

Judicature

THE JOURNAL OF THE AMERICAN JUDICATURE SOCIETY



The videotape tangle

Videotape for the legal community

By Sherwood Allen Salvan

In a society where access to information doubles every five years, the tradition in which the wheels of justice are permitted to grind slowly has produced an intolerable situation, both from the standpoint of the legal profession and from that of the parties it seeks to represent. The legal profession has largely failed to make use of modern technology. The consequences of this failure include (1) a continuing drain on the limited resources of time and energy available to lawyers, (2) a severe taxing of the court administration systems, with a consequent overcrowding of the court calendars, (3) higher costs for all parties concerned, and (4) possible prejudice of clients' rights.

At a time when our society is being profoundly altered by the introduction of new communications and information handling technologies, the legal profession is still using outdated systems. Tape cassettes, videotapes, computers and other devices in use by other professions have only begun to exert their influence on the legal structure. This article will discuss the use of videotape in the legal community, its history and its possible immediate and longterm effects.

History

Videotape was invented in 1956 by the Ampex Corporation and first used on a CBS

news broadcast on November 30, 1956. Originally designed for recording of commercial television programs, videotape has become a basic record-keeping technique. Portable video recorders, first marketed in 1963, greatly expanded video's usefulness.

One of the first documented uses of videotape in a court occurred in December 1971 when a deposition in a personal injury action was taken from a physician in Oak Ridge, Tennessee. The tape was admitted at a trial subsequently conducted in St. Petersburg, Florida.¹

In the most extensive use of videotape to date, Ohio Judge James J. McCrystal conducted an entire trial, except for the voir dire and opening and closing arguments, on videotape. When objections were raised, the trial court ruled on them, edited the objectionable portions before presenting it to the jury while preserving an original tape with the "objectionable" evidence in the event an appeal were to be filed after the trial. From opening gavel to verdict, the trial which would ordinarily have taken five days was

1. Videotape was first used in December 1971 in Oak Ridge, Tennessee, to take a deposition in a personal injury case. See also *Zollman v. Synnington Wayne Corporation*, 430 F2d 28 (7th Cir. 1972). Also, *On Trial. Video Tape*, 46 FLA. ST. BAR. J. 159 (1972); *Video Taping the Oral Deposition*, 18 PRAC. LAW 45 (1972).



Illustration taken from cover, *Law Enforcement Communications*
June, 1975. © United Business Publications, Inc.



The American Academy of Judicial Education uses videotape as an educational tool for judges. Here a judge is filmed as he presides over a mock trial.

reduced to two hours and forty minutes playing time. The judge, attorneys for the parties and witnesses were not required to be present when the tape was played to the jury.

Judge McCrystal and Justice James V. Barbeto² of Ohio, as well as Justice Oppido³ and Justice Harry Frank⁴ of New York have experimented with videotape. The use of videotape and related devices has been advanced in several other New York cases, but as yet the courts have not decisively chosen to recognize this new technology in any decisions on policy formation.⁵

2. Akron Beacon Journal, August 12, 1972, where Judge James Barbeto conducted two trials simultaneously on videotape in Court of Common Pleas, Summit County as an experiment.

3. Rubino v. G. D. Searle and Co., 73 Misc. 2d 447 (1973).

4. Wolman v. Flo Toronto Service Station Ltd. (Sup. Ct. New York County, Frank, H. J. 1974, index no. 07107/74).

5. People v. Goodman, 31 NY 2d 26 (1972). A motion was submitted on videotape to reargue a decision together with an audio tape and a written brief, but declined by the court without comment. In People v. Garcia (Sup. Ct. New York County, Polsky, L. J., docket no. 799236/74) the concept of computerized information feedback systems was advanced by the attorney for the defendant but denied without opinion by the court; and in the Matter of the application of the Watson Children (Family Ct. New York County, Miller, E. J. (1974) index no. 1303-5/73) a videotape of the children and the mother outside the courtroom was offered on the issue of custody but refused by the court.

Admissibility

As new forms of legal documentation have come into practice, piecemeal extensions of the rules of federal and state evidence have incorporated these new forms into court procedure. Motion pictures were first introduced as a new medium of evidence in 1915,⁶ and films are used more and more by both lawyers and judges to add vividness and accuracy to the presentation of facts. Videotape will ultimately prove more useful than film because of its instant replay capability and lower cost.

In New York there is ample case law permitting surrogate forms of transcribing depositions in lieu of stenographic minutes,⁷ however there are no affirmative guidelines either in the case law or statute prescribing the necessary requirements for the admissibility of videotape into the court.

