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Videotaped Trial Court Proceedings: The Potential Effect on Appellate Review of Credibility Determinations

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Abstract

Appellate courts have traditionally afforded great deference to a trial court's factual findings, both in jury and non-jury trials.

KEYWORDS: videotape, trials, court

Videotaped Trial Court Proceedings: The Potential Effect on Appellate Review of Credibility Determinations

I. Introduction

Appellate courts have traditionally afforded great deference to a trial court's factual findings, both in jury¹ and non-jury² trials. Particular deference has generally been given to the trial court's findings which were based on credibility determinations made by the fact finder.³ The policy reasons underlying such deferential standards of review range from a constitutional basis in jury trials⁴ to a practical or prudential basis; namely, the trial court's superior position to judge the credibility of witnesses.⁵ That is, trial courts have a significant advantage over appellate courts in making such factual determinations — they have a unique opportunity to observe the demeanor of witnesses⁶ and the accuracy of their recollection.⁷ Appellate courts, in contrast, do not have this opportunity,⁸ since official trial records have almost exclu-

1. See U.S. CONST. amend. VII. Most state constitutions contain a similar guarantee. See Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 381 (1984).

2. See, e.g., FED. R. CIV. P. 52(a); KY. R. CIV. P. 52.01. See also *CIC Leasing Corp. v. Dade Linen and Furniture Co.*, 279 So. 2d 73 (Fla. 3d Dist. Ct. App. 1973).

3. See, e.g., FED. R. CIV. P. 52(a); KY. R. CIV. P. 52.01. Both rules state that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See also *Povia v. Melvin*, 66 So. 2d 494 (Fla. 1953); *S. Kornreich and Sons, Inc. v. Titan Agencies, Inc.*, 423 So. 2d 940, 941 (Fla. 3d Dist. Ct. App. 1982).

4. See U.S. CONST. amend. VII. The seventh amendment provides that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the Rules of the common law." *Id.* Similar provisions are contained in most state constitutions. See Brennan, *supra* note 1, at 381.

5. See, e.g., *United States v. General Motors*, 384 U.S. 127, 141 n.16 (1966); *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984); *Lincoln v. Board of Regents*, 697 F.2d 928, 939 (11th Cir. 1983); *Wedding v. Wingo*, 483 F.2d 1131, 1136 (6th Cir. 1973); *Emery Air Freight v. Cornil*, 414 So. 2d 1167, 1168 (Fla. 5th Dist. Ct. App. 1982); *Bali, Inc. v. Sherwood's Commercial Brokers*, 326 So. 2d 21 (Fla. 1st Dist. Ct. App. 1975).

6. See, e.g., *Emery Air Freight*, 414 So. 2d at 1168.

7. See, e.g., *McConney*, 728 F.2d at 1201.

8. See, e.g., *Wedding*, 483 F.2d at 1136; *Lydle v. United States*, 635 F.2d 763,

sively been presented on appeal in transcript form.

Trial courts have traditionally employed a number of different court reporting methods in creating an official record of its proceedings.⁹ The most common has been court stenography (machine shorthand).¹⁰ Each of these methods produce a record in transcript form.¹¹ Appellate courts rely on this transcript when reviewing a case on appeal. This type of record affords appellate judges little, if any, opportunity to make credibility determinations based on the testimony of witnesses since they can neither hear nor observe the witness. Therefore, substantial deference has been given to trial court's decisions in these matters.¹²

Recently, however, videotaping has proven itself as a viable alternative to those court reporting techniques most commonly employed.¹³ Unlike a transcribed record, videotape allows an appellate court to hear the testimony and observe the demeanor of witnesses.

This Note will examine the issues which may arise from the use of videotape as the official trial record on appeal. First, a brief technical description will be given of the videotaping system presently used in many Kentucky trial courts to produce an official trial record. The feasibility and desirability of a videotaped trial record will also be explored by highlighting the system's key advantages and disadvantages. Second, an overview of current uses of videotape in judicial proceedings, other than as a court reporting method, will be presented. Finally, a detailed analysis will be made of the potential effects which this state-of-the-art videotape technology could have on appellate practice; in particular, the potential effect on appellate review of a trial court's factual findings based on the credibility of witnesses.¹⁴

765 n.1 (6th Cir. 1981).

9. Steelman & Conti, *An Evaluation of Kentucky's Innovative Approach to Making a Videotape Record of Trial Court Proceedings* (Apr. 1985) (publication of the Nat'l Center for State Courts). For a detailed description and analysis of these other methods see *id.* at 24-64; see also Greenwood and Dodge, *Management of Court Reporting Services* (1976) (publication of the Nat'l Center for State Courts).

10. Steelman and Conti, *supra* note 9, at 25.

11. *Id.*

12. See *supra* text accompanying notes 3-5.

13. Steelman and Conti, *supra* note 9, at 5.

14. Existing statutory or jurisdictional limitations on the use of videotape as an official record on appeal must be amended or eliminated as to allow such use of videotape. See, e.g., FED. R. APP. P. 10. The rule provides that "the transcript of proceedings shall constitute the record on appeal in all cases." *Id.* "Transcript" is defined as "the word-for-word typing of everything that was said 'on the record' during the trial."

II. The Videotaped Record — A Look at the Kentucky System

Courts in various states have considered using videotape as a court reporting method since the advent of video technology.¹⁵ Video technology, however, has only recently advanced to the point where videotape can be used effectively and efficiently to produce an official record of trial court proceedings.¹⁶

Kentucky has been the pioneer state in accepting and implementing the use of videotape as the official trial court record.¹⁷ Accordingly, in June of 1986 the Kentucky Supreme Court issued an order establishing procedures for videotaped appeals.¹⁸ Under the order, video recording of trial court proceedings may now serve as the official record on appeal.¹⁹ The order stated that "[t]he official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings."²⁰ The order further provides that "[t]he official videotape recording . . . shall constitute the entire original record on appeal . . . [and] no transcript of court proceedings shall be made a part of the record on appeal except as provided in Paragraph 3 of this order."²¹

BLACK'S LAW DICTIONARY 1342 (5th ed. 1979). The rule further provides that "the appellant shall order from the reporter a transcript of such parts of the proceeding" FED. R. APP. P. 10(b). Likewise, appellate rules governing the use of videotape records on appeals must be established. See, e.g., Order Establishing Procedures for Using Videotape Equipment to Record Court Proceedings, Ky. S. Ct. (Jun. 1986) [hereinafter cited as Order].

15. Steelman and Conti, *supra* note 9. From 1973 to 1975, Ohio and Tennessee experimented with the use of videotape as a court reporting method. Those efforts were discontinued as a result of excessive cost and technical difficulties with the videotaping system. *Id.* at 10-14.

16. Telephone interview with Robert McBeath, Administrative Assistant to the Kentucky Supreme Court (Sept. 24, 1986) [hereinafter McBeath].

