



FJC Staff Paper

RECOMMENDATIONS REGARDING USE OF COURT-OWNED
VIDEOTAPE EQUIPMENT IN FEDERAL DISTRICT COURT LITIGATION

Federal Judicial Center



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RECOMMENDATIONS REGARDING USE OF COURT-OWNED VIDEOTAPE
EQUIPMENT IN FEDERAL DISTRICT COURT LITIGATION

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Federal Judicial Center
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ABSTRACT

This paper is based on experience gained from the Center's Videotape Pilot Project, in which five district courts used videotape equipment for litigation-related purposes (as distinguished from purposes of education and training). The paper reviews the experience of the pilot courts as well as the status of videotape as a means of recording and presenting trial testimony. Although concluding that videotape has a valuable role to play in litigation, the paper recommends that the private sector, not the courts, be relied on as the principal provider of such services. It also recommends that federal courts not be provided with videotape capabilities for use in civil litigation except where there is a demonstrable need to have such capabilities in order to avoid disruption or delay.

I. INTRODUCTION

In 1970, in response to interest expressed by several federal judges, the Federal Judicial Center supplied four United States district courts with videotape equipment and training in its operation, in a pilot project intended to test the value of videotape capabilities as a tool in the disposition of litigation. The four districts were the Eastern District of Michigan, the Northern District of Ohio, and the Eastern and Western Districts of Pennsylvania. Later, in 1975, equipment was also supplied to the Southern District of New York, which became the fifth pilot district in the videotape study.

In 1976, after the first four pilot districts had gained five years of experience with videotape equipment, the Research Division of the Center commenced an effort to evaluate the pilot project. To that end, a process for monitoring the courts' use of videotape was initiated and continued for twenty-seven months. This report presents the results of that monitoring process and an evaluation of the utility of in-house videotape capabilities in the U.S. district courts.

When the pilot project was initiated, the use of videotape in court proceedings was relatively novel. At that time, mere acceptance and use of the videotape equipment by court and counsel could have been counted a victory--the successful introduction of a promising innovation. In the intervening years, how-

ever, there has been a marked increase in the use and acceptance of videotape by both bench and bar. Videotape is sufficiently familiar that some law firms have purchased their own equipment, videotape equipment manufacturers are advertising in legal publications and designing systems tailored to the requirements of courts, and videotape services are available throughout the nation--often through court-reporting firms. The rapidly increasing acceptance of videotape as a tool of litigation requires that we evaluate the pilot project against objectives different from those originally intended. Whether or not the pilot project succeeded in fostering the use of videotape, there is no apparent further need to foster it. Videotape not only has arrived in court but has obtained sufficient maturity that it probably needs no assistance in reaching whatever level of utility is warranted in the joint experience of judges and lawyers nationwide.

Under present circumstances, the pilot project needs to be evaluated in terms not merely of the utility of videotape in court but of the utility of court-owned videotape equipment. The purpose of this report is thus to consider whether and under what circumstances videotape capabilities should be purchased for federal district courts for case-related uses.

There are at least two important types of videotape use in the courts that need to be distinguished from the type of use that is the subject of this analysis. One type is the use of videotape equipment as an aid in the education and training of court personnel. A large number of federal courts have videotape equipment for this purpose, but such use is of relevance here

only because that equipment might be suitable for case-related use when and if such use is warranted. The second type is general case-related use, for example, admission into evidence of testimony recorded by a private videotape service. This report is principally concerned with case-related use of court-owned videotape equipment and only indirectly concerned with the latter type of use.

We readily conclude that there exists a proper role for videotape technology as a tool in litigation, but we go on to ask whether and in what circumstances that should lead the courts to become providers of case-related videotape services. Our analysis is based not only on the experience of the five pilot districts but also on an assumption regarding the relevant burden of persuasion. The most common and accepted case-related use of videotape is as a medium for recording and presenting deposition testimony. Stenography is the conventional means of recording deposition testimony, and the expense of stenographic recording is generally borne by the party taking the deposition. Therefore, we assume that one should start by asking, why shouldn't videotape recording be left to the private sector, like stenography? That is, we place the burden of persuasion on arguments favoring use of court resources to provide case-related videotape services. Absent good reason to distinguish between videotape and stenography in regard to who should pay the costs, we assume that videotape should be treated like stenography and thus that the courts should not be the providers of videotape recording services.