It has been held that videotape may be admitted into evidence when certain safeguards have been provided.⁸ These include: (1) a showing that the recording device was capable of taking testimony, (2) a showing that the operator of the equipment was qualified, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions or deletions have not been made to distort the substance of the proceeding, (5) a showing of the manner of the preservation of the recording, (6) identification of the speakers, and (7) a showing of voluntariness of the speakers.⁹ In criminal cases the requirement of voluntariness or lack of duress would also have to be established if a tape of a confession or line-up were offered into evidence.¹⁰

6. Glyn v. Western Feature Film Company, 114 L.T.R. 354 (1915).

7. Capano v. Shappiro, 6 A.D. 2d 1054 (1958). However, in Bichler v. Eli Lilly & Co. (Sup. Ct. New York County) New York Law Journal April 14, 1975, Justice Callaghan denied the use of videotape simply because stenographic means of transcription were not shown to be inadequate.

8. Victor A. Wild, *The Use of Videotape in Criminal Law*, SEMINAR LAW AND TECHNOLOGY, University of Arizona, Fall 1974; see also Affidavit of Ethics submitted by video technician Judith Mann in Wolman v. Flo Toronto Service Station Ltd. *supra* note 4.

9. State v. Miller, 6 Or. App. 366, 487 P2d 1387 (1971) *accord*.

10. State v. Newman, 4 Wash. App. 488, 484 P2d 473 (1971).

In general, the method used to acknowledge acceptance of videotape has been interpretive rather than declaratory. Videotape was recognized under the evidence code of California, by interpreting the existing statute to include "every *other means of recording* upon any tangible thing any form of communication or representation, including letters words, pictures or symbols or combinations thereof (emphasis added)."¹¹ The court went on to establish some guidelines by requiring that the technician's qualifications and technical procedures employed be fully described, and that each reel of tape and all parties involved in the production be fully identified.

Rule 53 of the Federal Rules of Criminal Procedures prohibits photography and radio broadcasting in the courtroom, but Rule 30(b) of the Federal Rules of Civil Procedure does provide that a motion for transcription by means "other" than stenographic methods may be granted. Although the prohibition against the use of photographic equipment being used in the courtroom has long since been an accepted safeguard, some courts have permitted videotape to be used to record of a lineup,¹² and an appellate court ruled that the admission in evidence of the defendant's videotaped confession did not violate his constitutional rights when the confession was found to be voluntary and the defendant had been advised of his constitutional rights.¹³

Finally, the Sixth Circuit Court in Catleen County Michigan affirmatively adopted a rule on the depositions of expert witnesses.

All expert witnesses *may* be deposed before trial by the party seeking to offer such witness at trial. Such deposition may be . . . taken by *videotape machine* or other such electronic means (emphasis added).

Court applications

The use of videotape in trial and appellate courts will assist those tribunals in several

ways. It will be used to record depositions of witnesses who are disabled,¹⁴ unavailable¹⁵ or in danger of dying.¹⁶ It will preserve perishable evidence¹⁷ and allow introduction of demonstrative evidence too cumbersome to present in court. It has also been noted that in some personal injury actions a videotape close-up of x-ray evidence is a superior exhibit to in-court display of the x-ray itself.

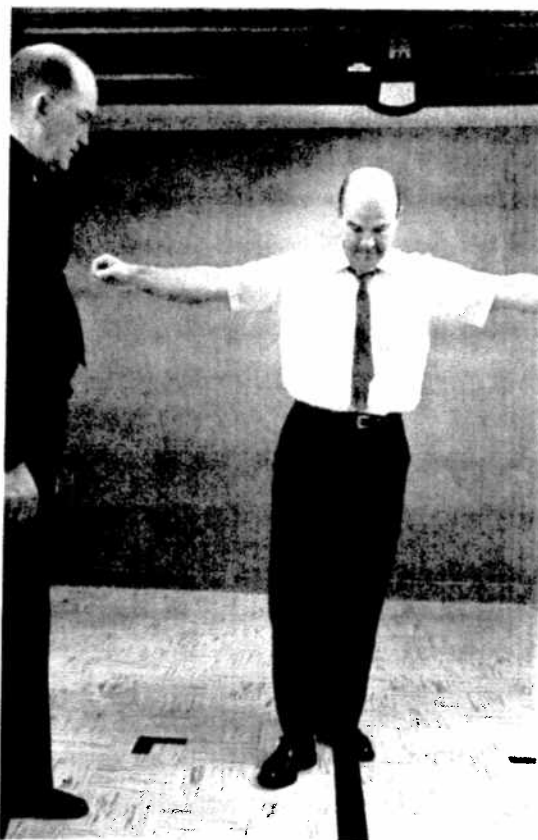
As this tool becomes more a part of the courts' workday techniques, its expanded uses will conform to the special needs of the individual tribunals. Thus, in surrogate

14. *Woodhouse, Drake & Carey Ltd. v. Seltzer Mental Disability*, (U.S.D.C. Western District, Penn. 112-69).