17. *Id.*

18. Order, *supra* note 14.

19. *Id.*

20. *Id.* at 1.

21. *Id.* at 2. Paragraph 3 of the order does provide, however, that upon request by the appellate court, transcription may be made of any portion of the videotaped record which it deems necessary. *Id.* at 6. Parties are also permitted to attach to their appellate brief an evidentiary appendix containing limited "transcription of only those parts of the videotape recording that support the specific issues or contentions raised in a brief on appeal or that relate to the question of whether an alleged error was properly preserved for appellate review." *Id.* at 5.

In 1981, Kentucky began experimenting with videotaping as an alternative method of producing a trial court record. This experimentation resulted from problems encountered with Kentucky's existing court reporting method: namely, excessive costs, unavailability of court reporters, and delays in providing trial transcripts.²² The video system originally used was installed in the courtroom of the Chief Circuit Judge of Madison County.²³ That system consisted of two fixed location cameras and one movable wide angle camera which was manually operated.²⁴

Influenced by the apparent acceptance and success of this system, the Kentucky Administrative Office of the Courts decided to expand the use of videotape as a method of producing a trial record.²⁵ Chief Circuit Judge Laurence Higgins aided these efforts by permitting this expansion to begin with the installation of a second videotape system in his Jefferson County courtroom.²⁶

While Kentucky's plan for expanded use of videotape as a method of court reporting progressed, so did the technology in the field of videotaping trial court proceedings.²⁷ Jefferson Audio Video Systems, Inc. (JAVS) made the most dramatic and significant advances.²⁸ Working in conjunction with the Kentucky Administrative Office of the Courts, JAVS developed a sophisticated, state-of-the-art videotaping system explicitly designed to produce a clear and precise videotape of trial court proceedings.²⁹

The system consists of six voice-activated microphones; five fixed, wall-mounted color cameras; and a patented computer programmable mixer.³⁰ This mixer, by providing for interaction between the voice-activated microphones and the wall-mounted cameras, makes the system

22. McBeath, *supra* note 16.

23. *Id.*; see also Steelman and Conti, *supra* note 9, at 15.

24. See Steelman and Conti, *supra* note 9, at 15.

25. McBeath, *supra* note 16; see also Steelman and Conti, *supra* note 9, at 16-17.

26. Steelman and Conti, *supra* note 9, at 16-17; McBeath, *supra* note 16.

27. See *infra* text accompanying notes 29-33.

28. McBeath, *supra* note 16.

29. Telephone interview with David Green, President of Jefferson Audio Video Systems, Inc. (Sept. 29, 1986) [hereinafter cited as Green].

30. *Id.* Five microphones and four cameras are positioned in the courtroom. A camera and microphone are also located in the judge's chambers. *Id.* See also Steelman and Conti, *supra* note 9, at 17.

totally automated.³¹ When any participant in the trial proceeding — judge, witness or attorney — begins to speak, the voice activated microphone receiving the voice impulse instantaneously signals the appropriate camera. The camera then automatically focuses on and begins videotaping the person speaking.³² Therefore, not only can every speaker's voice be recorded, but so too can his or her actions and expressions.³³

In February 1985, JAVS installed this system in Judge Higgins' courtroom.³⁴ The results and response to the system have been overwhelmingly positive, as exemplified by Kentucky's continued efforts and commitment toward expanding the use of this videotaping system in their trial courts.³⁵ The system has been installed, and now operates in eighteen Kentucky circuit courtrooms.³⁶ JAVS expects this rapid expansion in the use of videotape to continue throughout Kentucky and other states.³⁷

This revolutionary court reporting method has been readily accepted and widely praised by judges and attorneys who have participated in videotaped trials.³⁸ Illustrative of those who have expressed their support and enthusiasm regarding the use of videotape as a court reporting method is Judge Kenneth Corey.³⁹ Judge Corey's circuit courtroom has been equipped with a JAVS videotaping system.⁴⁰ He has expressed tremendous satisfaction with the system and believes that at the present level of technology, videotaping will soon become the trend in court reporting techniques.⁴¹ In his courtroom, "evidence has never been missed and no technical problems whatsoever have been encountered with the system."⁴² Judge Corey has found reviewing the

31. Green, *supra* note 29; see also Steelman and Conti, *supra* note 9, at 17.

32. *Id.*

33. *Id.*

34. *Id.*

35. See *infra* text accompanying notes 36-38.

36. Letter from David Green to author (Jan. 10, 1987) (updating information given during earlier telephone interview).

37. Green, *supra* note 29. Proposals regarding installation of the videotaping system have been made to four other states which expressed interest in its use as a court reporting method. *Id.*

38. McBeath, *supra* note 16; see also *infra* note 41 and accompanying text.

39. Telephone interview with Judge Kenneth Corey, Circuit Court Judge, Jefferson County, Kentucky (Nov. 8, 1986) [hereinafter cited as Corey].

40. *Id.*; see also McBeath, *supra* note 16.

41. Corey, *supra* note 39.

42. *Id.*

videotape to be extremely helpful when writing findings of fact in bench trials.⁴³ The videotape enables him to more accurately recall the testimony of a particular witness or the tone of the trial in general.⁴⁴ Most importantly, he can again observe the demeanor of the witnesses before making findings based on their credibility.⁴⁵

A similar advantage can be enjoyed in jury trials.⁴⁶ While deliberating, the jury may, upon request, review the videotaped testimony of a particular witness.⁴⁷ This allows the jury to recall both the words and the demeanor of the witness.⁴⁸ This is extremely beneficial since both judges and jurors "are subject to defects in their apprehension and their recollection of what the witnesses said and how they behaved."⁴⁹

The JAVS videotaping system has also been found to be cost-effective.⁵⁰ The largest expenditure involves the initial cost of purchasing and installing the sophisticated videotaping equipment.⁵¹ However, significant savings have been realized in the area of judicial economy,⁵² including actual cost to attorneys, their clients, and the court.⁵³

43. *Id.* "Findings of fact in a bench trial are sometimes not written until months after the trial began." *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* Prior to allowing a jury to review any segment of the videotape, the trial judge would review that segment and delete any inadmissible or prejudicial evidence. *Id.* If a traditional court reporting method was used and the jury requested to review a portion of a witness' testimony, the court reporter (stenographer) would read that portion of the witness' testimony back to the jury after being edited by the trial judge for inadmissible or prejudicial evidence. *Id.*

48. *Id.*

49. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 22 (1973).

50. *Id.* For an in-depth cost-benefit analysis of the videotaping system, see Steelman and Conti, *supra* note 9, at 29-64.