On the basis of an overview of videotape's strengths and weaknesses in chapter 2 and a discussion of the pilot courts' experience in chapter 3, we conclude in chapter 4 that there are only limited circumstances in which a court's possession of videotape capabilities would be of significant convenience to the court or in which a court's ability to record a deposition on videotape without cost to the litigants would avoid injustice to witnesses or parties. The analysis does not disclose adequate reason to support a policy by which the courts would offer case-related videotape services on a general basis. But it does support a policy by which the courts would provide case-related videotape services in certain limited circumstances.

II. OVERVIEW OF VIDEOTAPE AS A MEDIUM FOR RECORDING AND PRESENTING TESTIMONY

Although videotape has been used for a variety of case-related purposes other than the recording and presentation of deposition testimony, recording of depositions is the only use that has been sufficiently tested and accepted by bench and bar to warrant a conclusion that videotape now has a proper role as a tool in litigation. Among the videotape uses that we therefore exclude from our consideration are the use of videotape for recording trial proceedings and the use of videotape as the exclusive or principal means of presenting a trial to the trier of fact (e.g., cases in which all testimony is presented on prerecorded videotape).¹

Our courts' constitutional and historical tradition of live testimony, with its opportunity for confrontation and cross-examination, reflects a strong preference for spoken rather than mere verbatim presentation of testimony. There is an obvious distinction between spoken communication and a verbatim transcript of such communication. The content of spoken communication is only partly--and sometimes only in very small part--conveyed by the spoken words alone. Other elements of an utterance are often crucial. These may include the inflection, ca-

1. We do, however, examine the latter type of use in the Northern District of Ohio.

dence, and apparent emotion with which the words are spoken; accompanying gestures of the hands, face, eyes, and body of the speaker; and sometimes the interplay between the speaker and apparent responses of listeners.

The primary appeal of videotape is that it can record and recreate many more of the communicative elements of spoken testimony than can stenography. In short, a videotape presentation is much more like the real thing than is a stenographic transcript. We should not hesitate to add, however, that videotape is by no means the same as the real thing. Of the many differences between live and videotaped testimony, at least two are of crucial importance. First, the witness who testifies before a videotape camera does not encounter the same contextual influences as does the witness who testifies live in court. In videotaped testimony, there is usually no judge, few of the formal trappings of the courtroom, often no adverse party confronting the witness, and no jurors' skeptical, puzzled, or accepting faces. Second, the camera's-eye view of testimony is an edited view. The person viewing the videotape sees what the camera happens to show, which may not include the face of the person asking the questions or the responses of others present at the deposition.

If live testimony before the court is the standard against which alternative kinds of testimony are to be measured, videotape, although imperfect, is clearly superior to stenography. As for the other alternatives, audiotape recording is more realistic than stenography but less so than videotape, and motion-picture film is essentially equivalent to videotape.

Although videotape is a superior means of preserving and recreating live testimony, it does not necessarily follow that all depositions that might be offered in a court proceeding should be recorded on videotape. Stenography has certain important advantages over videotape, so a choice between the two recording mediums should depend on the importance of their relative strengths and weaknesses in particular circumstances. Two significant factors in such a choice are the ease of recording and "playing back" testimony by one or the other means and the speed and convenience with which the two types of recording can be reviewed or edited.

Recording by videotape is generally more difficult. It is slightly more complicated to record a deposition on videotape than to record it by stenographic means, simply because presently available videotape equipment requires that a camera, recorder, and microphone be put in place in a suitable studio setting. Playing back a videotape recording in a court proceeding, however, is substantially more complicated than reading a stenographic transcript, in two significant ways. One difficulty is that providing an adequate view of the playback to the judge, counsel, jury, and public gallery ordinarily requires three or more television monitors, at least two of which must be full-size television screens. If the courtroom is not already equipped with these devices (or with a projection television unit and large projection screen), equipment must be brought to the courtroom, connected with cables, and pretested. This is by no means an awesome undertaking, but it nonetheless requires some planning

and is not nearly as simple as picking up a deposition transcript and reading it aloud.

The other difficulty occurs when editing of the videotape testimony is necessary because of inadmissibility of, or counsel's choice not to introduce, certain portions. Two approaches to this problem are available: to edit the testimony prior to trial (which usually involves making an edited copy of the tape) or to edit the tape in the course of playback at trial. Pretrial editing can be rather costly. The costs include the expense of actually making the copy as well as any time required of the judge in making decisions about admissibility. Editing the tape during trial requires an alert machine operator who will stop the playback immediately when an objection occurs so that the judge can make a ruling. Moving past objectionable passages of any length introduces some tedium in the proceeding, unless a detailed "script" of the tape has been prepared before trial so that the operator can move promptly and accurately to the next segment. These problems with videotape playback can be dealt with satisfactorily but, again, not as easily as with a stenographic transcript.

