foster*, 624 A.2d 144, 148-52 (Pa. Super. Ct. 1993) (jury should not have been permitted to view video reenactment during deliberations).

56. See *Beers v. Western Auto Supply Co.*, 646 S.W.2d 812, 815-16 (Mo. Ct. App. 1982); *Phiropoulos v. Bi-State Dev. Agency*, 908 S.W.2d 712, 714 (Mo. Ct. App. 1995). See also *Reber v. General Motors Corp.*, 669 F. Supp. 717, 719 (E.D. Pa. 1987) (plaintiff precluded from introducing video of truck cab because it would have been cumulative).

57. *Brandt v. French*, 638 F.2d 209, 212 (10th Cir. 1981) (admission of films must be carefully scrutinized due to their highly persuasive nature); *Balian v. General Motors*, 296 A.2d 317, 322 (N.J. Super. Ct. App. Div. 1972) (due to "tremendous dramatic impact of motion pictures," courts must be alert to fact that jurors may place "inordinate weight" on them).

58. See *Brewer v. Jeep Corp.*, 546 F. Supp. 1147, 1149 (W.D. Ark. 1982) (video of crash demonstration inadmissible), *aff'd*, 724 F.2d 653 (8th Cir. 1983); *Field v. Omaha Standard, Inc.*, 582 F. Supp. 323, 333 (E.D. Pa. 1983) (film excluded because it was gory, inflammatory and confusing), *aff'd mem.*, 732 F.2d 145 (3d Cir.), *cert. denied*, 469 U.S. 828 (1984). As a matter of strategy, omitting the gory details can be wise since it not only averts evidentiary challenges, but also can actually increase the video's impact on the jury. As one writer poignantly observed, "[u]nderstatement is far more effective because it allows jurors to use their own imaginations to fill in gaps. That is why actors are taught to avoid the obvious. Watching someone cry is far less interesting than watching someone trying hard not to cry." Williams Bailey, *Making the Most of Day-in-the-Life Films*, 30 TRIAL 28, 30 (1994).

59. *Fusco v. General Motors Corp.*, 11 F.3d 259, 263-64 (1st Cir. 1993) (simulation of vehicle component failure excluded because dramatic effect of video would tend to override juror's awareness that conditions during filming did not correspond to actual accident conditions); *Phiropoulos v. Bi-State Dev. Agency*, 908 S.W.2d 712, 714-15 (Mo. Ct. App. 1995) (reversing defense verdict since video reenactment was introduced without sufficient proof that it was substantially similar to accident in question); *Carter v. Missouri Pac. R.R.*, 284 Ark. 278, 681 S.W.2d 314 (1984); *Carr v. Suzuki Motor Co.*, 280 Ark. 1, 655 S.W.2d 364 (1983); *Balian v. General Motors*, 296 A.2d 317, 321-24 (N.J. Super. Ct. App. Div. 1972). *But see* *Crossley v. General Motors Corp.*, 33 F.3d 818, 821-22 (7th Cir. 1994) (video of rollover test involving different model automobile admissible to illustrate scientific principle in light of extensive limiting instructions that tape was not reenactment); *Nash v. Stanley Magic Door, Inc.*, 863 S.W.2d 677, 681 (Mo. Ct. App. 1993) (video deemed admissible since defendant established that it was not a re-creation of accident); *Potlatch Corp. v. Missouri Pac. R.R.*, 321 Ark. 314, 326, 902 S.W.2d 217, 224 (1995) (video offered as a demonstration, not as a reenactment).

60. See, e.g., *Pierce v. State*, 671 So. 2d 186, 188 (Fla. Dist. Ct. App. 1996).

2. Re-creations versus Demonstrations

Nestled within this evidentiary twilight zone lie many of the cases involving accident videographics. The clear majority view is that videos that represent attempted *re-creations* of an event require proof that the essential facts depicted in the videos are "substantially similar"⁶¹ to those of the original event.⁶² However, when the video is offered strictly to *demonstrate* general scientific or physical principles that underlie an expert's opinion, the "substantial similarity" requirement disappears.⁶³

In addressing the foundational prerequisites for such videos, courts have often focused primarily on a nominal inquiry: whether the video should be called a "re-creation" (or "simulation") of the underlying event versus a "demonstration" of scientific or physical principles.⁶⁴ In many instances this simple binary analysis begs the question because no clear dividing line exists between "demonstrations" and "re-creations."⁶⁵ In fact, such videos are more appropriately viewed as falling along a continuum. Furthermore, many videos that are used in conjunction with expert testimony cannot be neatly compartmentalized within a single category.⁶⁶

61. The exact meaning of the term "substantially similar" is oblique. Clearly, the proponent need not prove "identical" conditions, *see Carr v. Suzuki Motor Co.*, 280 Ark. 1, 3-4, 655 S.W.2d 364, 365 (1983), but there is a dearth of case law that illuminates precisely how similar the conditions must be. Some courts have shown surprisingly little concern for the degree of similarity that would be required before a re-creation is admitted. *See, e.g., Jones v. Lingenfelder*, 537 So. 2d 1275, 1277-78 (La. Ct. App. 1989). Others have intimated that while facts that are *not* disputed should normally be reflected in the video, material facts that *are* disputed by the parties need not be. *See Hinkle v. City of Clarksburg*, 81 F.3d 416, 424-25 (4th Cir. 1996).

62. *See Hinkle*, 81 F.3d at 424-25; *Fusco*, 11 F.3d at 263; *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 402 (10th Cir. 1993); *Phiropoulos v. Bi-State Dev. Agency*, 908 S.W.2d 712, 713-15 (Mo. Ct. App. 1995); *Carter*, 284 Ark. at 280, 680 S.W.2d at 711. *See also Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1332-33 (8th Cir. 1985). This principle rests on the notion that, absent such similarity, the potential for the jury to be misled or "unable to visualize an opposing viewpoint," is simply too great. *Id.* at 1333 (quoting *Hinkle*, 81 F.3d at 425).

63. *See, e.g., Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083, 1087 (10th Cir. 1994); *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1278-79 (7th Cir. 1988). *See also Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473, 1493 (D. Mont. 1995) (substantial similarity not required since videos were not intended as duplications of accident).

64. *See, e.g., Pandit v. American Honda Motor Co.*, 82 F.3d 376, 382 (10th Cir. 1996). Some courts have used the term "illumination" in lieu of "demonstration." *See, e.g., Hinkle*, 81 F.3d at 424-25.

65. *See Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051-52 (4th Cir. 1984).

66. *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 403-04 (10th Cir. 1993). Thus, a video may contain both evidence that is merely illustrative and evidence that is substantive. *See also Misener v. General Motors*, 165 F.R.D. 105, 106-08 (D. Utah 1996).

Litigants have actively promoted this oversimplified approach toward categorization. Given the added foundational burdens associated with "re-creations,"⁶⁷ it is not surprising that proponents often describe their video as a mere "demonstration," in an effort to evade heightened scrutiny.⁶⁸ Some courts have accepted the proponent's description, but nevertheless have excluded the video because the demonstrations were "just similar enough . . . to confuse the jury"⁶⁹ Other courts have rejected the proponent's description and recharacterized the video as a re-creation. A good example of this latter approach is *Carter v. Missouri Pacific Railroad*.⁷⁰ There, the Supreme Court of Arkansas observed that the fact that the party construes its video as *merely* a demonstration of scientific or mechanical principles does not dictate that it is. Nor does such a representation ensure that, even in the wake of a cautionary instruction,⁷¹ the jury will interpret it as such.

One court has characterized the "demonstration"/"re-creation" dichotomy as "the difference between a jury believing that they are seeing a repeat of the actual event and a jury understanding that they are seeing an illustration of someone else's *opinion* of what happened."⁷² While such an observation helps to focus the debate, it does not settle it. Even the most inexperienced cross examiner should be able to establish at the very least that the video constitutes the expert's *opinion* of what happened. Moreover, many videos that are too short or abstract to be "re-creations" nevertheless

67. Some decisions have muddled the issue. See, e.g., *Randall v. Warnaco, Inc.*, Hirsh-Weis Div., 677 F.2d 1226, 1233-34 (8th Cir. 1982) (noting that "substantial similarity" must be shown, but then inexplicably stating that "dissimilarities affect the weight of the evidence, not its admissibility"). See also *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1278 (8th Cir. 1987) (quoting *Randall*).