51. Green, *supra* note 29. Currently, the cost of the system ranges from approximately \$40,000 to \$59,000, depending on the amount of optional equipment purchased. *Id.*

52. Corey, *supra* note 39. Judge Corey stated that "the use of videotape has made trial proceedings much more efficient. . . . Trials can begin earlier and continue later. . . . Because the system is automated, there are never any of the delays or problems generally associated with traditional court reporting methods which involve a human element" — namely sickness, tardiness or personality conflicts. *Id.*

53. Aside from the original expense of purchasing the necessary equipment, see *supra* note 51, videotaping trial court proceedings costs the court \$10 per day for recording and \$100 per month for maintenance. Green, *supra* note 29. The taped record is immediately available to the attorneys for \$15 per day. Other court reporting meth-

The use of videotape as a court reporting method has also been criticized.⁵⁴ Some believe that judges and attorneys will find reviewing the taped record unwieldy, more difficult, and more time consuming than reviewing a trial transcript.⁵⁵ This argument has little merit, however, because of the system's advanced reviewing capabilities.⁵⁶ The videotaping system as developed, along with appropriate procedures governing the use of videotape as the official record,⁵⁷ make reviewing the tape as easy and efficient as reviewing a written transcript. In short, the unique advantages experienced through the use of a videotaped record⁵⁸ make it superior to traditional court reporting methods.

III. Present Uses of Videotape in Judicial Proceedings

A. Child Sexual Abuse Cases

Videotaping children who were victims of or witnesses to sexual abuse has become a common and successful practice in a number of jurisdictions in recent years.⁵⁹ Many states,⁶⁰ including Florida,⁶¹ have enacted legislation which provides for the videotaping of such testimony when "there is a substantial likelihood that a victim or witness who is under the age of sixteen would suffer at least moderate emo-

ods require transcription of the record and therefore often involve significant time delays and costs often in excess of \$800 to \$1,000. *Id.*

54. Frank, *Video in Court: Taping Sparks Controversy*, A.B.A. J., Nov. 1985, at 26.

55. *Id.*

56. The system provides for easy reference to any portion of the videotape via a digital display of the tape's running time, showing the month, day, year, hour, minute and second. Green, *supra* note 29.

57. See Order, *supra* note 14, at 5, which states that "[e]ach reference in a brief to a segment of the videotaped recordings shall set forth in parentheses the word 'tape', the number of the videotape, and the month, day, year, hour, minute and second at which the reference begins as recorded on the videotape. For example: (TAPE NO. 1; 06/15/85; 14:24:05)."

58. See *supra* text accompanying notes 42-53.

59. MacFarlane, *Diagnostic Evaluations and the Use of Videotapes in Child Sexual Abuse Cases*, 40 U. MIAMI L. REV. 135 (1985).

60. For example, Minneapolis, Minnesota has videotaped interviews with child sexual abuse victims for the past three years. *Videotaping: Device for Fighting Child Abuse*, A.B.A. J., Apr. 1984, at 36. The taped interviews are conducted in a familiar setting using anatomically correct dolls to aid the child in describing the assault. *Id.*

61. FLA. STAT. § 92.53 (1985).

tional or mental harm if required to testify in open court."⁶² If the trial court orders videotaping, the taped testimony could be played at trial in lieu of live testimony.⁶³

There are two purposes for allowing videotaped testimony at trial: 1) to prevent psychological trauma to the child;⁶⁴ and 2) to capture the child's "physical reactions, body language, and facial expressions of fear, anger and avoidance."⁶⁵ These factors would be lost by merely reading a transcript of the child's testimony into evidence.⁶⁶

B. Depositions and Pre-recorded Trials

Most jurisdictions now have rules which permit videotaped depositions as an alternative method of obtaining the testimony of unavailable witnesses.⁶⁷ Such testimony has traditionally been recorded stenographically, thereby creating a written deposition.⁶⁸ A written deposition, however, has a distinct disadvantage compared to live testimony.⁶⁹ It does not allow the trial court to observe the demeanor of the witness, which is critical in determining credibility.⁷⁰ But videotaped depositions, like live testimony, enable the court to observe the demeanor of the witness.⁷¹ A court can therefore better determine credibility.

Videotape has also been used to conduct a pre-recorded trial.⁷² In an Ohio murder trial, the attorneys had the testimony of the various witnesses videotaped over the course of several weeks.⁷³ The trial judge edited the videotaped testimony for inadmissible and prejudicial evidence,⁷⁴ and then presented the videotape to the fact finder to be

62. *Id.*

63. *Id.*

64. *Id.*

65. MacFarlane, *supra* note 59, at 136. Florida also provides by statute for the use of closed circuit television, not only in sexual abuse cases, but in any judicial proceeding in which the court finds it necessary to protect the child victim or witness from severe mental or emotional harm. FLA. STAT. §§ 92.54, 92.55 (1985).

66. MacFarlane, *supra* note 59, at 136.

67. Murray, *Videotaped Depositions: Putting Absent Witnesses in Court*, 68 A.B.A. J. 1402 (1982); see, e.g., FED. R. CIV. P. 30(b); FLA. R. CIV. P. 1.310(b)(4).

68. See Murray, *supra* note 67, at 1403.

69. *Id.* at 1402.

70. *Id.*

71. *Id.*

72. *Videotaped Murder Trial in Ohio*, 68 A.B.A. J. 533 (1982).

73. *Id.*

74. *Id.*

viewed for disposition of the case.⁷⁵ Although defense counsel originally requested that a jury of twelve view the taped testimony, they subsequently asked that the case be heard by a three-judge panel.⁷⁶ Again, the credibility of the witnesses could be more accurately evaluated since they could be seen and heard by the fact finder.

C. Education and Instruction

The videotaping of judicial proceedings also plays an important role in legal education and instruction.⁷⁷ Florida State University Law School has videotaped oral arguments heard by the Florida Supreme Court since 1985.⁷⁸ Lawyers and law students have watched the videotapes of these appellate arguments in order to "see what piques judicial interest, to review tactics, and to improve their presentation."⁷⁹

Similarly, Dade County, Florida, plans to implement an educational program involving the use of videotape as an instructional device.⁸⁰ Installation of the videotaping system now used in Kentucky has been scheduled for a Dade County courtroom.⁸¹ Trial court proceedings will be videotaped and made available for educational purposes to judges, lawyers, and law students.⁸²

IV. Effect of Videotape on Standards of Appellate Review

A. Overview of the Issues

The Kentucky system has proven that videotaping trial court proceedings is not only a viable alternative, but a highly desirable method of creating an official trial record.⁸³ Expanded use of videotape as a court reporting technique will inevitably give rise to conflict. The most controversial issue will likely involve the effect videotaping will have on

75. *Id.*

76. *Id.*

77. Frank, *supra* note 54, at 26.

78. *Id.*

79. *Id.*

80. Telephone interview with David McGriff, Criminal Justice Coordinator for Dade County, Florida (Nov. 18, 1986).

81. *Id.*

82. *Id.*

83. *See supra* text accompanying notes 30-53.

existing standards of appellate review of factual findings made by a trial court — in particular, those factual determinations based on the credibility of witnesses. With a videotape record, appellate courts will be able to observe and hear witnesses' testimony, as opposed to reading a "cold" record.