Even the most informal review of a videotape deposition requires the use of a tape player and small television monitor. Because the videotape must be listened to (and watched) rather than read, review almost inevitably takes more time than does reading a transcript. Moreover, review of scattered segments of the testimony, or close comparison of two separate segments, is ordinarily more difficult with videotape because--even with

high-speed forward and reverse tape movement--it takes more time to locate a particular passage on tape than in a written transcript. These disadvantages can obviously be mitigated if a written transcript is prepared from the videotape or concurrent with the original recording of the testimony. Of course, these cannot fairly be considered disadvantages when nonverbal components of the testimony are important, because the stenographic transcript would not reveal these components at all.

The disadvantages of videotape are not necessarily inherent problems, however; they are limitations imposed by the relatively inexpensive and simple-to-operate videotape equipment that is presently available. It may be feasible to make far more satisfactory videotape equipment using existing technology--for example, a small videotape recorder with a built-in screen and video-projection system, featuring a digital tape-location mechanism that permits very high speed access to any segment of the tape and high-speed playback that permits fast review without the "chipmunk" tone of voice normally associated with speeded-up audiotape. Although such a system is not yet on the market and probably cannot yet be manufactured at an acceptable cost, the pace of technological development in electronics affords reason to suppose that all the disadvantages we have cited will be removed within a few years.

Probably the only advantage of videotape over stenography--other than its inherent superiority as a surrogate for live testimony--is that it is generally more effective for presenting lengthy testimony than is a stenographic transcript. It can be

extremely difficult for a jury to maintain attention to an oral recitation of a written transcript for more than, say, thirty minutes. Although videotape playbacks can also challenge a jury's attention capacity, they are generally more tolerable, permitting perhaps an hour of uninterrupted attention for average testimony and longer for especially interesting or lively testimony.

The problems described above are, we believe, generally the only significant factors that should influence a choice between videotape and stenography as a means of recording testimony. Other factors that have created concern about the use of videotape have not proved to be significant problems in the view of judges and counsel familiar with videotaped depositions. Among these are concerns relating to unauthorized alteration of recorded videotape, the possibility that the videotape medium will have an adverse psychological influence on jurors, and loss of important testimony resulting from mechanical failures or unintelligible passages.

The risk of alteration of the recorded deposition tape appears no greater than the risk of alteration of a stenographic record. Protection is afforded by using a time-date generator to record a running clock image on the tape and by ensuring that the tape is promptly filed with the clerk of court.

Concern that the videotape medium may have an adverse psychological influence on jurors has not found support in the results of several expert scientific studies. Differences between juror responses to live and videotaped testimony have indeed been apparent, but they have been both modest and mixed: Some witnesses

are more convincing and others less convincing when their testimony is heard live rather than on videotape; some testimony is better remembered by jurors and other testimony worse remembered when heard live rather than on tape.²

Concern about mechanical failure has not been supported by experience. Videotape equipment is extremely reliable, and risks of loss due to equipment failure are virtually eliminated when an inexpensive audiocassette recorder is used as a backup recording device. The principal risk is probably that of gross operator error (e.g., failure to turn on the recorder). It should be recognized that stenographic recording is not without its own risks, including that of the stenographer incorrectly perceiving or transcribing a word or phrase in a manner that seriously alters the meaning of the testimony.³

How should the relative advantages and disadvantages of videotape and stenography influence a choice between them as alternative means for recording a deposition? First, in most instances in which the credibility of the witness is not in question, and in which only the verbatim content of testimony is relevant, considerations of convenience will very likely favor use of stenography. If there is no significant advantage in having the greater realism of the videotape record, a stenographic tran-

2. See, e.g., G. Miller & N. Fontes, *Videotape on Trial* (Sage 1979); symposium on court uses of videotape at 1975 B.Y.U. L. Rev. 327.

3. See J.M. Greenwood et al., *A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting* (Federal Judicial Center 1983).

script will be preferred for the greater ease with which it can be reviewed and edited. Perhaps the only exception to this general rule is where the deposition will likely be presented to a jury in lieu of live testimony and the length of testimony will exceed ordinary limits of tolerance for listening to oral recitation of a deposition. (We assume that in a trial to the bench, the judge will ordinarily read the deposition rather than have it recited, so concerns about the tedium of transcript recitation in such a trial are irrelevant.)