68. See, e.g., *Finchum v. Ford Motor Co.*, 57 F.3d 526, 530-31 (7th Cir. 1995); *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051-52 (4th Cir. 1984); *Carter v. Missouri Pac. R.R.*, 284 Ark. 278, 280, 681 S.W.2d 314, 315 (1984); *Edwards v. ATRO S.p.A.*, 891 F. Supp. 1085, 1087-88 (E.D.N.C. 1995). See also *Four Corners Helicopters, Inc. v. Turbomeca, S.A.*, 979 F.2d 1434, 1442 (10th Cir. 1992) (proponent unsuccessfully argued both that video was merely a demonstration of physical principles *and* passed the substantial similarity test).

69. *Finchum*, 57 F.3d at 530. *Fusco v. General Motors Corp.*, 11 F.3d 259, 264 (1st Cir. 1993) (even if termed a "demonstration," the video should be excluded if it "is sufficiently close in appearance to the original accident to create the risk of misunderstanding").

70. 284 Ark. 278, 681 S.W.2d 314 (1984).

71. See *Carter*, 284 Ark. at 279-81, 681 S.W.2d at 315-16 (admission of film constituted reversible error notwithstanding a trial court's limiting instruction). *But see* *Montag v. Honda Motor Co.*, 75 F.3d 1414, 1420 (10th Cir. 1996) (discussing limiting instruction); *Pandit v. American Honda Motor Co.*, 82 F.3d 376, 382 (10th Cir. 1996).

72. *Datskow v. Teledyne Continental Motors*, 826 F. Supp. 677, 686 (W.D.N.Y. 1993) (emphasis in original). See also *Hinkle*, 81 F.3d at 425.

have enough factual similarities to the actual event to stimulate juror confusion.⁷³ Limiting instructions⁷⁴ theoretically offer some protection against confusion, but in light of the difficulty that *courts* have had in grappling with this “demonstration”/“re-creation” distinction,⁷⁵ it is unrealistic to assume the average juror will fully appreciate the subtleties of the distinction. Furthermore, as a practical matter it is doubtful that the juror will actually *remember* such a distinction (or admonitions contained in any limiting instruction) when, after what may be days or weeks of intervening evidence, the juror finally enters the jury room to evaluate all the evidence and decide the case. After all, the memory of a vivid videographic depiction may outlast any recollection of the warning contained in an oral limiting instruction.

If there is a true answer to the dilemma, it is clear that it does *not* lie with continued reliance on the oversimplified “demonstration”/“re-creation” dichotomy. While crafting a workable solution is beyond the scope of this article, several points are noteworthy. First, no matter how they are categorized, reconstruction videos can often facilitate the jury’s fact-finding process and consequently should not be automatically relegated to the status of evidentiary pariahs. Second, concerns over the possibility that jurors might be misled or confused must be tempered by the realization that thorough cross examination can often serve as an effective counterweight.⁷⁶ Third, in order for this counterweight to work, the cross examiner must be given the right to conduct full and early discovery.⁷⁷

73. See *Finchum v. Ford Motor Co.*, 57 F.3d 526, 530 (7th Cir. 1995); *Fusco v. General Motors Corp.*, 11 F.3d 259, 264 (1st Cir. 1993). *But see* *In re Air Crash Disaster*, 86 F.3d 498, 539 (6th Cir. 1996) (admission of computer animation upheld despite similarity to actual events).

74. For a set of representative limiting instructions used to caution juries, see *Pandit*, 82 F.3d at 381; *Hinkle v. City of Clarksburg*, 81 F.3d 416, 425 (4th Cir. 1996); *Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083, 1086-87 (10th Cir. 1994). See also *Saldana v. Wirtz Cartage Co.*, 385 N.E.2d 664, 669-70 (Ill. 1978).

75. See, e.g., *Hinkle*, 81 F.3d at 425 (“there is a fine line between a ‘recreation’ and an ‘illustration’”); *Gilbert v. Cosco, Inc.*, 989 F.2d 399, 403 (10th Cir. 1993) (“sometimes the distinction is not clear between tests that recreate an accident and tests that demonstrate scientific principles . . .”).

76. See *Naylor v. St. Louis S.W. Ry.*, 847 F.2d 1305, 1307 (8th Cir. 1988) (cross examination would expose dissimilarities).

77. Some courts have not seemed to recognize the importance of pretrial discovery of videos. See, e.g., *In re Air Crash Disaster*, 86 F.3d at 359.

3. Videotaped Depositions

The use of videotaped depositions in civil cases is essentially no different from the use of stenographically recorded depositions.⁷⁸ If the deposition is not of an adverse party,⁷⁹ then absent stipulation, the deponent must generally be unavailable within the meaning of Rule (32)(a)(3).⁸⁰ Yet unavailability cannot always guarantee admissibility. The proponent must also overcome objections based on relevance or unfair prejudice. In some cases the very fact that a video deposition can depict the deponent so vividly may sow the seeds of inadmissibility.⁸¹

Just as an attorney might use blowups of critical deposition testimony during closing arguments, the attorney should be free to play excerpts from video depositions during summation.⁸² Although the video becomes part of the record, it generally should not go into the jury room during deliberations.⁸³

78. See *King v. Westlake*, 264 Ark. 555, 558, 572 S.W.2d 841, 843 (1978) (embracing the presentation of medical witness testimony via videotaped deposition and recognizing that "videotape is the best substitute" for live testimony). Note, however, some reported cases show a curious prejudice against treating videotaped depositions the same as stenographic depositions. See, e.g., *Windsor Shirt Co. v. New Jersey Nat'l Bank*, 793 F. Supp. 589, 606-17 (E.D. Pa. 1992), *aff'd mem.*, 989 F.2d 490 (3rd Cir. 1993).

79. See FED. R. CIV. P. 32(a)(2).

80. Thus, under both the federal and Arkansas court rules, to admit the deposition, the court must find either that the witness is deceased, that the witness is out of the country or greater than 100 miles from the courthouse (or under state rule, out of state), that the witness is unable to attend because of age, illness, infirmity or imprisonment, that the witness's attendance could not be procured via subpoena or that "exceptional circumstances" exist. See *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 963 (10th Cir. 1993) (use of physician's deposition denied because proponent failed to use sufficient efforts to enforce subpoena); *Dickmann v. Larson Bus Serv.*, No. C8-95-865, 1995 WL 711105, at *3 (Minn. Ct. App. 1995) (trial court erred in admitting videotaped deposition; voluntary departure on fishing trip did not make him "unavailable"). *But see Reber v. General Motors Corp.*, 669 F. Supp. 717, 720 (E.D. Pa. 1987) (video deposition of physician allowed even though witness unexpectedly returned to within 100 miles of courthouse); *Keil v. Eli Lilly & Co.*, 88 F.R.D. 296, 300-01 (E.D. Mich. 1980) (plaintiff could not unilaterally call expert live since parties previously agreed to videotaped deposition, which had been edited to remove inadmissible evidence).

81. See, e.g., *Marsee v. United States Tobacco Co.*, 866 F.2d 319, 321-22 (10th Cir. 1989) (deponent's grim physical condition combined with low probative value of testimony raised high likelihood that video would unfairly prejudice defendant). *But see Walls v. Armour Pharmaceutical Co.*, 832 F. Supp. 1505, 1508-10 (M.D. Fla. 1993) (admitting video deposition of AIDS victim in wrongful death action against plasma manufacturer).

82. See *Bannister v. Town of Noble*, 812 F.2d 1265, 1271 (10th Cir. 1987) (no error in permitting excerpt from previously-admitted physician's deposition during closing argument); *Newland v. State*, 459 N.E.2d 384, 386 (Ind. 1984). See also *Videotape Evidence in the Courts - 1985*, 26 S. TEX. L.J. 453, 464 (1985).

83. See *United States v. Binder*, 769 F.2d 595, 600-01 (9th Cir. 1985) (jury should not

B. Criminal Cases

In the criminal law context, videos have been used extensively to memorialize confessions⁸⁴ or victim's statements,⁸⁵ to show crime scenes⁸⁶

have been allowed to replay videotaped testimony since it unduly emphasized one portion of evidence). *See also* 2 MCCORMICK ON EVIDENCE § 217, at 29 (4th ed. 1992). *But Cf.* United States v. Sims, 719 F.2d 375, 379 (11th Cir. 1983) (upholding trial court's decision to replay audiotaped testimony), *cert. denied*, 465 U.S. 1034 (1984); Davlin v. State, 313 Ark. 218, 220-23, 853 S.W.2d 882, 884-85 (1993) (victim's videotaped statement to police admitted into evidence and therefore could be replayed to jury if requirements of ARK. CODE ANN. § 16-89-125(e) followed).