Thus, when videotape constitutes the official record on appeal, the question arises: to what extent, if any, should an appellate court be bound by the deferential standards of review traditionally afforded to factual findings which were based on credibility determinations made by the trial court? To that extent attorneys will argue for, and appellate courts may be inclined to engage in, more extensive review of a trial court's credibility determinations.

Presently, only Kentucky uses videotape as a method of creating a trial court record,⁸⁴ and it has done so in only a limited number of its trial courts.⁸⁵ Consequently, few appeals have been heard from videotaped trials⁸⁶ and none in which counsel has argued for less deferential or independent review of credibility determinations based on the videotaped record.⁸⁷ However, innovative lawyers, appealing from a videotaped trial, will inevitably see the opportunity to argue for a more intrusive review of a trial court's credibility determinations.

An appellate court's willingness to engage in less deferential or independent review will depend primarily on what that court perceives to be the rationale underlying existing deferential standards of review. This section of this Note will examine how an appellate court might find authority to support an expanded scope of review of credibility determinations when videotape constitutes the official record on appeal. Separate discussions will examine the potential effect of videotaping on credibility determinations in jury and nonjury trials, since existing standards of review and underlying rationales are different for each.

84. Kentucky is the only state which presently uses videotape in many of its trial courts as a complete substitute for traditional court reporting methods. McBeath, *supra* note 16. See also Green, *supra* note 29.

85. See *supra* text accompanying notes 36-37.

86. McBeath, *supra* note 16.

87. *Id.*

B. Findings by the Trial Judge: The Clearly Erroneous Standard.

1. Federal Courts

In federal⁸⁸ appellate courts, an extremely deferential standard of review is accorded to findings based on the credibility of witnesses.⁸⁹ The trial judge's findings will be overturned on appeal only when they are clearly erroneous.⁹⁰ Generally, a finding will be held to be clearly erroneous when, "although there is evidence to support it, the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed."⁹¹

For decades, the various federal circuit courts of appeal have disagreed about the application of this "clearly erroneous" standard to findings of fact and credibility determinations based on evidence presented to the trial court in documentary or deposition form.⁹² Three well-defined interpretations of the clearly erroneous standard emerged.⁹³ The first interpretation provides that the standard applies equally to all factual determinations "regardless of the nature of the evidence from which they were deduced."⁹⁴ The second interpretation provides that the clearly erroneous standard applies to factual determinations based on evidence presented in documentary or deposition form, but allows for closer than normal judicial scrutiny.⁹⁵ Under this

88. See FED. R. CIV. P. 52(a).

89. See *supra* note 88 and accompanying text.

90. *Id.*

91. *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948); *Lincoln v. Board of Regents*, 697 F.2d 928, 940 (11th Cir. 1983).

92. See generally Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts — Is The "Clearly Erroneous Rule" Being Avoided*, 59 WASH. U.L.Q. 409 (1981); Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506 (1963) [hereinafter VIRGINIA Note]; Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?* 52 ST. JOHN'S L. REV. 68 (1977).

93. *Id.*

94. VIRGINIA Note, *supra* note 92, at 518.

95. See, e.g., *Bulls Corner Restaurant, Inc. v. Director of the Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir. 1985); *Bohart v. Mutual Life Ins. Co.*, 743 F.2d 313, 325 n.12 (5th Cir. 1984); *Sierra Club v. Sigler*, 695 F.2d 957, 968 (5th Cir. 1983); *Seaboard Coast Line R.R. Co. v. Trailer Train Co.*, 690 F.2d 1343, 1349 (11th Cir. 1982). See also Oliver, *Appellate Fact Review Under Rule 52(a): An Analysis and Critique of Sixth Circuit Precedent*, 16 U. TOL. L. REV. 667, 669 (1985).

approach, the appellate court gives less deference to the trial judge's findings, thereby reducing the burden of proving that his findings were clearly erroneous.⁹⁶ The third interpretation provides that the standard does not apply to factual determinations based on evidence presented in documentary or deposition form.⁹⁷ Thus, complete and independent review of credibility by the appellate court is appropriate. Debate among the federal appellate courts has focused on these last two interpretations of the clearly erroneous standard. It is these last two interpretations which may also provide the basis for other appellate courts to more extensively review a trial judge's credibility determinations when videotape constitutes the official record on appeal.

Although the third interpretation holds the clearly erroneous standard to be completely inapplicable while the second provides for a less deferential application of the rule,⁹⁸ the rationales supporting both interpretations are identical. Only the degree to which the deferential standard is abrogated differentiates the two approaches.

Appellate courts which have adopted either of these interpretations have held that the primary rationale for deferring to the trial judge's credibility determinations is that the trial judge is in a "superior position" to make such findings; only he can observe the testimony and demeanor of the witnesses.⁹⁹ When factual findings and credibility determinations are based on evidence presented to the trial judge in documentary or deposition form, however, the trial judge does not have an opportunity to observe witnesses.¹⁰⁰ Therefore, he does not enjoy any such advantage over the appellate court.¹⁰¹

In such circumstances, the reviewing court is in as good a position

96. See *Bohart*, 743 F.2d at 325 n.12; *Sierra Club*, 695 F.2d at 968.

97. See, e.g., *Lydle v. United States*, 635 F.2d 763, 765 n.1 (6th Cir. 1981); *Gay Lib v. University of Missouri*, 558 F.2d 848, 853 n.10 (8th Cir. 1977); *Wedding v. Wingo*, 483 F.2d 1131, 1136-37 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974); *Seagrave v. Mount*, 212 F.2d 389, 394 (6th Cir. 1954). See also *Oliver*, *supra* note 95, at 669.

98. See *supra* text accompanying notes 95-97.

99. See, e.g., *Lydle*, 635 F.2d at 765 n.1; *Wedding*, 483 F.2d at 1136; *A.J. Indus., Inc. v. Dayton Steel Founding Co.*, 394 F.2d 357, 361-62 (6th Cir. 1968); *Seagrave*, 212 F.2d at 394. The United States Supreme Court has also stated, in dicta, that the rationale behind the clearly erroneous standard is the trial court's unique opportunity to evaluate the demeanor of witnesses. *United States v. General Motors*, 384 U.S. 127, 141 n.16 (1966). This is commonly referred to as the "superior position" rationale behind the clearly erroneous standard.

100. *A.J. Industries, Inc.*, 394 F.2d at 361-62; *Seagrave*, 212 F.2d at 394. See also *Oliver*, *supra* note 95, at 678-82.

