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Videotape—The Michigan Experience

By THOMAS E. BRENNAN*

THE most dramatic and potentially revitalizing of all the recent developments in the administration of justice is the use of videotape in the preparation, presentation and preservation of evidence. The purposes of this article are to report the progress of videotape experimentation in Michigan, develop some of the goals which are sought to be achieved, and discuss the several obstacles to implementation which will surface as progress continues.

Michigan's integrated court system has the peculiar constitutional capability of experimenting with new proposals to advance the administration of justice.¹ By its constitution of 1963, Michigan has only one court of justice, compartmentalized among essentially four tiers, but nonetheless a functioning unity under the supervision of the supreme court² which has broad rule making powers.³ In addition, it has a constitutional duty of general superintendence over the court system.⁴ These powers give the courts of Michigan an advantage of flexibility and the impetus of responsible leadership. Experimentation is possible without statutory change.

Medical Evidence in Wayne County

Addressing itself to a gathering backlog of civil litigation in Wayne County—the state's most populous county—the Supreme Court of Michigan entered a comprehensive administrative order.⁵ The order approached the backlog in various ways. One provision, however, inserted with the support and encouragement of the local bar, was designed to combat the specific problem of procuring expert testimony in personal injury cases. Busy doctors and other experts were among

* Justice, Supreme Court of Michigan.

1. MICH. CONST. art. 6, § 5.

2. *Id.* § 1.

3. *Id.* § 5.

4. *Id.* § 4.

5. See 50 MICH. ST. B.J. 266 (1971).

the most troublesome witnesses to schedule, both for discovery depositions and for testimony in court. In several earlier cases, videotaped testimony had been admitted pursuant to agreements between the litigants and had worked well. Presentation of the taped testimony in court proved satisfactory. The juries had been attentive. The offering parties had been pleased with the impact; the opposing parties had been satisfied with their cross-examination.

Against this background, the supreme court's special administrative order provided:

All expert witnesses may be deposed by the party seeking to offer such witnesses' testimony within the time limits provided in special rules 314.1 and 314.2. Such depositions may be stenographically recorded, may be taken by video tape machines, or may be taken by other electronic means. In the absence of or failure of the expert witness to appear at trial, such deposition or video tape of such deposition may be offered as evidence at the trial. No adjournment of trial shall be granted because of unavailability of expert witnesses at the time of trial.⁶

Admittedly, the scope of the order was limited, both as to the jurisdiction in which the tapes could be used—Wayne County—and the purpose for which they could be taken—deposing expert witnesses. Nonetheless, the order was an important step. For the first time, the videotape deposition was established as a usable tool for the presentation of testimony which was not fully dependent upon the prior agreement of the parties for its admissibility.

The Mason Project

Shortly after the Wayne County experiment was operative, the supreme court authorized another experiment.⁷ It was conceived upon an entirely different, but related, premise. For many years, the Circuit Court of Washtenaw County had cooperated with the University of Michigan Law School in using closed circuit television as an educational tool. A small, inconspicuous camera was installed in the courtroom of the late Judge James Breakey. That camera and its audio transmission system were connected to a viewing studio at the law school. Students and professors were able to tune in to the courtroom unobtrusively and observe proceedings as part of their law school training. This long-standing project, however, did not reflect the modern sophistication of the television art. Its single position camera viewed the bar from the back of the courtroom and produced a very

6. MICH. CT. R. 302.7. See also *id.* 302.8 (County of Genesee).

7. Administrative Order No. 1971-5, 386 Mich. xxvii (1971).

small picture in which facial movements of the witnesses were scarcely perceptible and only the backs of counsels' heads could be seen. The Ann Arbor installation served its single educational purpose as well as possible under the circumstances, but it did not address itself to the feasibility of video-recording court proceedings. Of importance was to discover whether a trial could be recorded and preserved on videotape.

Background of the Mason Project

Electronic audio-recording systems, used in Michigan since 1968, exhibited shortcomings. Multiple tracks were necessary to separate the voices of the participants in the courtroom. The shuffling of papers, outside noises and internal commotion tended to distract and distort any purely audio record. There was the continuing problem that a multi-track audio system might in some cases be too faithful. When an attorney objected loudly, he successfully prevented the jury from hearing the simultaneous answer of the witness. The court stenographer produced a transcript in which counsel's objection was shown as "(interrupting)." The point at which the interruption occurred and the extent to which it obliterated the continuing testimony of the witness were judgment decisions made by the stenographer. He was probably faithful to his own ears, which may or may not approximate the jury's hearing of the event. In multi-track audio systems, both the witness and the objecting lawyer were recorded. An appellate court was compelled to assume that the jury heard everything.