84. *See* Hendricks v. Swenson, 456 F.2d 503, 504-07 (8th Cir. 1972); Paramore v. State, 229 So. 2d 855, 858-59 (Fla. 1969), *vacated in part*, 408 U.S. 935 (1972); *see also* Cox v. State, 313 Ark. 184, 189, 853 S.W.2d 266, 268 (1993). *But see* 5 WEINSTEIN'S EVIDENCE ¶ 1001(2)[03], at 1001-34 to -35 (1996) (use of video to show that confessions were voluntarily made "must be viewed with some skepticism" because they may not show what went on immediately before the filming, such as coercion, requests for counsel, and statements inconsistent with guilt).

85. *See* Davlin v. State, 313 Ark. 218, 853 S.W.2d 882 (1993); Grayson v. State, 611 So. 2d 422, 423-24 (Ala. Crim. App. 1992) (admitting video of victim's dying declaration). *But see* Lowery v. Collins, 988 F.2d 1364, 1368-74 (5th Cir. 1993) (admission of videotaped interview of child violated defendant's Sixth Amendment Confrontation Clause rights).

86. The Arkansas Supreme Court has frequently sanctioned the use of crime scene videos. In Williams v. State, 316 Ark. 694, 874 S.W.2d 369 (1994), the Court sustained the admission of a murder scene video that was filmed within thirty minutes of the detective's arrival. *Id.* at 696-97, 874 S.W.2d at 369-70. The Court noted that the video showed the crime scene and shed light on the violence done to the victim, including the nature and extent of wounds, which was deemed relevant to proving the defendant's intent. *Id.* Footage showing the coroner rolling the victim's body to investigate the wounds was deemed inadmissible by the trial court. *Id.* at 696, 874 S.W.2d at 369. Other Arkansas decisions have approved the use of crime scene videos. *See* Weger v. State, 315 Ark. 555, 559, 869 S.W.2d 688, 690 (1994); Cox v. State, 313 Ark. 184, 193, 853 S.W.2d 266, 270-71 (1993); Hickson v. State, 312 Ark. 171, 176, 847 S.W.2d 691, 694-95 (1993) (video properly authenticated through investigating officer's testimony that it accurately depicted what he saw and would help the jury understand his testimony); Logan v. State, 299 Ark. 255, 259, 773 S.W.2d 419, 422 (1989) (silent walk-through tour of crime location admitted). *But cf.* Taylor v. State, 640 So. 2d 1127, 1135 (Fla. Dist. Ct. App. 1994) (crime scene video unduly prejudicial since it panned to family photos and crucifix on wall). Arguments challenging the cumulative nature of admitting both videos and photographs have not fared well on appeal, particularly if the trial court has exercised *some* discretion in limiting their use. *See, e.g.,* Cox, 313 Ark. at 193, 853 S.W.2d at 271; Hickson, 312 Ark. at 176, 847 S.W.2d at 694-95 (trial court foreclosed use of some portions of video and barred audio replay). Periodically, defendants have sought to introduce crime scene videos to dispute officer's credibility over ability to observe certain events. *See, e.g.,* State v. Richardson, 838 S.W.2d 122, 124-25 (Mo. Ct. App. 1992); State v. Jones, 298 So. 2d 774, 776 (La. 1974) (trial court erred in excluding film showing visibility in negligent homicide case). For an extensive discussion of the use of crime scene videos, see Danny R. Veilleux, Annotation, *Admissibility in Homicide Prosecution of Allegedly Gruesome or Inflammatory Visual Recordings of Crime Scene*, 37 A.L.R. 5TH 515 (1996).

or to depict criminal activity that has been captured on film.⁸⁷ Where the filming is adventitious, admissibility may not face serious challenge so long as basic foundational prerequisites outlined above⁸⁸ are met.⁸⁹ Admissibility faces greater scrutiny if the video is the product of premeditated surveillance or monitoring, when the motivation and opportunities for manipulation increase.⁹⁰ The dangers of manipulation grow even greater when videos are used as crime scene reenactments,⁹¹ particularly if the videos use an actor

87. *United States v. Alexandro*, 675 F.2d 34, 43 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982) (use of videotapes of criminal activity in course of Abscam investigation appropriate since they can often serve as the only means of uncovering crime); *United States v. Brager*, 455 F.2d 217, 218 (8th Cir. 1972) (surveillance films of bank robbery admitted); *Hoback v. State*, 286 Ark. 153, 156-57, 689 S.W.2d 569, 571 (1985) (video of drug transaction); *Walker v. State*, 13 Ark. App. 124, 129-30, 680 S.W.2d 915, 919 (1984) (video of accomplice selling stolen truck to undercover officer); *Fisher v. State*, 7 Ark. App. 1, 6, 643 S.W.2d 571, 574 (1982) (upholding admission of surveillance video from grocery store); *French v. State*, 271 Ark. 445, 446, 609 S.W.2d 42, 43 (1980) (video of crime filmed by defendant). *But see Haltiwanger v. State*, 322 Ark. 764, 766-67, 912 S.W.2d 418, 420 (1995) (barring defendant's use of videos of similar robberies committed while defendant was incarcerated on relevancy grounds; no sufficient proffer made to facilitate appellate review).

88. *See supra* text accompanying notes 44 through 46. Unmanned surveillance films pose special but not insurmountable issues as to authentication since, by definition, no witness could testify that the video footage correctly depicts what occurred at the scene. Although the pictorial testimony theory of admissibility is inapplicable, courts have nevertheless permitted authentication under the silent witness theory, under which the film is deemed to be substantive evidence that speaks for itself. *See Fisher v. State*, 7 Ark. App. 1, 6-8, 643 S.W.2d 571, 574-76 (1982).

89. *Williams v. State*, 316 Ark. 694, 696, 874 S.W.2d 369, 370 (1994) (same requirements for admissibility apply to both photographs and videotapes; video of crime scene deemed probative and admissible despite arguably gruesome nature); *Weger v. State*, 315 Ark. 555, 560, 869 S.W.2d 688, 691 (1994); *Hickson v. State*, 312 Ark. 171, 176, 847 S.W.2d 691, 694-95 (1993) (trial court properly admitted crime scene video after foreclosing use of audio portions of tape; alleged cumulative nature of tape deemed insufficient basis for exclusion); *United States v. Bynum*, 567 F.2d 1167, 1171 (1st Cir. 1978) (video of crime detected by surveillance camera deemed admissible).

90. *See United States v. Roach*, 28 F.3d 729, 733 (8th Cir. 1994) (affirming under plain error standard admission of surveillance video showing defendant's purchase of chemicals/equipment necessary for manufacture of methamphetamine); *Fisher v. State*, 7 Ark. App. 1, 5-6, 643 S.W.2d 571, 573-74 (1982) (authenticity of crime surveillance film established through store owner's testimony as to positioning of camera, loading of videotape, starting of filming, return, cessation of filming, changing of film, and continuous custody of video thereafter).

91. *See People v. McClary*, 571 P.2d 620, 626-27 (1977), *overruled on other grounds*, 853 P.2d 1037, 1059 (Cal. 1993); Note, *Manufacturing Evidence for Trial: The Prejudicial Implications of Videotaped Crime Scene Enactments*, 142 U. PA. L. REV. 2125 (1994). *But see Loy v. State*, 310 Ark. 33, 36-37, 832 S.W.2d 499, 501 (1992) (upholding admission of videotaped reenactment of bomb detonation; though simulated bomb was not identical to original, it was substantially similar, which "is all the law requires for an admissible reenactment of an original happening").

to play the part of the defendant.⁹² As in the civil arena, criminal court litigants have attempted to defuse concerns over the dangers of manipulation by characterizing their videos as demonstrative rather than substantive evidence.⁹³ While such characterizations carry some facile appeal, the fact that most jurors will not appreciate the difference at the time the video is played (or remember the difference after all proof has been offered and deliberations begin) counsels in favor of heightened judicial scrutiny.

Due in part to the fact that depositions historically have been disfavored in the criminal law context,⁹⁴ the use of videotaped depositions in criminal cases is more closely scrutinized. Notwithstanding the traditional antipathy toward use of depositions, most states have statutorily authorized courts to admit videographic testimony from child sexual abuse victims.⁹⁵

Like similar statutes from other states, Arkansas Code Annotated section 16-44-203 is designed to insulate children from the pressures and concomitant psychological trauma associated with confronting the alleged abuser in the court room. Prosecutors have often taken advantage of the statute and, consequently, numerous Arkansas criminal cases have involved videotaped testimony from child sexual abuse victims.⁹⁶ The Arkansas Supreme Court has required strict adherence to the *procedural* dictates of Arkansas Code Annotated section 16-44-203,⁹⁷ in order to permit introduc

92. See 3 Charles C. Scott, PHOTOGRAPHIC EVIDENCE § 1329.5 (2d ed. Supp. 1994).

93. See *Pierce v. State*, 671 So. 2d 186, 189-91 (Fla. Dist. Ct. App. 1996) (computer animation of accident reconstruction introduced as demonstrative evidence only).