101. *Id.*

as the trial judge to make credibility determinations.¹⁰² Numerous appellate courts have therefore found that the rationale supporting the clearly erroneous standard breaks down when factual findings and credibility determinations are based on documentary or deposition-type evidence.¹⁰³ Once this rationale has fallen, appellate courts have been willing to engage in more intrusive review of factual findings and credibility determinations.¹⁰⁴

a. *The "Inapplicable" Interpretation of the Clearly Erroneous Standard*

The United States Court of Appeals for the Sixth Circuit held the clearly erroneous standard inapplicable for findings based on evidence presented at trial in documentary or deposition form in *Seagrave v. Mount*.¹⁰⁵ In *Seagrave*,¹⁰⁶ corporate stockholders in a derivative suit sought injunctive relief from the corporation and its executives.¹⁰⁷ Virtually all testimony was presented to the district court in deposition form.¹⁰⁸ The court neither saw nor heard the witnesses testify.¹⁰⁹ The court of appeals affirmed the judgement of the district court,¹¹⁰ but only after making its own complete and independent determination of the credibility of the witnesses, based on their deposition testimony.¹¹¹ The appellate court held that the findings of the district court were not controlling.¹¹² The reviewing court found it was in as good a position as the district court to judge the credibility of the witnesses.¹¹³

Similarly, in *Wedding v. Wingo*¹¹⁴ a federal district court based its credibility determinations on testimony presented on an audio re-

102. *Seagrave*, 212 F.2d at 394; see also Oliver, *supra* note 95, at 679.

103. See, e.g., *Lydle*, 635 F.2d at 765 n.1; *Wedding*, 483 F.2d at 1136-37; *Seagrave*, 212 F.2d at 394.

104. See, e.g., *Bull's Corner Restaurant, Inc.*, 759 F.2d at 502; *Bohart*, 743 F.2d at 325 n.12; *Gay Lib*, 558 F.2d at 853 n.10; *Wedding*, 483 F.2d at 1136-37; *Seagrave*, 212 F.2d at 394.

105. 212 F.2d 389 (6th Cir. 1954).

106. *Id.*

107. *Id.*

108. *Id.* at 394.

109. *Id.*

110. *Id.* at 397.

111. *Id.* at 394-97.

112. *Id.* at 394.

113. *Id.*

114. 483 F.2d 1131 (6th Cir. 1973), *aff'd*, 418 U.S. 461 (1974).

order.¹¹⁵ Again, in vacating the judgment, the Court of Appeals for the Sixth Circuit¹¹⁶ refused to defer to the district court's credibility determinations.¹¹⁷ As in *Seagrave*,¹¹⁸ the appellate court found that it was in as good a position as the trial judge to make findings based on the witnesses' recorded testimony.¹¹⁹ Thus, the court found the rationale for deferring to the district court's findings inapplicable. Independent review was therefore appropriate.¹²⁰

b. *The "Less Deferential" Interpretation of the Clearly Erroneous Standard*

Other federal appellate courts have held that while the clearly erroneous standard is not completely inapplicable when findings are based on documentary or deposition-type evidence, the standard should be applied with less deference.¹²¹ Thus, the United States Court of Appeals for the Eleventh Circuit¹²² held that "[w]hen . . . the district court reaches its [factual] determinations solely of the basis of depositions, affidavits, and documents, the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated."¹²³ This precise reasoning was also applied by the United States Court of Appeals for the Fifth Circuit.¹²⁴ The court held that although it was bound by the clearly erroneous standard, "the degree of deference to be accorded a district courts findings of fact is lower when the case is submitted wholly on documents"¹²⁵ Similarly, in *A.J. Industries v. Dayton Steel*¹²⁶ the defendant presented to the district court the testimony of five of its nine witnesses in deposition form.¹²⁷ While

115. *Id.* at 1132.

116. *Id.* at 1137.

117. *Id.*

118. 212 F.2d at 389.

119. *Wedding*, 483 F.2d at 1131.

120. *Id.* at 1337.

121. See *infra* notes 122-31 and accompanying text; see also *Sierra Club*, 695 F.2d at 967-68; *Onaway Transp. Co. v. Offshore Tugs, Inc.*, 695 F.2d 197, 200 (5th Cir. 1983).

122. *Seaboard*, 690 F.2d at 1343.

123. *Id.* at 1349.

124. *Bull's Corner Restaurant, Inc.*, 759 F.2d at 502.

125. *Id.* (quoting *Onaway Transp. Co.*, 695 F.2d at 200).

126. 394 F.2d 357 (6th Cir. 1968).

127. *Id.* at 361.

affirming the judgment of the district court,¹²⁸ the court of appeals stated that the conclusiveness generally afforded to the district court's credibility determinations was somewhat weakened because a significant portion of the testimony was presented by deposition.¹²⁹ The court reasoned,¹³⁰ as did the Fifth and Eleventh Circuit Courts of Appeal,¹³¹ that the rationale behind the clearly erroneous standard did not support the application of the extreme deference generally afforded to a district court's credibility determinations. The appellate court was in as good a position as the district court to make such findings.

Appellate courts which adopt the "superior position" rationale behind the clearly erroneous standard¹³² may be inclined to extend their reasoning to justify independent or less deferential review of credibility determinations in cases in which videotape constitutes the official record on appeal. Videotape not only records the words of a witness, but also his reactions, facial expressions, and physical appearance.¹³³ Every word, along with each significant gesture and movement made by the witness which could have been observed by the trial judge, is captured on videotape¹³⁴ and is available to the appellate court. Hence, the rationale supporting the clearly erroneous standard would again appear to break down. The videotape would allow an appellate court the same opportunity that the trial court had to observe the testimony and demeanor of witnesses.¹³⁵ The trial court would no longer be in a position superior to the appellate court to make credibility determinations. Independent, or less deferential review of such determinations could therefore be justified.

c. *The "Strict" Interpretation of the Clearly Erroneous Standard*

The remaining interpretation of the clearly erroneous standard provides that the standard applies equally regardless of the form and nature of the evidence.¹³⁶ This interpretation does not allow for any

128. *Id.* at 362.

129. *Id.* at 361-62.

130. *Id.*

131. *See supra* notes 122-25 and accompanying text.

132. *See supra* text accompanying note 99.

133. *See supra* notes 32-33 and accompanying text.

134. *Id.*

135. *Id.*

136. *See supra* note 94 and accompanying text.

derogation of the clearly erroneous standard.¹³⁷ Courts applying this interpretation hold that the rationale for deferring under the clearly erroneous standard is not limited to the trial judge's superior position to observe witnesses.¹³⁸ They hold that judicial economy, stability, and uniformity in judicial decision-making require that the clearly erroneous standard be applied equally, regardless of the form in which evidence is presented to the trial court.¹³⁹ The use of videotape as the official trial record would not cause this rationale to break down. Therefore, under this interpretation, more intrusive appellate review of credibility determinations could not be justified.

Federal Rule of Civil Procedure 52(a), which codifies the clearly erroneous standard for federal appellate courts,¹⁴⁰ has recently been amended to reflect this latter interpretation.¹⁴¹ This appears to settle the standard of review issue for federal appellate courts. As such, it would seem to preclude federal appellate courts from engaging in independent or less deferential review of a trial courts credibility determinations, regardless of the manner in which evidence was presented at trial.