Videotape is preferable whenever witness credibility is a matter of importance and whenever somewhat lengthy testimony will be presented to the jury at trial. Additional special circumstances that might counsel for use of videotape rather than stenography include instances in which the witness's limited ability to speak English might make a written transcript more difficult to understand than an audiovisual presentation and, of course, instances in which exhibits or other things visible are material to the testimony.

The considerations just mentioned are those that influence the choice of recording medium. It would be wrong to assume, however, that the decision to record a deposition on videotape is always merely a decision about what recording medium to employ. The fact that videotape is a more realistic surrogate for live testimony than is stenography will necessarily influence the choice to take a deposition rather than require live testimony at trial. In many--perhaps the vast majority--of cases in which videotape depositions are employed, the choice is not simply to use video-

tape instead of stenography, but rather to use videotape in lieu of having the witness testify live or not at all.

The best arguments in favor of the videotape deposition are based on its acceptability as an alternative to live testimony when requiring live testimony would cause injustice to litigants or witnesses or inconvenience to the court. Videotape can avoid injustice to witnesses when requiring the witness to appear at trial would impose extreme hardship (and when stenographic recording of a deposition would be unacceptable for reasons such as those mentioned above). It can avoid injustice to litigants when the litigant is not able to obtain the witness's presence at trial, but can take a deposition. And a videotape deposition can avoid inconvenience to the court (including jurors) when the deposition can be substituted for live testimony by a witness who becomes unable to appear at trial as scheduled. For example, a surgeon is scheduled to testify on Wednesday and is to perform a critical operation on Thursday. When the surgeon is unable to appear at trial on Wednesday, a videotape deposition is taken Wednesday evening, allowing both the trial and the operation to proceed on Thursday.

Although videotape depositions are perhaps the most feasible method for avoiding inconvenience or injustice in these types of circumstances, we should also mention that testimony via live closed-circuit television is another possible solution. Although testimony via closed-circuit television would probably be preferable in many circumstances, the technology is less readily avail-

able than videotape. It is perhaps more a promise of the future than a presently feasible possibility.⁴

The potential value of having a court-owned videotape capability is suggested not simply because videotape is sometimes the preferred medium for recording a deposition, but because videotape recording of a witness's deposition can avoid injustice to witnesses or litigants or inconvenience to the court. These are matters within the responsibility of the courts, so there is significant potential benefit associated with having videotape capability in the control and at the disposal of the court. The experience of the five pilot courts can be instructive about the magnitude of realizable benefits.

4. We are not aware of closed-circuit television services that are available--on short notice and at reasonable cost--to be set up to link a courtroom to a remote witness. AT&T provides such a service at reasonable cost between a few major cities, but only between special studios in those cities, and access ordinarily requires an advance appointment. Although closed-circuit television has been used by the courts, we are unaware of any uses other than those on an experimental or demonstration basis.

III. EXPERIENCE OF THE FIVE PILOT COURTS

Our examination of the experience of the five pilot districts is based in part on systematic data provided by the courts on videotape-usage logs and in part on an anecdotal history of the courts' experience derived from interviews and informal contact with court personnel.

Court personnel were asked to complete a videotape log form each time the court's videotape equipment was used, during a data collection effort lasting twenty-seven months. We believe that the cooperation of court personnel was adequate to ensure that the information compiled provides a fair picture of actual usage. We assume, however, that use of the equipment was not recorded on some occasions in those courts in which use was infrequent, simply because the log sheet requirement might occasionally have been overlooked. In courts that reported very infrequent use of the videotape equipment, we suspect that such use was not quite as infrequent as reported.

The log sheets requested the following information for each use of the equipment: the date of the recording, the duration of the recording, whether there was concurrent stenographic recording, and the nature of the event recorded (deposition or not). When the event recorded was a deposition, the form also sought the identity of the deponent (type of witness) and of the party that initiated the use of videotape. When the equipment was used

to play back a recording, the date and purpose of the playback were sought. When the purpose was playback of a deposition in a court proceeding (as opposed to playback for review by counsel, court, or a stenographer, for instance), additional information was requested: whether the deposition was used to present direct testimony or to impeach testimony, how objectionable material on the tape was handled in playback, who recorded the deposition, and whether the tape was in black-and-white or color.