94. See *Misskelley v. State*, 323 Ark. 449, 472-73, 915 S.W.2d 702, 714 (1996); *Cogburn v. State*, 292 Ark. 564, 567-69, 732 S.W.2d 807, 808-09 (1987); *McGuire v. State*, 288 Ark. 388, 393, 706 S.W.2d 360, 362 (1986). See also *United States v. Armstrong*, 116 S. Ct. 1480, 1485 (1996) (narrowly interpreting Rule 16(a)(1)(C) of the Federal Rules of Civil Procedure to permit discovery of information that defendant can use as a shield, not as a sword).

95. See C. Alan Gauldin, Note, *McGuire v. State: Arkansas Child Abuse Videotape Deposition Laws—Room for Improvement*, 41 ARK. L. REV. 155, 156-57 & nn.11, 12 (1988) (citing statutes).

96. See, e.g., *Richard v. State*, 306 Ark. 543, 815 S.W.2d 941 (1991) (overruling objection to videotaped testimony of four year, ten month old rape victim). But see *Russell v. State*, 269 Ark. 44, 46, 598 S.W.2d 96, 97 (1980) (prosecution's use of videotaped deposition deemed reversible error since, under then applicable statute, ARK. STAT. ANN. § 43-2011 (1977), only defendant had right to take deposition in a criminal case). Act 1022 of 1979, codified at ARK. CODE ANN. § 16-44-201 & 202, amended ARK. STAT. ANN. § 43-2011 and has rendered *Russell* of primarily historical interest only.

97. The statute applies only to testimony by sexual abuse victims under seventeen years of age. It requires that the deposition be videotaped before the judge in chambers and in the presence of the prosecuting attorney, the defense attorney and the defendant. See *Cogburn v. State*, 292 Ark. 564, 569, 732 S.W.2d 807, 809 (1987) (ruling that ARK. STAT. ANN. § 43-2036, later codified at ARK. CODE ANN. § 16-44-203, controls and Rule 803(25) of the Arkansas Rules of Evidence does not apply; consequently, admission of videotape of child ruled prejudicial error); *State v. Lee*, 277 Ark. 142, 143-44, 639 S.W.2d 745, 746-47 (1982)

tion of a child's videotape. However, the court has rather broadly construed the more substantive "good cause" requirement⁹⁸ and has repelled challenges based on the vagueness of the term⁹⁹ and on the quality and quantity of the proof necessary to meet that requirement.¹⁰⁰

While Arkansas Code Annotated section 16-44-203 is a tool solely for the use by the prosecution, Arkansas criminal defendants may take advantage of the video medium through the generic criminal court deposition statutes, Arkansas Code sections 16-44-201 to 202.¹⁰¹ Moreover, a defendant in a capital murder case can exploit the virtues of video by using videotapes to present mitigating evidence free from most admissibility constraints so long as the video evidence is relevant to the issue of punishment and the film appears free from manipulative editing.¹⁰²

(under previous version of statute, if prosecution commenced deposition and witness balked at testifying, prosecution could not thereafter call that witness live at trial). *Cf.* *Davlin v. State*, 313 Ark. 218, 220-23, 853 S.W.2d 882, 884-86 (1993) (reversing conviction because victim's videotaped statement was replayed to jury in jury room outside defendant's presence).

98. The "good cause" requirement is most often established through proof that, due to the victim's tender age and/or emotional state, the child would suffer if required to testify in person at trial. *See, e.g.,* *Greenlee v. State*, 318 Ark. 191, 198, 884 S.W.2d 947, 950 (1994); *Cope v. State*, 293 Ark. 524, 528-29, 739 S.W.2d 533, 535 (1987). *But see* *Chappell v. State*, 18 Ark. App. 26, 33, 710 S.W.2d 214, 217 (1986) (expert testimony not required to establish "good cause"). *Cf.* *United States v. Boyles*, 57 F.3d 535, 546 (7th Cir. 1995) (expert testimony presented before deciding to allow videotaping of testimony).

99. *McGuire v. State*, 288 Ark. 388, 394, 706 S.W.2d 360, 363 (1986). In contrast to the imprecise "good cause" requirements, some states have implemented more definitive standards. *See, e.g.,* MARYLAND CTS. & JUD. PROC. CODE ANN. § 9-102 (1995) (before authorizing closed-circuit testimony, court must determine that "testimony by the child victim in the defendant's presence will result in the child suffering serious emotional distress such that the child cannot reasonably communicate").

100. *See Kester v. State*, 303 Ark. 303, 306-07, 797 S.W.2d 704, 705-06 (1990) (good cause supported through letter from "psychiatric social worker" that live testimony would be "emotionally upsetting" to 11-year old witness; the inability to cross examine letter's author deemed unavailing to defendant); *Greenlee v. State*, 318 Ark. 191, 198, 884 S.W.2d 947, 950 (1994) (sole reliance on testimony of witness' mother deemed sufficient to establish good cause); *Cope v. State*, 293 Ark. 524, 528-29, 739 S.W.2d 533, 535 (1987) (upholding use of videotaped depositions of child victims); *McGuire v. State*, 288 Ark. 388, 394, 706 S.W.2d 360, 363 (1986) (grandparents' testimony that child could be harmed if forced to testify in court deemed sufficient to establish good cause); *Chappell v. State*, 18 Ark. App. 26, 710 S.W.2d 214 (1986). *See also*, Steven M. Ramanoff, Comment, *The Use of Closed-Circuit Television Testimony in Child Sexual Abuse Cases: A Twentieth Century Solution to a Twentieth Century Problem*, 23 SAN DIEGO L. REV. 919 (1986); Note, *The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations*, 98 HARV. L. REV. 806, 813-16 (1985) (providing discussion of various states' videotaping statutes).

101. *See Berna v. State*, 282 Ark. 563, 569, 670 S.W.2d 434, 438 (1984) (authorizing defendant to take expert's videotaped deposition at government expense), *cert. denied*, 470 U.S. 1085 (1985).

102. ARK. CODE ANN. § 5-4-602(4). In light of amendments to section 602(4), a

In the federal courts, subject to the "exceptional circumstances" requirements of Rule 15 of the *Federal Rules of Criminal Procedure*, the availability of videotaping as a recordation medium is treated essentially in the same way as under Rule 30 of the *Federal Rules of Civil Procedure*,¹⁰³ although, as with criminal court depositions in general, actual use at trial is comparatively more restricted.¹⁰⁴ Furthermore, consistent with the dictates of the Confrontation Clause of the Sixth Amendment, the defendant should normally be permitted to be present at the taping.¹⁰⁵

resourceful prosecutor might use videotapes to present victim impact evidence at the sentencing phase of a capital murder trial. *Cf.* Ruiz v. Norris, 868 F. Supp. 1471, 1517-21 nn. 9-10 (E.D. Ark. 1994), *aff'd*, 71 F.3d 1404 (8th Cir 1995) (discussing use of victim impact evidence), *petition for cert. filed*, May 28, 1996. *See also* State v. Mease, 842 S.W.2d 98, 108-09 (Mo. 1992) (upholding use of video of crime scene during penalty phase), *cert. denied*, 508 U.S. 918 (1993).

103. *See* FED. R. CRIM. P. 15(d) (deposition "shall be taken and filed in the manner provided in civil actions" however, as with all depositions in federal criminal court, the court retains authority to impose "additional conditions"). The federal courts have permitted videotaping where, for example, economic realities make it cheaper for counsel to travel to the witnesses' location than to bring witnesses to court. *United States v. Laymon*, 127 F.R.D. 534, 536 (D. Colo. 1989). A similar situation arises when a witness would not likely be available for trial due to incarceration elsewhere. *United States v. Acevedo-Ramos*, 605 F. Supp. 190, 192-93 (D.P.R. 1985).

104. *See* *Government of the Virgin Islands v. Riley*, 754 F. Supp. 61, 63-64 (D.V.I. 1991) (comparing Rule 15(e) of the Federal Rules of Criminal Procedure with Rule 32(a) of the Federal Rules of Civil Procedure). *Cf.* 18 U.S.C. § 3503 (1995 & Supp. 1996). *See also* *United States v. Grooms*, 978 F.2d 425, 429 (8th Cir. 1992).