15. *Barber v. Page*, 398 U.S. 719 (1968); see also *California v. Greene*, 399 U.S. 149 (1970) and *Hendricks v. Swanson*, *supra* note 13.

16. *Supra* note 3.

17. In the matter of the application of the Watson children, *supra* note 5.



A policeman in Santa Clara county administers a test for drunk driving. Such tests can be videotaped and introduced as evidence.

11. *People v. Moran*, 39 Calif. App. 3d 398; 114 Cal. Reporter 413 (1974); see also *State v. Lusk*, 452 SW 2d 219 (Mo. 1970); *Paramore v. State*, 229 So. 2d 855 (1969 Fla.)

12. *Washington v. Newman*, 484 Pwd 473 (1971).

13. *Hendricks v. Swanson*, 456 Fwd 503 (8th Cir. 1972); see also *Paramore v. State*, *supra* note 11.

court, videotaped wills may become a common occurrence; in family court, a tape may be used to demonstrate the custodial care afforded children in foster homes, or the relationship of a parent and child outside the courtroom environment.

Criminal courts: The applications of videotape to the criminal court are similar to those in the civil arena, with several extensions of use unique to this forum. Some criminal courts have already adopted videotape for all stenographic recordings of transcripts.¹⁸ In New York the district attorney's offices in Queens¹⁹ and the Bronx²⁰ are studying the uses of videotape for confessions, line-ups, drunk-driving charges, giving of Miranda warnings, closed circuit recordings in shoplifting cases, and police surveillance investigations in narcotic transactions. Defense counsel may find it advan-

tageous to videotape testimony of witnesses who will be unable to testify in person.

Evidence of a defendant's mental competency may be recorded to augment expert testimony. (This suggested use may have some real dangers apart from the credibility issues the jurors might raise. The privileged communications between patient and physician can not be waived if the defendant is incompetent to do so, unless a limited waiver as to the substance of the material contained on the tapes can be elicited.)

An immediate question with regard to videotape in the criminal courts is: to what extent may it be used without jeopardizing the right of the defendant to a fair trial? An Illinois court has ruled that a defendant's physical state while intoxicated is admissible if Miranda warnings are given.²¹ If the defendant requests an attorney at the time of his arrest, counsel must be present at any further proceedings documented by videotape.²²

The issues concerning the defendant's right to confront witnesses and the right to a

18. The Tennessee Criminal Courts, under the direction of Judge Tilman Grant, used three-quarter-inch videotape to record all criminal proceedings before the bench, while two half-inch videotape cameras are used for a backup system.

19. Queens district attorney's office has been experimenting with the use of videotape since July 1974.

20. Mario Merola, Bronx District Attorney, is presently using videotape for lineups.

21. *People v. Ardella*, 49 Ill. 2d 517 (1971).

22. *Cox v. State*, 219 So. 2d 762 (Fla. 1969).



Jurors can play back portions of a videotaped trial to refresh their memories. This "jury" is posed in McGeorge Law School's Courtroom of the Future.

public trial were addressed in a California decision holding that the confrontation clause is satisfied if the defendant is given an adequate opportunity to cross-examine witnesses, even though the jurors are not physically present to examine the demeanor of the witness or the defendant when the questions are posed.²³

It has been contended that editing the trial itself and deleting all objectionable material prior to the jury's viewing infringes on a defendant's rights to effective counsel and trial by jury. Rebuttal testimony as well as favorable prejudices will certainly be curtailed, but this is not a denial of the right to effective counsel. The personality of both counsel and the trial judge will probably have less impact; however, the necessary reorientation of trial lawyers should be part of their continuing education responsibility. The voir dire, opening and closing statements may be retained for in-person delivery to preserve a vital element of the trial process.

Videotaped testimony edited by the judge prior to the jury screening satisfies the seventh amendment right to a trial by jury; indeed, significant potential prejudice would be eliminated.