Information obtained from the log sheets is summarized in the tables that follow. We have excluded non-case-related uses, such as recording and playback of speeches and juror orientation talks, since our focus is on videotape as a medium for recording and presenting testimony.

Tables 1 and 2 illustrate the extent to which the pilot courts used their videotape equipment for case-related purposes. Two sets of statistics derived from the data in the tables are notable; as they reflect the diversity of the pilot courts' videotape usage: The frequency of use of the equipment ranges from an average of about nine recordings or playbacks per month (in Eastern Pennsylvania) to fewer than six uses per year (in Western Pennsylvania). Measured in terms of the hours of testimony recorded, the range is from about nine hours per month to one-half hour per month. As a general matter, it is apparent that the equipment supplied to the pilot courts was put to a good deal of use in Eastern Pennsylvania and Southern New York, but to very little use in Western Pennsylvania and Eastern Michigan. In

TABLE 1
OCCASIONS OF CASE-RELATED VIDEOTAPE EQUIPMENT USE

Use	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D. N.Y.	Total
No. of uses, all kinds	230	13	50	17	64	374 (100%)
No. of recordings	134	6	27	7	47	221 (59%)
No. of playbacks	96	7	23	10	17	153 (41%)

TABLE 2
LENGTH OF COURT-MADE RECORDINGS (IN HOURS)

Length	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D. N.Y.	All
Mean	2:20	--	1:50	9:25	3:50	2:55
Median	1:45	--	1:15	3:15	2:00	1:55
Maximum	17:50	8:25	5:25	41:00	18:30	41:00
Total case-related recording hours	243	12	37	66	127	485

these four districts, virtually all recordings and playbacks were of depositions (a few playbacks were of tapes showing a crime scene or illustrating a crime-lab testing procedure).

In Northern Ohio, the equipment was used most extensively for recording complete trials, all but one being bench trials. Although this type of use is not one that is widely accepted, and thus does not fall within the scope of this report, it nonetheless warrants explanation. Use of the equipment in Northern Ohio

was attributable almost exclusively to the activity of a single judge, who employed the equipment to operate a "dual docket." With the assent of counsel, all testimony in selected bench trials was prerecorded on videotape, permitting the judge to "try" these cases at his convenience, during evening or weekend hours. This enabled the judge to conduct more trials per month than would otherwise have been the case. The rationale for this practice, however, was not only to increase trial output but to increase case dispositions by settlement. The judge believed that by using the dual docket to set definite trial dates for more cases, he was able to make greater use of the deadline value of the trial date in producing case settlements. Some cases settled after being scheduled for videotaping, but before any recording took place, while others settled after the testimony was fully or partially recorded, but before the judge began to hear it. The experience of cases settling after the trial was partly or completely taped has led to a theory that prerecording of testimony can result in settlement of cases that would otherwise go to trial; this theory is examined in the next chapter.

Tables 3 and 4 permit comparison of the extent to which the equipment was used in three different ways: recording depositions, playing back depositions recorded by the court, and playing back depositions recorded elsewhere. From table 3, it is apparent that only a few of the depositions recorded using the courts' equipment were ever played back. Overall, only 28 percent were played back at all, and only 22 percent were played back at trial or in any formal court proceeding. These need not

be regarded as disappointing statistics. They may be consequences of the fact that the majority of cases terminate without reaching trial, or they may even be evidence of a causal connec-

TABLE 3
PLAYBACKS OF RECORDINGS MADE BY COURT

Recordings	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D. N.Y.	Total	
No. made	134	6	27	7	47	221	(100%)
No. ever played back	38	0	8	3	13	62	(28%)
No. played in court	29	0	8	2	10	49	(22%)

TABLE 4
CASE-RELATED PLAYBACK ACTIVITY

Playbacks	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D. N.Y.	Total	
Total	96	7	23	10	17	153	(100%)
Recorded by court ¹	46	0	10	6	14	76	(50%)
Recorded elsewhere	50	7	13	4	3	77	(50%)
In court	67	7	21	6	11	112	(100%)
Recorded by court ¹	32	0	10	3	10	55	(49%)
Recorded elsewhere	35	7	11	3	1	57	(51%)

¹The figures in these rows exceed the figures in comparable rows in table 3 because here we include tapes recorded by the court prior to our data collection effort.

tion between videotaping of a deposition and case settlement. Table 4 illustrates that playback of tapes recorded other than by the court was a major part of the videotape activity in every pilot court but the Southern District of New York. Playbacks of "foreign" tapes accounted for slightly more than half of all playbacks of any kind, including playbacks in trials or other formal proceedings. Note that the data in table 4 relate only to playbacks using the courts' equipment and do not account for playbacks on equipment brought into the court by the litigants.