105. *Compare* *United States v. Benfield*, 593 F.2d 815, 821-22 (8th Cir. 1979) (videotaped deposition violated defendant's confrontation rights since he was kept outside the vision of the witness) *with* *United States v. Terrazas-Montano*, 747 F.2d 467, 469-70 (8th Cir. 1984) (video depositions deemed appropriate because the defendant faced the witness). *Cf.* *Coy v. Iowa*, 487 U.S. 1012, 1022 (1988) (Confrontation Clause violated by Iowa statute that permitted accuser to testify from behind screen which blocked view of defendant). *But cf.* *Johnson v. Lockhart*, 71 F.3d 319, 320-21 (8th Cir. 1995) (Confrontation Clause not violated by physician's testimony about child's out-of-court statements if child is subject to cross examination at trial). *See also*, Tammera L. Rankin, Note, *Evidence—The Confrontation Clause—A Literal Right to a Face-to-Face Meeting*, 11 U. ARK. LITTLE ROCK L.J. 591 (1988-89) (discussing *Coy v. Iowa*, 108 S. Ct. 2798 (1988)). The Confrontation Clause does not require the accuser to "fix his eyes upon the defendant." *Coy*, 487 U.S. at 1019. Moreover, as noted in *Maryland v. Craig*, 497 U.S. 836 (1990), the right to confrontation does not necessarily require face-to-face confrontations in every case, at least if compelling interests counsel otherwise. *Id.* at 847. Congress has statutorily embraced this concept in the context of deposition testimony by child sexual abuse victims. 18 U.S.C. § 3509(b)(2) (Supp. 1996). *See* *United States v. Boyles*, 57 F.3d 535, 545-46 (7th Cir. 1995) (trial court must find that video deposition is necessary to protect child's welfare; that child would be traumatized by defendant's presence; and that such trauma is more than mere nervousness, excitement or reluctance to testify). To the extent that the principles underlying the Confrontation Clause encourage not only face-to-face meetings between the witness and the defendant, but also full observation of the witness by the jury, video depositions are far preferable to stenographically-transcribed depositions. *See* *California v. Green*, 399 U.S. 149, 158 (1970).

C. Playback at Trial

Most seasoned trial attorneys recognize that, notwithstanding the virtues of the videotape medium, an inverse relationship exists between the video's length and its persuasiveness. After fifteen or twenty minutes, jurors' minds tend to wander.¹⁰⁶ Consequently, brevity should remain a foremost objective of the proponent. Yet, at times, interpreting a video requires close and repetitive scrutiny. In certain circumstances, any party may seek to stop the video at a particular frame,¹⁰⁷ play it in slow motion, or even play it in reverse.¹⁰⁸ Moreover, on occasion, courts have permitted parties to furnish the jury with a transcript of the video's audio portions.¹⁰⁹

IV. SURVEILLANCE FILMS AND DAY-IN-THE-LIFE DOCUMENTARIES

Defense attorneys have long used surveillance videos to depict claimants engaged in daily physical activities. Such videos can be used to attack the plaintiff's credibility by providing hard evidence that asserted limitations on physical or mental activities are exaggerations, if not blatant lies.¹¹⁰ The surveillance film can also provide the jury with substantive evidence of the claimant's less-than-bleak daily life and thereby drastically

Yet, video depositions hardly can be deemed truly equivalent to in-person testimony. If, as intimated in *Coy*, the jury should be permitted to "draw its own conclusions" from the accuser's refusal to look the defendant in the eye, then a defendant loses some of the benefits of the Confrontation Clause if the camera angle fails to depict that which would be observed by the jury if testimony were presented in the courtroom. *See Coy*, 487 U.S. at 1019.

106. *See* Steven W. Quattlebaum, *Effective Video Presentations at Trial: Put on a Good Show, But Cut to the Chase (Part II)*, ARK. LAW., Summer 1993, at 56, 63 (1993).

107. *State v. Borden*, 455 N.W.2d 482 (Minn. Ct. App. 1990); *English v. State*, 422 S.E.2d 924, 925 (Ga. Ct. App. 1992) (computer-enhanced copy of individual frame from videotape properly admitted). *But see Commonwealth v. Hindi*, 631 A.2d 1341, 1344-46 (Pa. Super. Ct. 1993) (defendant precluded from showing video in slow motion when he had been permitted to play it at regular speed and use still photographs).

108. *See Scott v. State*, 390 N.W.2d 889 (Minn. Ct. App. 1986).

109. *See United States v. Rosenthal*, 793 F.2d 1214, 1237-39 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Llinas*, 603 F.2d 506, 509-10 (5th Cir. 1979). *But see State v. Reyes*, 704 P.2d 261, 263 (Ariz. Ct. App. 1985) (transcript properly barred).

110. *See, e.g., National Bank of Commerce v. McNeill Trucking Co.*, 309 Ark. 80, 84, 86-87, 828 S.W.2d 584, 586-87 (1992); *Guillot v. Miller*, 580 So. 2d 1104, 1107 (La. Ct. App. 1991); *McGoorty v. Benhart*, 27 N.E.2d 289, 293-96 (Ill. App. Ct. 1940).

curtail damages.¹¹¹ Alternatively, the surveillance film may provide ammunition for a failure-to-mitigate-damages defense.¹¹²

Although serious distortions in sequencing, lighting, or speed can give rise to admissibility problems¹¹³ as noted in *Ponder v. Cartmell*,¹¹⁴ the fact that a surveillance film may depict only a selected portion of a few days in the plaintiff's life goes to the weight of the evidence, not to its admissibility.¹¹⁵ Similarly, the fact that the video is filmed "covertly rather than openly is immaterial."¹¹⁶ Given the extensive track record of surveillance videos, courts have employed a number of tests for establishing the requisite foundation.¹¹⁷

Normally characterized as an innovation of the plaintiff's bar, the day-in-the-life documentary is, in one sense, merely an offensive adaptation of the surveillance video. Both purportedly share the same fundamental objective: to portray the plaintiff in his natural routine.

Notwithstanding the similarity in overall purpose, the two types of presentations differ in three fundamental respects. First, in the day-in-the-life film the subject of the video is normally fully aware of the filming and may therefore exaggerate expressions or limitations,¹¹⁸ whereas in surveillance videos the surreptitious nature of the filming removes the potential for acting by the claimant.¹¹⁹ Second, the potential for pre-film rehearsal, sound

111. See, e.g., *Simons v. State Compensation Mut. Ins. Fund*, 865 P.2d 1118, 1122 (Mont. 1993) (surveillance video was offered for substantive proof, not to impeach credibility). Most surveillance videos contain both impeachment and substantive evidence. See also *Shushereba v. R.B. Indus., Inc.*, 104 F.R.D. 524, 531-32 (W.D. Pa. 1985) (surveillance film properly used both to impeach credibility and to refute plaintiff's contention that he cannot return to work).

112. See, e.g., *Marion County v. Cavanaugh*, 577 So. 2d 599, 600 (Fla. Dist. Ct. App. 1991) (surveillance film should have been admitted *inter alia* to show that plaintiff was doing physical work harmful to his back in violation of doctor's orders).

113. See *Utlely v. Heckinger*, 235 Ark. 780, 786-87, 362 S.W.2d 13, 17 (1962) (portions of film should be deleted instead of simply giving jury instruction to ignore); *Blanchard v. Means Indus., Inc.*, 635 So. 2d 288, 294 (La. Ct. App. 1994) (surveillance video barred because it was not timed, film portions ran together, and it lacked significant impeachment value).

114. 301 Ark. 409, 784 S.W.2d 758 (1990).

115. *Id.* at 413, 784 S.W.2d at 761.

116. See *Carney v. Smith*, 608 N.E.2d 379, 383 (Ill. App. Ct. 1992).

117. See Jordan S. Gruber, *Foundation for Contemporaneous Videotape Evidence*, 16 AM. JUR. PROOF OF FACTS 3d 493 (1992).

118. *Bannister v. City of Noble, Oklahoma*, 812 F.2d 1265, 1269 (10th Cir. 1987). See also *Marion County v. Cavanaugh*, 577 So. 2d 599 (Fla. Dist. Ct. App. 1991) (overturning trial court's exclusion of thirty minute surveillance tape; fact that tape was a distillation of forty-four hours of footage did not render it inadmissible).

119. See Douglas A. Graham & Daryl J. Lapp, *Day-in-the-Life Videos: Evolving Arguments on their Making and Use at Trial*, 27 TORT & INS. L.J. 574, 591 (1992) (observing that, by their very nature, "day-in-the-life films involve a staged or packaged

enhancement, or multiple takes to “get it right” always exists with the filming of day-in-the-life videos,¹²⁰ whereas the surveillance videographer usually labors under the handicaps of poor camera angles, bad lighting or atmospheric conditions and frequently, though unintentionally, uncooperative subjects.¹²¹ Thus the potential for manipulation—though not entirely absent in surveillance videos¹²²—is comparatively greater in day-in-the-life films. Third, whereas surveillance films are most often used to portray the claimant in a single act that belies his professed disabilities, the day-in-the-life film is offered as a summary of a typical day.¹²³

A. Admissibility of Day-in-the-Life Videos

The potential for manipulation and exaggeration creates a welter of issues both as to admissibility and discovery. When day-in-the-life videos were a relatively new phenomenon, courts were particularly responsive to

presentation of facts, whereas a surveillance film involves a recording of unrehearsed fact”). See also *Egelhoff v. Holt*, 875 S.W.2d 543, 550 (Mo. 1994) (surveillance film deemed highly relevant since it is the next best thing to allowing jury to observe plaintiff’s movements at a time when she is unaware of being observed).