Videotape recording minimizes some of these difficulties. When a camera is properly focused on the witness, facial movements can be coordinated with sounds. Doubtful words and sounds can be better understood. Against the background of expanding psychological definitions of communication,⁸ the entire range of meaning and impact of a witness's testimony can be recorded and measured on appeal.

It once was fashionable for appellate judges to defer to trial court fact finding—even in non-jury cases. Appellate reports frequently refer to the superior opportunity of the trial judge to observe and weigh the demeanor of the witnesses. In an era of expanding appellate judicial activism, courts tend to depart from this practice. Given the disposition to right real or imagined ills by direct action, appellate judges more quickly engage in fact finding. Often their decisions are based upon literal or strained readings of typewritten transcripts. The

8. Cf. CAL. EVID. CODE § 250 (West 1966).

real purport of these transcripts is apparent only to those who saw and heard the witness.

The Results of the Mason Project

In search of a more comprehensive and reliable trial record, the Supreme Court of Michigan adopted an administrative order which set the Mason Project in motion.⁹ The project, which lasted for a period of twenty days, recorded a jury's eye view of actual trials in circuit court. Three separate cameras were installed above the jury box. One maintained a broad view of trial, encompassing the lawyers, the witness, the judge and the courtroom staff. Two moveable cameras focused on the witness and counsel respectively. Well-hidden cables connected all cameras to a control room outside the courtroom. In the control room a number of screens monitored the proceedings. A skilled engineer pieced together a master tape by selecting the view most pertinent and adjusting the focus or altering the direction of the two moveable cameras. The net result was singularly successful. The trial judge and participating counsel agreed that the often mentioned fears of distraction, showboating and witness hesitation simply did not materialize. The videotapes themselves were near-masterful. They were clear and understandable and could be transcribed easily into a typewritten record. The innuendoes and emphasis of questions and answers were captured. Despite the fact that there had been no prior selection of cases to be taped, the combination of subtleties which comprise the total impact of courtroom drama were clearly evident.¹⁰

The cost, if nothing else, prohibits the large scale use of a video system as the official record of trial court proceedings. That is to say, it is not economically feasible simply to substitute jury box cameras for the traditional court reporter. A critical review of the tapes, however, reveals the fact that a typical trial embraces two distinct functions. One is the trial proper—the presentation of admissible evidence and permissible arguments to the jury. The second function, completely interspersed with the first, is the "trial of the trial"—an ongoing debate about the trial. Under our theory of law, this debate is irrelevant to the jury. The debate has to do with the order of proof, burden of proof, presumptions, admissibility and a host of communication problems. It is as though one were watching a motion picture *about* the

9. Administrative Order No. 1971-5, 386 Mich. xxvii (1971).

10. These tapes have been retained by the State Bar of Michigan. They have been viewed by a number of committees, by the supreme court and by other interested groups.

making of a movie. The ultimate product is presented in bits and pieces. The interplay between the director and the producer and between both of them and the actors becomes the "story line."

The Mason Project demonstrated that, stripped of interruptions, the trial proper is reduced to cameo proportions. A trial which actually consumed three days could have been presented to the jury in less than one day. A witness who spent an entire morning on the stand could have his appearance condensed to forty or fifty minutes of actual, uninterrupted testimony, both on direct and cross-examination. This inexorably points to the development of the prerecorded or canned trial.¹¹

The word "canned" is unfortunate, but unavoidable. Unfortunately, in food packaging terms, it suggests something artificially preserved and not fresh. To lawyers, it suggests the shortcomings of the familiar canned briefs which law school students are tempted to use to replace actual research and analysis. However, the word is unavoidable. Opponents of prerecorded testimony undoubtedly will insist on the term. More importantly, it is a term of art in the video-recording business. The magnetic tapes upon which video recordings are made and preserved must be stored in metal cylinders. They are called cans. When a particular segment of taping has been completed, video people say, "It's in the can." So it is. When all the testimony to be presented in a trial has been preserved on videotape, it will indeed be "in the can." Unlike peaches or asparagus, a canned trial is not artificially preserved. It is an accurate record, devoid of the artificially added ingredients of objection, exception and interruption.