Appellate courts: As videotape gains acceptance in the trial court, the appellate courts will necessarily develop video procedures as well. Videotape could be used as a substitute for oral argument²⁴ and provide a forum for oral argument on motions in appellate court in areas of practice where the rules of the court do not presently provide for oral argument.

Videotape, when used on the appellate level, will preserve an aspect of the trial nonexistent in a written transcript. Nonverbal communication expression and gesture as well as verbal inflections will be preserved.

Allowing videotape argument before an appellate tribunal may suggest curtailment of a vital aspect of appellate practice; i.e. oral argument which includes the questions addressed by the court during its presenta-

tion. Counsel would undoubtedly be able to study his presentation more carefully, but questions from the bench could only be answered by some ancillary information system capable of transmitting these questions to counsel, and thereafter, receiving an appropriate response. Videotape, as it exists presently, does not satisfy this need. Video telephones are still in the experimental stage but, when perfected, may provide the key to a surrogate form of oral argument, and a videotape record of oral argument at the intermediate tribunal will provide a transcript of all inquiries undertaken by the appellate judges in the event of a further appeal.

Procedures and personnel

As videotape comes into increasing use, fundamental changes in court procedure will take place. In addition to those mentioned earlier, changes in the interior design and structure of the courtrooms seem likely. These changes will tend to eliminate unnecessary delays and expand the caseload capacity of a court.

Judges: Videotape will allow the judiciary greater flexibility of scheduling. In addition, as previously mentioned, the judge can pre-edit objectionable material so that the jury need not be exposed to it, obviating the virtually impossible task of having a juror perform an evidentiary lobotomy on evidence to which he has already been exposed.

In practice, the edited tape would not be the exclusive trial record since a separate unedited version would be preserved as the record for appeal. The use of two tapes, one for the jury, and the other edited tape for use on appeal, will necessitate a stricter adherence to the rules of evidence than is now the case. As a result of the stricter application of the rules, their re-examination, enlargement or further limitation may be necessary.

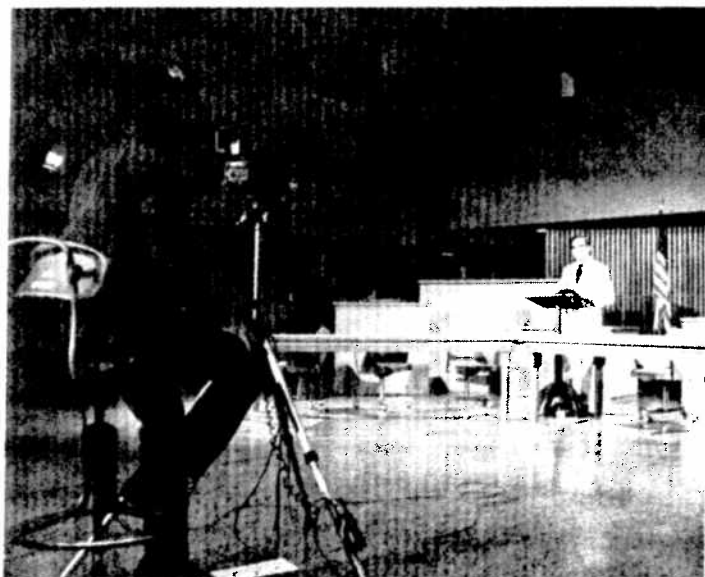
Despite criticisms, I predict that the judiciary will find video a useful tool in the maintenance of an objective position on controlling court proceedings. Presently, judges exercise discretion in questioning or cross-examining witnesses called by parties for a multitude of presumably beneficial reasons. Nevertheless, a juror should not be

23. *California v. Greene*, *supra* note 15.

24. *People v. Goodman*, *supra* note 5.

persuaded by the source of the inquiry. If the record requires further testimony, it should be prompted outside the purview of the jury.

The severest criticism of videotape's effect on the judicial aspect of court procedure is that it will detract from the dignity of the bench and usurp the role of the judge. Actually, the judge will edit the tapes before they are presented to the jury, and his charge or any portion of the trial will be available for replay if the jury requests it. Further, the judge will still be called upon to answer the jury's questions during the trial. An exact



Law schools can use videotape to record an important lecturer. Here a lecture is videotaped at Hastings College of the Law at the University of California in San Francisco.

recording of audio and visual portions of the trial can only serve to maintain a consistency which will actually promote the dignity of the bench.