120. For an analysis of the various types of manipulative techniques that are available when day-in-the-life videos are filmed, see Monty L. Preiser & Mark L. Hoffman, *Day-in-the-Life Films—Coming of Age in the Courtroom* (pt. 1), 17 TRIAL 26, 29-30 (1981) and Charles W. German et al., *Videotape Evidence at Trial*, 6 AM. J. TRIAL ADVOC. 209, 210, 215-18, 224-26 (1982).

121. *But see Maryland Casualty Co. v. Coker*, 118 F.2d 43, 44 (5th Cir. 1941) (upholding admission of surveillance film though defendant staged the event by inviting plaintiff to party complete with plenty of liquor and female companions).

122. See *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973) (observing that in surveillance films, “the camera may be an instrument of deception. . . . Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events.”); *Jenkins v. Rainer*, 350 A.2d 473 (N.J. 1976).

123. This gives rise to numerous evidentiary issues. The first stems from the fact that the term “day-in-the-life” is a misnomer because neither is the film a *day* in length, nor is it necessarily representative of the witness’s *life*. Seen in this light, the day-in-the-life documentary is at best merely a *summary* of a day in the plaintiff’s life. Yet whereas with the presentation of conventional summaries, the party against whom the summary is offered typically must be given the opportunity to examine all components that lead to preparation of the summary (see FED. R. EVID. 1006; ARK. R. EVID. 1006), a party opposing introduction of a day-in-the-life film normally has no access to the “rest of the day” that has not been depicted in the final product or in related out takes.

In a similar vein, it is noteworthy that the true purpose of the film is not to present merely *one* day in the plaintiff’s life, but rather to portray the plaintiff’s *life* through the filming of a purportedly typical day. Again, the defense attorney normally lacks access to the proof that she would normally be afforded if the summary being offered were work papers, computer records, or photographs.

defense arguments against admissibility. In one leading case, *Thomas v. C.G. Tate Constr. Co.*,¹²⁴ the plaintiff sought to introduce a video that graphically depicted a rigorous, twenty-seven minute physical therapy session. Citing video footage that showed the plaintiff in extreme pain and anguish, the court observed that the film's inflammatory nature would surely incite sympathy for the plaintiff.¹²⁵ The court also pointed out that there was "no way in which the defendant can possibly depict with equal impact those periods of time during the plaintiff's recovery process when he was either free of pain or relatively speaking, free of pain."¹²⁶ Finding it unduly prejudicial, the court barred the use of the video at trial.¹²⁷

Such analysis typifies the reluctance with which trial courts have often viewed such evidence.¹²⁸ Defense counsel therefore most frequently raise the specter of unfair prejudice when challenging admission of day-in-the-life videos. But such is not the only hurdle the plaintiff's attorney must overcome.

By definition, a day-in-the-life documentary is problematic. The underlying concept is that the video accurately portrays a "typical" day when, in fact, there may be no such thing. Thus, concerns expressed in *Thomas*¹²⁹ over the defendant's relative lack of access to proof deserve reflection.¹³⁰ While virtually the same problem arises with all evidence that is not equally accessible to all parties, a real danger posed by the admission of day-in-the-life videos stems from the lack of any practical restraint on how the jury will use the information contained therein. In short, despite

124. 465 F. Supp. 566 (D.S.C. 1979).

125. *Id.* at 569.

126. *Id.* at 571. See also *supra* note 123.

127. *Thomas*, 465 F. Supp. at 571. Part of the court's rationale—the relative novelty of using videotape technology in the courtroom—is now obsolete.

128. See also *Haley v. Byers Transp. Co.*, 414 S.W.2d 777, 780-81 (Mo. 1967); *Butler v. Chrestman*, 264 So. 2d 812, 816 (Miss. 1972); *Transit Homes v. Bellamy*, 282 Ark. 453, 462, 671 S.W.2d 153, 158-59 (1984) (day-in-the-life film should not have been shown to jury since it was impossible to distinguish limitations that were linked to accident from those that preexisted accident). But see *Elk Corp. v. Jackson*, 291 Ark. 448, 457, 725 S.W.2d 829, 834 (1987) (appellant failed to demonstrate how day-in-the-life tape was inadmissible).

129. *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566, 571 (D.S.C. 1979). See also *Foster v. Crawford Shipping Co.*, 496 F.2d 788, 791-93 (3d Cir. 1974) (*ex parte* nature of filming unduly prejudiced defendant).

130. Some courts have reasoned that the plaintiff's availability for cross-examination at trial mitigates the dangers of prejudice. See *DeBiasio v. Illinois Central R.R.*, 52 F.3d 678, 687 (7th Cir. 1995), *cert denied*, 116 S. Ct. 1040 (1996); *Bannister v. Town of Noble*, 812 F.2d 1265, 1270 (10th Cir. 1987). But this overlooks the fact that the lag time between filming and cross-examination at trial understandably may dull the plaintiff's memory, thereby giving the plaintiff (or any other attesting witness) an easy way to avoid effective cross-examination.

a judge's limiting instruction,¹³¹ the potential exists that jurors may view that which is supposed to be mere *illustrative* evidence as *substantive* evidence.¹³² Moreover, jurors may unconsciously fill in gaps in the proof with whatever happens to be shown in the video.¹³³

Efforts to use day-in-the-life videos have been challenged on grounds that they constitute hearsay,¹³⁴ that they are cumulative,¹³⁵ that they are

131. *Cf.* Carter v. Missouri Pac. R.R., 284 Ark. 278, 279-81, 681 S.W.2d 314, 315 (1984) (despite limiting instruction and representation that film was not offered as a "re-creation," film of accident scene was a re-creation and therefore was inadmissible because essential elements were not "substantially similar" to actual situation).

132. *See* Foster v. Crawford Shipping Co., 496 F.2d 788, 791-92 (3d Cir. 1974) (video of plaintiff used not merely for illustrative purposes, but also as substantive evidence to establish plaintiff's medical condition).

133. *Cf.* King v. Copp Trucking, Inc., 853 S.W.2d 304, 309 (Mo. Ct. App. 1993) (video of experiment excluded because jury may be inclined to fill in "unascertainable facts" with circumstances portrayed in video).

134. *See* Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 610-11 (D. Alaska 1977) (although hearsay, film deemed admissible under the residual exception of Rule 803(24)); *But see* Haley v. Byers Transp. Co., 414 S.W.2d 777, 780 (Mo. 1967); *see also* Foster v. Crawford Shipping Co., 496 F.2d 788, 791 (3d Cir. 1974); Sprynczynatyk v. General Motors Corp., 771 F.2d 1112, 1117 (8th Cir. 1985) ("In general a videotape offered to prove the truth of the matter asserted constitutes inadmissible hearsay."), *cert. denied*, 475 U.S. 1046 (1986). Certainly, hearsay challenges are inevitable if the tape contains narrative and such challenges will normally succeed if the narrator is unavailable for cross-examination at trial. *Cf.* Wilson v. Piper Aircraft Corp., 577 P.2d 1322, 1329-30 (Or. 1978). Yet even nonverbal conduct may trigger hearsay objections if it can be construed as a nonverbal assertion. *But see* Strach v. St. John Hosp. Corp., 408 N.W.2d 441, 453 (Mich. Ct. App. 1987) (admitting video despite some unfairly prejudicial portions and rejecting hearsay challenge).