Rule 315

Recognizing the value of prerecorded testimony, the Michigan Supreme Court has now adopted a comprehensive rule to permit the use of videotape.¹² The rule assimilates visual depositions into the existing machinery for discovery by deposition and depositions to preserve testimony.¹³ In Ohio, similar rules have already been adopted.¹⁴

11. The first videotape trial was *McCall v. Clemens*, Civil No. 39,301 (C.P. Erie County, Ohio, Nov. 18, 1971). See also *McCrystal, Ohio's First Videotape Trial*, 45 OHIO B.A.R. 1 (1972); *Murray, Comments on a Videotape Trial—from Counsel for the Plaintiff*, 45 OHIO B.A.R. 25 (1972); *Watts, Comments on a Videotape Trial—from Counsel for the Defense*, 45 OHIO B.A.R. 51 (1972).

12. MICH. CT. R. 315.

13. See *id.* 302, 303, and 306.

14. OHIO SUP. R. 15 set forth in 45 OHIO B.A.R. 1186 (1972).

Some comment on differences between the Michigan and Ohio rules is in order. Most strikingly, the Ohio rule permits a completely canned trial with the agreement of all the parties or, in special instances, upon order of the court.¹⁵ In such a case, the use of the taped testimony does not depend upon a showing of unavailability of witnesses; indeed witnesses are not permitted to testify "live."¹⁶ Michigan's rule does not go that far.

The Ohio rule establishes a standard for video tape equipment, specifying the IEAJ Standard and Japanese Standard one-half inch tape.¹⁷ Michigan chose not to specify standards, since technical advance is still forthcoming. Also one-inch tape is being used with success in some Michigan cases. Unlike Ohio, Michigan does not anticipate the acquisition of monitors by the courts, leaving the burden of making such equipment available upon the proponent of the visual deposition. Unlike Ohio, Michigan's rule requires a split screen with a digital clock in the picture.¹⁸ The purpose is to provide a ready reference in the nature of pagination. Thus, objections can be located easily, and court-directed editing facilitated.

Project T.A.P.E.

Michigan's approach to the canned trial is embodied in a very ambitious undertaking identified as Project T.A.P.E., an acronym for total application of pre-recorded evidence. It goes a step beyond the adventurous Ohio rules. The concept is not only to can a single trial, or even a number of trials, but to can an entire docket. The advantages of pre-recorded evidence in terms of trial presentation have been demonstrated.¹⁹ Project T.A.P.E. is intended to discover the impact of canned trials upon the judicial system. Hopefully, the result will be the solution to problems inherent in docket management where the ultimate means of communication to the jury will be recorded evidence.

Project T.A.P.E. contemplates the adoption of special court rules to govern the submission of all personal injury cases on the docket of a single judge during a determined project period. It will involve the installation of video-recording equipment in a courtroom-type studio in the courthouse. A project director, skilled in court administration, will be retained; sufficient supporting technical and clerical personnel

15. OHIO SUP. R. 15(C) 2.

16. *Id.* 15(C) 1.

17. *Id.* 15(D) 1.

18. MICH. CT. R. 315.3(2).

19. See text accompanying notes 7-11 *supra*.

will be provided. Depositions and trial preparation will be merged. Witnesses will testify only once. That testimony will be before the camera. The adversary system will be channeled toward the editing and preparation of the tape for presentation to the jury.

The goals of the project are kaleidoscopic. Savings in time lag from filing to trial or settlement are anticipated. Reduction of judicial time, attorneys' time and empty courtrooms is foreseen, as well as convenience in scheduling of witnesses and retrial after reversal. The quality of the end product will be improved. The hollow warning that jurors disregard this or that will no longer be heard. The dull, irrelevant nitpicking of each witness's former testimony on deposition will be eliminated. Juror attentiveness will be improved. Thus, there will be a savings of time and money and relief from aggravation caused by present methods of jury scheduling and attendance.

Looking Ahead

Even as Project T.A.P.E. awaits full implementation, we can look to further refinements and innovations in our system of administering justice which are made possible by the development of videotape. The people of America have an abiding fascination with trials, both civil and criminal. The notion of public trials and the need for accurate reporting of trial proceedings to the public literally cry out for the adaptation of new methods of human communication to the ancient ritual of adversary fact finding. In this context, the canned trial becomes an official documentary presentation of disputed events. Insofar as those disputed events may be the objects of public concern and interest, the canned trial addresses itself to a myriad of problems, not the least of which is the endless debate over free press versus fair trial. Once prerecorded testimony becomes commonplace and accepted, the manner in which such trials are kept public must be decided. In the criminal field, progress will be slower and more conservative. However, in civil actions, canned trials can be broadcast simultaneously with their presentation to the jury.

Nobody can deny the need for broader understanding of and appreciation for the process of law. We may well be on the threshold of a new public awareness of law and justice. If so, it comes none too soon.