137. *Id.*

138. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985); *see also* Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157 (1985).

139. *Id.*; *see also* Brennan, *Standards of Appellate Review*, 33 DEF. L.J. 377, 379 (1984).

140. FED. R. CIV. P. 52(a).

141. FED. R. CIV. P. 52(a) (amended 1985). The rule as amended states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . ." *Id.* (emphasis added). The rule was amended for the purpose of resolving conflict among the circuits as to the application of the clearly erroneous standard and promoting uniformity and stability in the application of the rule. FED. R. CIV. P. 52(a) Advisory Committee's Note. The United States Supreme Court interpreted the clearly erroneous standard to apply equally regardless of the nature and form of the evidence upon which the trial court based its factual findings. *Anderson*, 105 S. Ct. at 1512. Although the *Anderson* case was decided more than one month before the federal rule amendment, it is clear that the federal amendment was an independent determination by Congress and not a mere codification of the *Anderson* decision. This is apparent from the Advisory Committee Notes on the rules, which made no reference to *Anderson*. Furthermore, the Notes stated that "[t]he Supreme Court has not clearly resolved the issue." FED. R. CIV. P. 52(a) Advisory Committee's Note.

2. State Courts

State appellate courts, however, may still maintain the "superior position" rationale¹⁴² as the basis for the clearly erroneous standard, irrespective of the recent federal interpretation.

In Kentucky, the state rules of civil procedure codify the clearly erroneous standard for factual findings and credibility determinations made by a trial judge.¹⁴³ The rule states that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."¹⁴⁴ This language is identical to that of the federal rule prior to its latest amendment. Many federal appellate courts interpreted this precise language to allow for independent or less deferential review of a trial court's credibility determinations where the appellate court was in as good a position as the trial court to judge credibility.¹⁴⁵ Therefore, the present language of the Kentucky rule¹⁴⁶ leaves the door open for state appellate courts to subscribe to the "superior position" rationale behind the clearly erroneous standard. As such, it also provides Kentucky appellate courts with strong support for engaging in independent or less deferential review of credibility determinations in cases in which videotape constitutes the official record on appeal.¹⁴⁷

Similarly, Florida appellate courts could certainly find support for a more intrusive degree of appellate review of credibility determinations if videotape were used as the official trial record.¹⁴⁸ Although the clearly erroneous standard has not been codified in Florida, it continues to be the judicially recognized standard for reviewing factual findings and credibility determinations made by a trial judge.¹⁴⁹ For example, in

142. See *supra* text accompanying note 99.

143. KY. R. CIV. P. 52.01.

144. *Id.*

145. See *supra* text accompanying notes 95-135. See also *Lydle*, 635 F.2d at 765 n.1; *Wedding*, 483 F.2d at 1136-37.

146. KY. R. CIV. P. 52.01.

147. Only those appellate courts which adopt the "superior position" rationale behind the clearly erroneous standard would consider engaging in more intrusive review of credibility determinations.

148. Presently, the Florida rules do not provide for the use of videotape as a method of creating an official trial record. Videotape has been used, however, in child abuse cases and for educational purposes. See *supra* text accompanying notes 58-65 and 75-80.

149. See, e.g., *Simmons v. State*, 305 So. 2d 178 (Fla. 1974). See also *Mori v. Matsushita Electric Corp.*, 380 So. 2d 461 (Fla. 3d Dist. Ct. App. 1980); *CIC Leasing*

CIC Leasing Corp. v. Dade Linen and Furniture Corp.,¹⁵⁰ Florida's Third District Court of Appeal stated that "it is basic that an appellate court will not disturb the finding of fact of a trial judge unless it is clearly erroneous."¹⁵¹

While the rationale behind this standard has never been specifically articulated, Florida appellate courts may very well follow the "superior position" rationale. In *Emery Air Freight v. Cornil*,¹⁵² Florida's Fifth District Court of Appeal held that when the fact-finding function is performed by the trial judge and he "has an opportunity to observe the witnesses, their demeanor, candor or lack of it, he must determine whether the testimony of such witnesses is worthy of belief."¹⁵³ Such determinations will be afforded great deference by the appellate court.¹⁵⁴ This identical position had previously been adopted by Florida's First District Court of Appeal.¹⁵⁵ In *Bali, Inc. v. Sherwood's Commercial Brokers of Daytona Beach, Inc.*,¹⁵⁶ the written record of the trial court proceedings contained much conflicting testimony.¹⁵⁷ In affirming the trial court's judgment, the appellate court again deferred to the trial judge's credibility determinations. The court reasoned that "[t]he able trial judge who heard the testimony was in a *better position* to resolve the conflicts and judge the credibility of the witnesses than is [the appellate] court."¹⁵⁸ These cases¹⁵⁹ indicate that Florida appellate courts may subscribe to the "superior position" rationale behind the clearly erroneous standard. That is, that the primary reason for deferring to a trial judge's credibility determinations is his "superior position" to observe the witnesses and their demeanor.¹⁶⁰ These cases also

Corp. v. Dade Linen and Furniture Co., 279 So. 2d 73 (Fla. 3d Dist. Ct. App. 1973).
150. 279 So. 2d at 73.

151. *Id.* at 75. Florida appellate courts occasionally describe this "clearly erroneous" standard with language that requires a clear showing that the trial judge's credibility determinations are "unsupported by competent and substantial evidence." See, e.g., *Jeffreys v. Simpson*, 222 So. 2d 224, 227 (Fla. 1st Dist. Ct. App. 1969).

152. 414 So. 2d 1167 (Fla. 5th Dist. Ct. App. 1982).

153. *Id.* at 1168.

154. *Id.*

155. *FirstAmerica Dev. Corp. v. County of Volusia*, 298 So. 2d 191 (Fla. 1st Dist. Ct. App. 1974).

156. 326 So. 2d 21 (Fla. 1st Dist. Ct. App. 1975).

157. *Id.* at 21.

158. *Id.* (emphasis added).

159. *Emery*, 414 So. 2d at 1167; *FirstAmerica*, 298 So. 2d at 191; *Bali*, 326 So. 2d at 21.

160. See *supra* note 99 and accompanying text.

suggest that such deference to the trial court would not be required if the appellate court were in as good a position as the trial judge to make such determinations. This was further suggested in *Redondo v. Jessup*.¹⁶¹ In *Redondo*,¹⁶² the trial court denied the defendant's motion for a new trial based on the trial judge's determination of the credibility of a witness.¹⁶³ The witness' testimony was presented to the trial court in deposition form.¹⁶⁴ The Third District Court of Appeal reversed and remanded, holding that "[s]ince the trial court had no opportunity to observe [the witness'] demeanor, we are not required . . . to accept the trial court's determination of [his] credibility."¹⁶⁵ This case again indicates application of the "superior position" rationale — since the appellate court was in as good a position as the trial court to make credibility determinations, more intrusive review was appropriate.¹⁶⁶ Similarly, the use of videotape as the official record on appeal would place an appellate court in as good a position as the trial judge to make such determinations.¹⁶⁷ Thus, the "superior position" rationale would again break down, leaving Florida appellate courts free to reject the trial court's credibility determinations and engage in their own independent or less deferential evaluation of credibility.