135. *See* Bolstridge v. Central Main Power Co., 621 F. Supp. 1202, 1204 (D. Me. 1985) (video deemed cumulative of oral testimony and in-court demonstrations); Ashley v. Nissan Motor Corp., 321 So. 2d 868, 872-73 (La. Ct. App. 1975) (film of plaintiff in hospital deemed cumulative of fourteen still photographs). *See also* Repple v. Barnes Hosp., 778 S.W.2d 819, 823 (Mo. Ct. App. 1989) (excluding video since plaintiff appeared at trial and was able to demonstrate daily activities through conventional testimony); Helm v. Wismar, 820 S.W.2d 495, 497 (Mo. 1991); J. B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 1001(2)[103], at 1001-43 (1993) (describing need for heightened scrutiny as to the cumulative nature of videos). *But see* Elk Corp. v. Jackson, 291 Ark. 448, 457, 725 S.W.2d 829, 834 (1987) (trial court's admission of day-in-the-life film will not be overruled notwithstanding its alleged cumulative nature if probative value outweighs any prejudice); Apache Ready Mix Co. v. Creed, 653 S.W.2d 79, 83-84 (Tex. Ct. App. 1983) (day-in-the-life video of semicomatose quadriplegic admitted because evidentiary value and relevance outweighed prejudice resulting from repetitiveness); Jones v. City of Los Angeles, 24 Cal. Rptr. 2d 528, 533-34 (Cal. Ct. App. 1993) (since film is "best evidence of the plaintiff's pain and suffering and loss of enjoyment of life," it is not cumulative).

The discord among decisions involving challenges based on the cumulative nature of videos stems, at least in part, from a broader dispute over whether photographic evidence can ever be cumulative of other non-photographic evidence. *Compare* United States v. Falcon, 766 F.2d 1469, 1477-78 (10th Cir. 1985) (video excluded because expert witness previously testified about subject matter) and Balian v. General Motors Corp. 296 A.2d 317, 322 (N.J.

inflammatory,¹³⁶ and that they delve into collateral issues.¹³⁷ Likewise, questions over the methodology of recordation, staging, editing, or other material alterations remain as stumbling blocks for admissibility.¹³⁸

Notwithstanding these impediments to admissibility, courts have been increasingly more receptive to day-in-the-life video evidence. For example, after noting the various theoretical concerns inherent in day-in-the-life videos, the court in *Bannister v. Town of Noble*,¹³⁹ upheld admission even though it recognized that some of the footage depicted the plaintiff "conducting activities that he would be unlikely to do frequently."¹⁴⁰ Likewise in the oft-cited *Grimes v. Employers Mutual Liability Insurance Co.*¹⁴¹ case, the court rejected arguments that the film was selective and cumulative and constituted inadmissible hearsay. As the court observed, "[t]he films illustrate, better than words, the impact the injury has had on the plaintiff's life in terms of pain and suffering and loss of enjoyment of life. While the scenes are unpleasant, so is plaintiff's injury."¹⁴² Some courts attempt to mitigate the prejudicial impact of day-in-the-life videos either by limiting the scope of their use or by giving limiting instructions.¹⁴³

1972) (film deemed cumulative in light of previous testimony of expert witness) with *Grimes v. Employers Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Alaska 1977) (photographic evidence is generally cumulative only of other similar photographic evidence). See also 2 CHARLES C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1022 (2d ed. 1993). Regardless of whether the video is technically cumulative of other evidence, the court retains the authority to weigh whether excluding inflammatory film would deprive the plaintiff of critical damages testimony. If plenty of other damages evidence exists, the court can discharge a conventional Rule 403 balancing analysis and exclude a film that might arouse undue sympathy from the jury. *Haley v. Byers Transp. Co.*, 414 S.W.2d 777, 780 (Mo. 1967) (excluding day-in-the-life film since, *inter alia*, considerable other evidence existed to convey plaintiff's message); *Ashley v. Nissan Motor Corp.*, 321 So. 2d 868, 872 (La. Ct. App. 1975). See also *Easterling v. Weedman*, 54 Ark. App. 22, 37, 922 S.W.2d 735, 742 (1996) ("[T]he probative value of evidence correlates inversely to the availability of other means of proving the issue.").

136. See, e.g., *Thomas v. C.G. Tate Constr. Co.*, 465 F. Supp. 566, 570-71 (D.S.C. 1979); *Butler v. Chrestman*, 264 So. 2d 812 (Miss. 1972).

137. *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 687 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1040 (1996). See also *In re Marriage of Willis*, 599 N.E.2d 179, 182 (Ill. App. Ct. 1992) (proscribing use of day-in-the-life video at child custody proceeding in light of statute requiring presence of counsel during interview of child and potential for adverse effect on children).

138. For a discussion of considerations in preparing and authenticating or challenging day-in-the-life videos, see Fred I. Heller, *Planning and Producing A "Day-in-the-Life" Videotape in a Personal Injury Lawsuit*, 39 261 (1989), and Fred I. Heller, *Using or Challenging a "Day-in-the-Life" Documentary in a Personal Injury Lawsuit*, 40 249, § 949-59 (1990) (discussing modes of challenging such videos).

139. 812 F.2d 1265 (10th Cir. 1987).

140. *Id.* at 1270.

141. 73 F.R.D. 607 (D. Alaska 1977).

142. *Id.* at 610.

143. See, e.g., *Elk Corp. v. Jackson*, 291 Ark. 448, 457, 725 S.W.2d 829, 834 (1987)

The case law is bereft of any formulaic approach toward authenticating day-in-the-life films. Nevertheless, several key themes emerge. As an initial matter, proper authentication requires testimony from a qualified witness that the scenes depicted on the video are indeed representative of the plaintiff's prototypical day.¹⁴⁴ Since day-in-the-life videos are normally heavily edited, the sponsoring witness should testify as to who was involved in the filming, how the filming and editing were conducted and, most importantly, establish that the film fairly and accurately portrays what it is intended to portray.¹⁴⁵

B. Discovery of Surveillance and Day-in-the-Life Videos

Discovery¹⁴⁶ of surveillance films has been litigated extensively at the federal and state court level. Defendants have argued, with varying degrees of success, that pretrial disclosure blunts the impact of effective cross-examination since it enables the plaintiff to tailor his testimony to the information depicted in the films. Several courts have agreed, rebuffing pretrial disclosure since it would merely "frustrate an effective cross-examination and . . . avoid the possibility of impeachment."¹⁴⁷

The clear majority view, however, is that notwithstanding the legitimacy of such concerns and the fact that such films normally constitute work product, surveillance films are discoverable prior to trial.¹⁴⁸ Most

(day-in-the-life video played with sound turned off); *DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 687 (7th Cir. 1995) (limiting instruction).

144. *Jones v. City of Los Angeles*, 24 Cal. Rptr. 2d 528, 530 & n.5 (Cal. Ct. App. 1993) (nurse properly authenticated video by testifying that she was present during filming, had previously seen plaintiff prior to filming, and was aware of her routine).

145. Once admitted, the day-in-the-life video can be shown in closing statements. *See Bannister*, 812 F.2d at 1271.

146. For purposes of discovery, courts have ruled that a request for "photographs" may, in some instances, be construed to encompass videotapes. *See Crawford v. Deets*, 828 S.W.2d 795, 799 (Tex. Ct. App. 1992) (upholding exclusion of videotape that was not produced following discovery request for "photographs"); *Kiss v. Jacob*, 633 A.2d 544, 547-48 (N.J. Super. Ct. App. Div. 1993), *rev'd on other grounds*, 650 A.2d 336 (N.J. 1994).

147. *Mort v. A/S D/S Svendborg*, 41 F.R.D. 225, 227-28 (E.D. Pa. 1966). *Accord Hickel v. Abousy*, 41 F.R.D. 152, 155 (D. Md. 1966). *See also Wilson v. Southern Ry.*, 431 S.E.2d 383, 387-88 (Ga. Ct. App. 1993) (affirming admission of surveillance tape despite claims that plaintiff was not informed of its existence until second day of trial), *cert. denied*, 114 S. Ct. 1303 (1994).

148. *See, e.g., Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517-18 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1536 (1994); *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 156-60 (N.D. Iowa 1994); *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54-55 (E.D.N.Y. 1974); *La Villarena, Inc. v. Acosta*, 597 So. 2d 336 (Fla. Dist. Ct. App. 1992); *Collins v. Crosby Group, Inc.*, 551 So. 2d 42 (La. Ct. App. 1989). Such rulings are premised primarily on the need to be able to verify the video's accuracy, through the use of experts or otherwise, long

courts that have adopted this position have tempered its effect by ruling that a defendant need not make such disclosure until after the plaintiff's deposition.¹⁴⁹ Such an approach quells the potential for the plaintiff to exaggerate his condition, but preserves an avenue for impeachment for the defense in case the plaintiff lies.¹⁵⁰

Discovery of day-in-the-life films has also been hotly contested. While there has been little dispute about whether defense counsel may inspect the plaintiff's day-in-the-life video, the *timing* of such discovery has prompted serious controversy. Given the potential for selective editing, defense counsel in *Cisarik v. Palos Community Hospital*¹⁵¹ sought leave to be able to attend the filming of the plaintiff's day-in-the-life video.¹⁵² The trial court granted such relief, but the defendant was subsequently rebuffed by the Illinois Appellate Court and by a divided Illinois Supreme Court,¹⁵³ which ruled that the defense had no such right.