Table 5 further illustrates the use of pilot court equipment for recording deposition testimony. About 31 percent of the witnesses whose testimony was recorded were expert witnesses, of whom somewhat more than half were medical experts. Another 57 percent of the witnesses were lay witnesses other than the plaintiff or defendant, and only 9 percent of the witnesses were parties to the litigation. Somewhat surprisingly, in almost all instances it was one of the parties to the suit at whose initiation the deposition was recorded on videotape; only 4 percent of the recordings were reported as initiated by the court.

TABLE 5

NATURE OF DEPOSITIONS RECORDED BY COURT

Characteristic	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D. N.Y.	Total	
Person testifying							
Total	134	6	27	*	47	214	(100%)
Plaintiff	1	1	1	*	7	10	(5%)
Defendant	2	0	0	*	6	8	(4%)
Plaintiff's expert	27	2	9	*	11	49	(23%)
Defendant's expert	7	2	6	*	3	18	(8%)
Court's expert	0	0	0	*	1	1	(0%)
Lay witness	97	1	11	*	14	123	(57%)
Unknown	0	0	0	*	5	5	(2%)
Type of expert witnesses							
Total	34	4	15	*	15	68	(100%)
Medical	19	3	8	*	7	37	(54%)
Other	13	1	7	*	4	25	(37%)
Unknown	2	0	0	*	4	6	(9%)
Party initiating video-tape deposition							
Total	134	6	27	*	47	214	(100%)
Plaintiff	73	4	19	*	25	121	(57%)
Defendant	61	2	8	*	6	77	(36%)
Court	0	0	0	*	8	8	(4%)
Unknown	0	0	0	*	8	8	(4%)

*At least six, and possibly all seven, of the recordings made in the Northern District of Ohio were fully videotaped trials (four or five) or special recordings--of counsel's closing arguments in one case and of a deposition in a criminal matter, pursuant to Fed. R. Crim. P. 15, in another.

IV. ANALYSIS AND RECOMMENDATIONS REGARDING COURT PROVISION OF VIDEOTAPE SERVICES

The question posed for this report was whether and in what circumstances court-provided videotape services should be available as an alternative or adjunct to videotape services available otherwise than from the court. Given that videotape has a proper role in recording and presenting deposition testimony, is there a need for a court-owned videotape capability?

Among the ways in which the pilot courts' experience can illuminate this question, perhaps the most obvious is that it reflects varying levels of coexistence between private and court-owned videotape capabilities. Only in Southern New York was the court's equipment the primary vehicle by which videotape depositions entered the courthouse. Although Eastern Michigan, Northern Ohio, and Eastern Pennsylvania varied greatly in their total videotape usage, playbacks in all three courts were about equally divided between in-house and "foreign" recordings. At the other extreme, all playbacks in Western Pennsylvania were of foreign tapes. The principal reason for that court's very infrequent use of the equipment was apparently that the local bar association offered a videotape service that was preferred by the bar.

Because the pilot courts provided videotape services without charge (except for the comparatively nominal cost of recording

tape), it is notable that private, and presumably more expensive, services nonetheless played a significant role in the videotape activities of these courts. Given that private services were available and were often used in lieu of the courts' services, and given that it is ordinarily the parties' responsibility to pay for analogous services, one assumes that maintenance of the pilot courts' videotape capabilities could be justified only if such capabilities advanced the courts' interests in a way that could not have been accomplished (or accomplished as well) by private videotape services.

There are several circumstances in which it may be supposed that the courts' videotape services could be so justified; but relatively few instances are apparent in which such circumstances were the reason for uses of the pilot courts' equipment. (We mean no criticism of the pilot courts' use of their equipment; the Center wanted to examine how the equipment might be employed by the courts, so no guidelines were issued that would suggest any type of use to be proper or improper.)