3. *Practical Effect of a Videotaped Record on the Clearly Erroneous Standard*

The recent amendment to federal rule 52(a), which codified the clearly erroneous standard¹⁶⁸ and similar state interpretations may reject the "superior position" rationale as the primary one supporting the clearly erroneous standard. Despite these interpretations, the use of videotape may nonetheless have a significant impact on appellate review of factual findings based on credibility determinations. While ap-

161. 426 So. 2d at 1146.

162. *Id.*

163. *Id.* at 1146-47. *Redondo* involved an evidentiary hearing to determine whether a jury member had lied or concealed information during voir dire and thereby deprived the parties of a fair trial. The trial judge determined, on the basis of the juror's deposition testimony, that the juror had not lied or concealed any information.

Id.

164. *Id.* at 1147.

165. *Id.*

166. *See id.*

167. *See supra* text accompanying notes 32-33.

168. FED. R. CIV. P. 52(a) (amended 1985).

pellate courts in many jurisdictions may refrain from expressly engaging in independent or less deferential review, videotape may, in practice, make the clearly erroneous standard easier to satisfy. An appellate court's ability to observe the testimony of witnesses may significantly affect its decision as to whether or not a finding based on that testimony was clearly erroneous.

Generally, an appellate court will hold the findings of a trial judge which were based on the credibility of a witness to be clearly erroneous when the court is left with the firm and definite conviction that a mistake had been committed.¹⁶⁹ An appellate court may be more likely to have such a conviction after reviewing a videotape of the witnesses' testimony, rather than a transcript of that testimony. A transcript fails to capture tones of voice, hesitations of speech and other demeanor clues that often convey a different meaning than the words, standing alone would indicate.¹⁷⁰ In such a case, an appellate court "has to operate in the partial vacuum of the printed record."¹⁷¹ As Karl Llewellyn noted, however, "[w]e know that [an appellate] court's 'smell' for the 'facts' beneath the officially given 'facts' is frequently, not just semioccasionally, a factor in the deciding."¹⁷² Appellate judges, like trial judges and jurors, are human¹⁷³ and therefore will undoubtedly be influenced to some degree, albeit unconsciously, by the appearance and demeanor of a witness.¹⁷⁴ To that extent, so too may the judges' determination be influenced regarding whether or not a finding based on a witness' testimony was clearly erroneous. An appellate court's decision whether a finding was clearly erroneous will be based not on the words of the witness alone, but on the meaning of those words as embraced and modified by the witness' silent testimony — his demeanor.

C. Findings by a Jury: Sufficiency of the Evidence

The framers of the United States Constitution granted the Supreme Court the power to review factual determinations made by a jury.¹⁷⁵ The fear that jury findings would become freely reviewable,

169. *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948).

170. FRANK, *supra* note 49, at 23.

171. *Id.*

172. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 27 (1960).

173. See FRANK, *supra* note 49, at 146-56.

174. *Id.* at 152.

175. U.S. CONST. art. III, § 2. It provides that "[t]he Supreme Court shall have

and thus meaningless,¹⁷⁶ prompted the passing of the seventh amendment.¹⁷⁷ The seventh amendment provides that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."¹⁷⁸ Congress intended this to act as a check on the power of appellate courts to review jury findings.¹⁷⁹ Nearly every state constitution now contains similar guarantees.¹⁸⁰

This does not mean, however, that a jury's factual determinations may never be reexamined by an appellate court.¹⁸¹ "A jury verdict cannot stand without an [adequate] evidentiary basis."¹⁸² An evidentiary basis will generally be held sufficient if there is substantial evidence to support the verdict.¹⁸³ A mere scintilla of evidence will not be sufficient.¹⁸⁴ Therefore, jury facts can be reexamined, but only to the extent necessary to determine whether substantial evidence exists.

All federal and most state appellate courts test this substantial evidence requirement by a reasonable conflict or reasonable man standard.¹⁸⁵ A court will inquire whether "reasonable and fair minded men in the exercise of impartial judgment might reach a different conclusion."¹⁸⁶ If reasonable minds could not differ as to the conclusion to be drawn then there was no substantial evidence to support the verdict.¹⁸⁷

appellate jurisdiction, both as to Law and Fact with such exceptions and under such regulations as Congress shall make."

176. See Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 69 (1977).

177. U.S. CONST. amend. VII.

178. *Id.*

179. See Note, *supra* note 176, at 69.

180. See Brennan, *supra* note 139, at 381.

181. See Childress, *Standards of Review in Eleventh Circuit Civil Appeals*, 9 NOVA L.J. 257, 286 (1985) [hereinafter cited as Childress I]. See also Childress, *Standards of Review in Federal Civil Appeals: Fifth Circuit Illustration and Analysis*, 29 LOY. L. REV. 851, 880 (1983) [hereinafter cited as Childress II].

182. Childress II, *supra* note 181, at 880.

183. See, e.g., *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). See also Childress I, *supra* note 181, at 287-88.

184. *Boeing Company*, 411 F.2d at 374.

185. See, e.g., *id.* at 374; See also *Hulse v. Blue Cross/Blue Shield, Inc.*, 424 So. 2d 191, 192 (Fla. 5th Dist. Ct. App. 1983).

186. *Boeing*, 411 F.2d at 374. See also *Hulse*, 424 So. 2d at 192.

187. *Id.* This issue is generally presented on appeal of a trial court's granting of a directed verdict or its decision on a judgement N.O.V. motion. See Childress II, *supra* note 181, at 880.

An appellate court must then reverse, even though the verdict was based on a factual determination made by the jury.

The question then remains: how might the use of videotape as the official record on appeal effect this standard of reviewing credibility determinations which form the basis of a jury verdict? Because the "reasonable conflict" standard¹⁸⁸ has a constitutional basis,¹⁸⁹ the argument asserted with the regard to the clearly erroneous standard cannot be used. It cannot be contended that the rationale behind the standard breaks down when videotape is used and thus allows independent or less deferential review.