While the *Cisarik* decision has been strongly and justifiably criticized,¹⁵⁴ the defense bar is not left wholly remediless. Just as the trend is toward full discovery of surveillance films, the defense should also be permitted full discovery of day-in-the-life videos and all related outtakes. Even when such discovery fails to provide a basis for successfully challenging the introduction of the video, the defense may request bifurcation of the liability and damages phases of the trial,¹⁵⁵ and/or seek to play

before trial and, secondarily, on the notion that full discovery may promote settlement. *See also* Ponder v. Cartmel, 301 Ark. 409, 413, 784 S.W.2d 758, 761 (1990). In light of work product concerns, production of surveillance films that are not intended to be used at trial should not normally be compelled. *See* Fisher v. National R.R. Passenger Corp., 152 F.R.D. 145, 150-55 (S.D. Ind. 1993). *But see* Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986) (requiring production of all films); Corrigan v. Methodist Hosp., 158 F.R.D. 54, 58-59 (E.D. Pa. 1994).

149. *See* Forbes v. Hawaiian Tug & Barge Corp., 125 F.R.D. 505, 508 (D. Haw. 1989); Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986); Snead v. American Export - Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151-52 (E.D. Pa. 1973); Cabral v. Arruda, 556 A.2d 47 (R.I. 1989); Rodger v. New York, 585 N.Y.S.2d 32, 32 (N.Y. App. Div. 1992) (disclosure delayed pending *second* deposition of plaintiff). Likewise, at least one court has ruled that, if defense counsel ultimately decides against using surveillance videos at trial, plaintiff may not comment on such a tactical decision. *See* DiMichel v. South Buffalo Ry., 604 N.E.2d 63, 69 (N.Y. 1992), *cert. denied*, 114 S. Ct. 68 (1993).

150. *See* Wegner, 153 F.R.D. at 160.

151. 549 N.E.2d 840 (Ill. App. Ct. 1984).

152. *Id.* at 842.

153. 579 N.E.2d 873 (Ill. 1991). *But see id.* at 877 (Miller, C.J., dissenting) ("[D]ay-in-the-life film is a distinct type of evidence, one that is not simply equivalent to still photographs, charts, and graphs Indeed, there might be circumstances in which a film will not be admissible unless opposing counsel has been afforded the opportunity to attend its preparation.").

154. *See* Graham & Lapp, *supra*, note 119, at 587-92.

155. *See* Grimes v. Employers Mut. Liab. Ins. Co., 73 F.R.D. 607, 610 (D. Alaska 1977).

the video and then question prospective jurors during *voir dire* in an effort to identify jurors who would be unduly impacted by the film.¹⁵⁶

V. RECOVERY OF COSTS

The reported federal case law regarding the recovery of costs for videotaped depositions is marked by utter discord. Some courts have permitted only the costs of a regular stenographer's deposition, and other courts have fashioned alternative remedies.¹⁵⁷ One leading decision, *Commercial Credit Equipment Corp. v. Stamps*,¹⁵⁸ embraced a Solomon-like approach—allowing recovery of the expense of videotaping and replaying depositions at trial, but foreclosing recovery of a court reporter's stenographic transcription fees.¹⁵⁹

Such penurious approaches ignore both the practical realities of the situation as well as the fact that under Rules 26 and 32 of the *Federal Rules of Civil Procedure*, a party seeking to use a videotaped deposition at trial must normally submit an accompanying transcript.¹⁶⁰ Given the primary rationale for permitting videotaped depositions—that juries' credibility determination and fact finding are significantly enhanced through the visual medium¹⁶¹—and considering the fact that rules require written transcripts to accompany the videotape, courts should normally award the prevailing party reasonable videotaping, playback, and transcription expenses.¹⁶²

156. *Roberts v. Sisters of St. Francis Health Servs.*, 556 N.E.2d 662 (Ill. App. Ct. 1990). See also *Graham & Lapp*, *supra* note 119, at 592-94.

157. See *Fressell v. AT&T Technologies*, 103 F.R.D. 111, 116 (N.D. Ga. 1984) (limiting recovery to the then-existing \$30 per diem witness fee); *Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891 (5th Cir. 1993) (denying recovery of video technician's fees on the grounds that such are not provided for under 28 U.S.C. § 1920), *cert. denied*, 114 S. Ct. 1303 (1994); *Echostar Satellite Corp. v. Advanced Communications Corp.*, 902 F. Supp. 213, 215-16 (D. Col. 1995) (same). Cf. *Pearce v. General Am. Life Ins. Co.*, 637 F.2d 536, 543-44 (8th Cir. 1980) (disallowing costs of videotaping undertaken in wake of party's refusal to admit certain facts).

158. 920 F.2d 1361 (7th Cir. 1990).

159. *Id.* at 1368-69. The court reached this result even though the expense was greater than that of two stenographically-recorded depositions. *But see Miller v. National R.R. Passenger Corp.*, 157 F.R.D. 145 (D. Mass 1994) (refusing to award costs for videotaping and playback in court of physician's deposition on the grounds that they are not authorized under 28 U.S.C. § 1920). *Accord*, *Barber v. Ruth*, 7 F.3d 636, 645 (7th Cir. 1993); *Macario v. Pratt & Whitney Canada, Inc.*, No. CIV.A. 90-3906, 1995 WL 550444 (E.D. Pa. Sept. 14, 1995); *Jamison v. Cooper*, 111 F.R.D. 350, 352 (N.D. Ga. 1986). See also *Gordon v. Castle Oldsmobile & Honda, Inc.*, 157 F.R.D. 438, 442 (N.D. Ill. 1994) (ruling that stenographic transcription costs of videotaped depositions are not recoverable).

160. See FED. R. CIV. P. 26(a)(3)(B) & 32(c).

161. See *supra* note 2 and accompanying text.

162. See *Garonzik v. Whitman Diner*, 910 F. Supp 167, 170-72 (D.N.J. 1995); *Weseloh-*

VI. CONCLUSION

The technological explosion over the last two generations has fostered an expectation that communication is often best received through a television screen. It was therefore inevitable that videotapes would become standard equipment for most trial lawyers. However, the entree into the courtroom has not been without growing pains¹⁶³ for the simple fact that, as in many areas, technological changes have generally outpaced accompanying evidentiary advances.¹⁶⁴

Yet, in many respects, the pendulum has swung. During the past fifteen years judicial responses to proffered videographic evidence have closed some of the gap and ushered in a relatively more relaxed courtroom atmosphere toward admissibility. This can be seen not only in the promulgation of rules that have facilitated the use of videotaped depositions, but also in wider use of such foundational innovations as the "silent witness" theory, and in greater receptivity towards the admission of videographic accident reconstructions and day-in-the-life documentaries.

The irony is that, as courts have become less apprehensive about the technology—and particularly less wary about the prospects for fabrication—the technology itself has mutated. The emergence of digital technology has breathed new life into concerns about the prospects of manipulation and outright fabrication of videographic evidence. While this potential should not cast a pall over the entire field of videographic authentication, it does call for some degree of caution.

Notwithstanding these concerns, courts should not lose sight of the fact that videographic evidence—whether illustrative or substantive—can play a vital role at trial. If the ultimate goal is to insure that jurors have the best possible tools to unravel disputes, then the use of videotapes should be encouraged and impediments to full-scale implementation of the medium

Hurtig v. Hepker, 152 F.R.D. 198 (D. Kan. 1993) (awarding costs of videotaping and stenographic transcriptions); Meredith v. Schreiner Transp., Inc., 814 F. Supp. 1004, 1006 (D. Kan. 1993) (same). Barring amendment to the current language in Rule 30 of the Arkansas Rules of Civil Procedure or to the proposed revisions, see *supra* note 28, there is no authority in Arkansas state court for the recovery of any expenses associated with video depositions. See Wood v. Tyler, 317 Ark. 319, 322, 877 S.W.2d 582, 583 (1994). In light of the analysis outlined above, the proposed amendments to the Arkansas Rules of Civil Procedure should be revised to provide for recovery of such costs.

163. See 2 MCCORMICK ON EVIDENCE § 214, at 17 (John W. Strong et al. eds., 4th ed. 1992).

164. See Jordan S. Gruber et al., *Video Technology*, in 58 AM. JUR. TRIALS § 64 (1996) (discussing technological changes in videography). Cf. *Aside, The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1477-78 (1975) (chronicling regulatory responses in the wake of strategic innovations in the game of baseball).

such as overly penurious limitations on recovery of costs and certain unnecessarily onerous chain-of-custody foundational hurdles, should be eliminated.