The first circumstance is use of the court's equipment for emergencies, where immediate access to videotape recording equipment is the only means to avoid significant inconvenience to the court, parties, or witnesses. We have in mind occasions on which unforeseen problems arise on the eve of or in the course of trial--when it would be an unreasonable burden to require a witness to attend trial, but absence of the witness's testimony would require that the trial be delayed. Table 6 shows the elapsed time between recording and playback at trial for those

depositions recorded on the pilot courts' equipment that were ever played at trial. The table shows that thirty of the forty-nine depositions that were used at trial (61 percent) were recorded fewer than thirty days before trial. This does indeed suggest that recording a deposition by videotape was often a means to avoid delay. But a time frame of thirty days in which to record a deposition does not seem so urgent as to preclude obtaining videotape services from private sources. The thirteen depositions that were recorded within three days of their playback at trial may represent a better measure of the degree to which the courts' equipment could meet an emergency that could not have been met in other ways. We should also note that among the cases that were terminated short of trial in Eastern Pennsylvania, there were three in which the deposition was recorded fewer than three days prior to termination (see table 7). It is

TABLE 6

TIME FROM RECORDING TO PLAYBACK FOR DEPOSITIONS PLAYED IN COURT

Time	Number of Depositions					Total	
	E.D. Pa.	W.D. Pa.	E.D. Mich.	N.D. Ohio	S.D.N.Y.		
3 days	9	0	2	0	2	13	(27%)
7 days	11	0	4	0	5	20	(41%)
15 days	15	0	4	0	5	24	(49%)
30 days	17	0	5	0	8	30	(61%)
19 months	29	0	8	2	10	49	(100%)

NOTE: The rows are cumulative, so that, for example, although twenty depositions were played in court within seven days of recording, thirteen of those twenty were played within three days of recording.

TABLE 7

TIME FROM LAST USE OF VIDEOTAPE TO CASE TERMINATION,
FOR CASES IN WHICH THE VIDEOTAPE WAS NEVER PLAYED
AT TRIAL (EASTERN DISTRICT OF PENNSYLVANIA)

Time to Termination	Number of Cases	Percentage of Cases
3 days	3	5%
7 days	3	5%
15 days	9	14%
30 days	17	28%
2 months	27	41%
4 months	36	55%
8 months	57	86%
16 months	66	100%

NOTE: Only cases in the Eastern District of Pennsylvania are included, both because recordings in this district represent more than 50 percent of the total and because we did not have ready access to case-related data for the other districts.

surely possible that these were recorded in order to avoid a prospective delay of trial but that the cases settled on the eve of trial. That the depositions were not used at trial does not detract from the value of being able to record them on very short notice when it appeared that they were needed. These cases may therefore be added to those in which use of the courts' equipment could have been justified as the only practical means of avoiding a delay in trial.

A second circumstance in which use of the court's videotape equipment could be justified is when it is necessary, for reasons of convenience, to use court-owned equipment to play back tapes recorded privately. Table 4 shows that about half of all tapes played back on the courts' equipment were recorded elsewhere.

We assume that in most of these instances, availability of court-

owned equipment was not necessary to permit playback. But one may suppose that use of the court's equipment was a significant convenience to litigants and the court. We noted earlier that a videotape playback at trial, especially at a jury trial, ordinarily requires at least three television monitors, in addition to a videotape recorder and connecting cables. That is a fairly bulky and heavy complement of equipment, which takes a significant amount of time (perhaps one hour) to set up in the courtroom and later remove. The burden is ordinarily lighter when the necessary equipment is on hand in the courthouse and can be set up by court personnel who are familiar with the requirements imposed by the courtroom and judges. Avoiding potential disruption and complications attendant to transporting and setting up private videotape equipment for playback at trial can be counted as a use of court-owned videotape equipment that is justified by the legitimate interests of the court. In addition to the "emergency" recordings mentioned in the previous paragraph, therefore, we include all in-court playbacks as justified uses of pilot court equipment.

From the information collected, we cannot identify any other uses of the pilot courts' equipment in which it is apparent that reliance on private videotape services would not have served as well. There are two other circumstances, however, that might justify use of court-owned equipment. One is when use of a videotape deposition is warranted to avoid inconvenience or injustice, a circumstance in which responsibility for securing the service would ordinarily fall to a litigant, but in which the litigant

does not have adequate means to underwrite the expense of private services.⁵ But the cost of private videotape services does not obviously require reliance on court-provided services. On the basis of an informal telephone survey of videotape services in several localities around the nation (Charlotte, N.C.; Portland, Me.; Des Moines, Iowa; and Washington, D.C.), it appears that the fees charged by private services for recording and playing back a videotape deposition vary from about the same to about twice as much as the fees charged by a reporter for recording and transcribing a deposition of comparable length. Consequently, practical difficulties associated with obtaining such services on behalf of an indigent litigant would not appear to differ from whatever problems might arise in obtaining stenographic services. Nonetheless, availability of a court-owned videotape capability might well ease such problems in circumstances in which videotape recording is warranted.