It can be argued, however, that a videotape record will make a jury verdict, based on testimonial evidence, easier to overturn on appeal. Findings based on the testimony of a single witness could constitute substantial evidence to support a jury verdict. Conversely, such testimony may be so incapable of belief that reasonable minds could not differ and thus would not be entitled to any weight on appeal.¹⁹⁰ This type of evidence would, therefore, be deemed insufficient to constitute substantial evidence to support the jury verdict.¹⁹¹

When an appellate court uses a trial transcript as the official record on appeal, the judges have before them for consideration only the "words" of a witness — a typewritten or printed record of the testimony. If videotape were used as the official record, however, an appellate court would be able to see and hear a witness, just as he was seen and heard at trial.¹⁹² Not only would the appellate court consider the words of the witness, but the witness' appearance and demeanor would become factors as well in determining whether his testimony was so unbelievable that findings based on it should not constitute substantial evidence to support a verdict. Therefore, an appellate court reviewing a videotaped trial record may find the testimony of a witness incapable of belief because of his appearance and demeanor rather than because of the testimony itself. That same testimony may not have been found completely unbelievable had review been based solely on a written record.

188. See *supra* text accompanying note 186.

189. See *supra* notes 178-80 and accompanying text.

190. See Brennan, *supra* note 139, at 384.

191. *Id.*

192. See *supra* text accompanying note 99.

V. What About Justice?

Imagine that every word that would have been spoken during a trial was written down and then read by the fact finder. No one would be "so foolish as to say that a wrong decision would not be more likely in the absence of the living witnesses and speakers" ¹⁹³ Like pictures, their facial expressions and gestures are worth a thousand words. ¹⁹⁴ It is these "unspoken words" which allow a fact finder to most accurately make factual/credibility determinations. Thus, the ability of the fact finder to hear and observe witnesses increases the probability that accurate findings will be made. ¹⁹⁵

It follows, then, that an appellate court reviewing a trial court's factual findings would be likely to render a more informed and knowledgeable decision after hearing and observing the testimony upon which the challenged factual finding was based, rather than merely reading the written testimony. Traditionally, however, appellate courts reviewing factual findings based on credibility determinations have before them for review only the written words of the witnesses. Absent from review are the witnesses' "unspoken words" — gestures and tone of voice which often "make a sentence mean the reverse of what the mere words signify." ¹⁹⁶

But why should we care whether factual determinations reflect as accurately as possible the actual facts of any given case? The answer is found in one of the oldest of human concerns and desires — to understand and establish "justice." ¹⁹⁷ "[A]ny civilized legal system must be based on reason, grounded on universal, eternal principles of justice" ¹⁹⁸

When a trial court makes a mistake about the facts, an injustice occurs — even though the court applied what would have been the correct legal rule had those facts been the actual facts. ¹⁹⁹ "[I]t is as unjust to apply the 'right' rule to the wrong facts as to apply the 'wrong' rule." ²⁰⁰ As a result of avoidable trial court errors, "innocent men are

193. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 21 (1973) (quoting OSBORN, THE MIND OF THE JUROR 86-98 (1937)).

194. *Id.*

195. *See generally id.* at 14-36.

196. *See id.* at 23.

197. J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 7 (1966).

198. FRANK, *supra* note 193, at 34.

199. *Id.* at 33.

200. *Id.* at 33.

convicted of crimes; and every week, for similar reasons, someone loses his life's savings, his livelihood, his job. Most of such injustices stem not from lack of justice in the legal rules but from mistakes in fact-finding."²⁰¹

While it is true that no judge or legal system can assure perfect justice, "the unattainability of the ideal is no excuse for shirking the effort to obtain the best available."²⁰² The task of the judge must still be to seek to achieve justice.²⁰³ This requires that everything feasible be done to increase the probability of ascertaining the true facts of a case.²⁰⁴

Probably ninety-five percent of all cases end at the trial court level.²⁰⁵ Therefore, in any case within that ninety-five percent in which factual mistakes were made by the trial court, a potential injustice occurred which will never be corrected or even reviewed. Furthermore, in those cases which are appealed, traditional deferential standards of review generally require the appellate court to accept the trial court's factual findings.²⁰⁶ Therefore, any injustice which occurred at the trial level because of factual mistakes will most likely go undisturbed.²⁰⁷

It is a myth that an appellate court "can and will safeguard litigants against the trial judges' mistakes concerning the facts."²⁰⁸ In reference to an appellate court's limited ability to correct a trial court's factual mistakes, Judge Jerome Frank stated that "[p]erhaps, if on appeal we used records consisting of talking motion pictures of trials, this particular difficulty could be overcome."²⁰⁹

The technology now exists which allows trial court proceedings to be clearly and accurately recorded on videotape.²¹⁰ Reviewability of such tapes has been made as easy and efficient as reviewing a written record. Therefore, an appellate court reviewing a challenged factual finding which was based on the credibility of a witness can review the videotaped testimony of that witness as easily as it could review the

201. *Id.* at 35.

202. *Id.* at 36.

203. See STONE, *supra* note 197, at 671.

204. See FRANK, *supra* note 193, at 222.

205. *Id.* at 33.

206. See *supra* notes 1-3 and accompanying text.

207. See FRANK, *supra* note 193, at 33.

208. *Id.* at 223.

209. *United States v. Rubenstein*, 151 F.2d 915, 921 n.5 (2d Cir. 1945) (Frank, J., dissenting).

210. See *supra* text accompanying notes 29-33

written testimony. Review of the videotaped testimony, however, allows an appellate court to consider not only the words spoken by the witness but the "unspoken words" as well — which often relate a different meaning than the words alone.²¹¹ An appellate court, reviewing the videotape record would therefore be able to make a more informed and knowledgeable decision, even under traditional standards of review. Appellate review would merely be based on a record which reflects more accurately the testimony upon which a challenged factual finding was based. Thus, justice would be better served without exhausting any additional appellate resources and without usurping the trial court's primary fact finding function.

VI. Conclusion

Videotape is an efficient and desirable method of creating an official record of trial court proceedings. State and federal courts should give strong consideration to this high quality and cost-effective court reporting method.

Videotape may also have the significant effect of expanding an appellate court's power to review credibility determinations made by the trial court. In reference to the desirability of expanded appellate review Judge John C. Godbold noted:

If guarded use of this power is made, the essential distinction between courts of appeals and trial courts will not be abrogated nor will the integrity of the [trial] courts be undermined. Instead of supplanting the existing structure of the judiciary, the power to find facts at the appellate level will supplement and enrich this structure.²¹²

Appellate courts which do begin to review videotape records may well refrain from expressly engaging in independent or less deferential review of a trial court's factual findings and continue to abide by traditional deferential standards of review. They will nonetheless be unconsciously influenced by the additional information which they will necessarily synthesize — gestures, tone of voice and other non-verbal clues. As our legal system is one which continuously strives toward achieving justice, this unconscious effect on appellate courts should be viewed as a

211. *Id.*

212. Godbold, *Fact Finding by Appellate Courts — An Available and Appropriate Power*, 12 COLUM. L. REV. 365, 381 (1982).

favorable and promising one. Appellate courts will merely have more complete and accurate information upon which to base their decision — while still applying traditional deferential standards of review. Thus, justice will best be served.

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