A final justification that has been advanced for the courts' provision of videotape services is based on the theory that the use of videotape depositions may result in settlement of cases that would otherwise proceed to trial and on the idea that judges would feel more free to take advantage of this tool if videotape services could be provided without cost to the litigants. Although this theory has some appeal, and has been suggested by at

5. It does not seem that lack of funds was a frequent reason for litigants' use of the pilot courts' videotape services. Our data show that nearly 90 percent of the depositions recorded on the pilot courts' equipment were simultaneously recorded by stenography, the costs of which would ordinarily be borne by the litigant.

least one pilot court judge and one experienced videotape operator, its merit is unclear. The theory reasons that once counsel have recorded the testimony of one or more key witnesses, counsel are in a position that is in some ways like their position during trial. They have seen (and can review) the actual testimony that will be presented to the trier of fact, and are thus better able to assess their prospects at trial. This might well enhance the prospects for settlement, much as trial itself often produces settlements prior to verdict. But it is not clear that a videotape deposition would place counsel in a markedly better position to assess trial outcome than would a stenographic deposition. Presence at the deposition affords counsel an opportunity to evaluate the witness's effectiveness, and the stenographic transcript affords an opportunity to review the testimony. Clearly a stenographic transcript of a deposition is not quite as effective in this respect as playback of a videotape deposition, but is it so much worse that it would be significantly less effective in facilitating settlement?

Even if videotape depositions are effective in producing settlements, one may still question whether that provides more than incidental justification for court provision, rather than private provision, of videotape services. Surely judges may be more inclined to order a videotape deposition when the service can be provided without cost to the litigants. But it is not apparent that the prospect of producing settlement is an adequate basis for the court to order the use of videotape depositions in lieu of live testimony. Where use of a videotape deposition is

justified by inconvenience or injustice associated with requiring live testimony, the prospect that a videotape deposition would obviate trial might further encourage the decision to use videotape, and where resort to private services is somehow problematic, might justify use of court resources to provide the videotape service. But court provision of videotape services in other than urgent circumstances would seem to warrant considerably stronger justification than the marginal possibility that videotape might produce settlements.

Recommendations

We conclude, first, that videotape has a valuable and not infrequent role to play in litigation, a role justified by benefit to parties, witnesses, and the court. Second, we believe the circumstances are relatively limited in which there is reason to rely on the court rather than on the private sector as the provider of videotape services.

We therefore recommend against any substantial investment of court resources for purposes of providing case-related videotape services with court-owned equipment on any general basis. In addition to the equipment in the five pilot courts, however, the federal district courts already possess in excess of one hundred videotape systems; we do recommend that these systems be used for case-related purposes in limited circumstances. Two circumstances justifying case-related use of the courts' videotape systems may arise with sufficient frequency in some districts to warrant limited expenditures in anticipation of these needs. First,

when playback of videotape depositions becomes fairly common in a particular district, it may be in the court's interest to purchase additional video monitors so that the court's equipment is adequate for playbacks at trial. This will permit the court to provide the playback facilities,⁶ and consequently mitigate the disruption associated with preparation of equipment before and after playback. Second, where the need to record a videotape deposition occurs with some frequency in circumstances of such urgency that reliance on a private service is infeasible, it may be wise for the court to purchase a videotape camera (if it does not already own one), and perhaps ensure that a few members of the staff receive minimal training in deposition recording, adequate for responding to emergency needs.

These recommendations recognize that the courts' role in case-related videotape services will be limited by the need to minimize costs. There are two types of cost that should be avoided: (1) expenditures for a complete deposition-recording capability, including full equipment (with special devices such as time-date generators), a recording studio, and thorough operator training, and (2) the personnel costs of operating a videotape service that is generally available to all litigants. We recommend that case-related videotape services ordinarily be con-

6. Although the videotape may have been recorded in a format incompatible with that of the court's videotape recorder, the court's video monitors can nonetheless be used for playback, by being connected to a video recorder provided by the litigant. The video monitors constitute the bulkiest part of the equipment needed for playback at jury trial.

sidered, like stenographic services, the responsibility of the parties to obtain.

Only if experience under the recommended policy demonstrates that the courts' interests are thereby ill-served should projects like those in the five pilot districts be continued or expanded.

END