Jury: The elimination of objectionable intrusions, as well as the curtailment of dialogue between the judge and advocates, will present problems yet to be resolved. However, as has been pointed out, this change will benefit the juror who heretofore has been called upon to disregard these asides in his final deliberations. Time of jury service will be reduced by videotape. Duty commitment will be determined prior to selection,

and the possibility of a juror's having to be excused could be largely eliminated.

The fatigue of sitting through a long trial can also be minimized,²⁵ as the video unit can be turned off to give jurors a rest and safeguard against loss of concentration. Instant replay to review testimony, the charge, or counsel's arguments will also help the jury. The jury's deliberations may also be videotaped, and apart from their instructional value, the tapes may also serve as a basis for determining possible prejudices in the determination of the verdict.

Attorneys: As previously noted, trial strategy will be altered for civil and criminal advocates, and additional out-of-court preparation may be required. However, the benefits of video will far outweigh these drawbacks.

Pretrial taping will facilitate settlements when counsel has reviewed the tapes objectively, after editing and prior to viewing by the jury. With this knowledge, the calculated risks of trial will be that much less. Further, counsel will have a better idea what alternatives for appeal exist. The selection of a jury, after the edited tapes have been viewed, will allow counsel to concentrate fully on the jury selection and argumentation aspects of the trial.

Court personnel: The introduction of this new medium to the courtroom will undoubtedly alter the present roles of court personnel by requiring their retraining in the use of video equipment, but these skills can be learned quickly. Most important, for the equipment to be used intelligently it should be operated by persons familiar with court procedures and practice.

At McGeorge School of Law's courtroom of the future, videotape equipment plays a significant role. The clerk of the court, the court officer and court reporter's roles are altered but not eliminated. The arrangement at Hastings includes six videotape cameras focused on defendant, judge, jury, plaintiff, attorneys, exhibits, plus one back-up camera in the event one of the other units breaks down.

25. Gerald Miller, *Televised Trials: How do Jurors React?* 58 JUDICATURE 242 (December, 1974).

Court reporters would still be able to produce a written transcript, inasmuch as videotape produces an audio record from which a written transcript could be produced. The operation of this equipment would logically become the court reporter's responsibility.

Standards have been proposed that would forbid the use of videotape equipment by improperly trained personnel, or so as to interfere with court procedures. In general, they set standards of conduct for court reporters, the proposed operators of the equipment. The clerk of the court and the court officers would still function in their present roles. A time generator on the equipment would aid the recording of events by the clerk of the court, who would still be required to keep records or log the tapes. Court-trained personnel would still assist the judge, attorneys, reporters and clerks. Video equipment requires proper control and maintenance, but no more so than the dictaphone machines, electric typewriters or photostatic machines presently used in office practice.

Outside the courts

Videotape can become as significant a tool in legal education as any of the existing moot court assignments, handbooks, or trial practice courses now offered. Both trial and appellate advocacy are better understood when actual cases are presented visually. In schools where law clinics are in existence, videotape could be used to assist the law student in reviewing points of strength and weakness in client interviews. These tapes will provide practical understanding of the attorney-client relationship. Advocacy and self-evaluation techniques are only the first step. Videotape would permit schools to record lectures by specialists to be replayed at the convenience of professors or students.

Access to information about courts and the law is important for all citizens. Videotape broadcast over television channels is ideal for this purpose. Cable television can also serve as a feedback system or public service television can also satisfy this need. Legislators, jurists, advocates and educators could stay in touch with public attitudes



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through immediate response devices on the home video receivers or through citizen's broadcast over the same vehicles.

Once a legal information feedback system is operational, the legal community will be able to react to and meet ongoing community demands for legal education. Community law offices might become the focal point for receiving and transmitting information to and about groups of citizens with specialized needs relevant to the needs of the particular community.

The videotape equipment now produced consists of a camera, three beam battery pack, portapack, tripod and various accessories with a suggested retail price of \$1,700 to \$2,500. Tapes come in thirty and sixty minute reels and cost approximately \$11 and \$23 respectively. Videotape, like the electronic calculator, may become cheaper as it becomes more refined.

Savings will be measured in terms other than equipment outlay. There will be savings in court time, court staff time, storage space, courtroom space needed for trials, and expert witness fees.

The legal profession did not stop using scribes until 300 years after the Gutenberg flatbed press had been developed. Videotape and its related technologies offer the legal system an innovation that will render its work more objective, economical and timely. Their adoption will signify the beginning of contemporary electronic technology in the legal system, and it is hoped that the time between availability and use will be somewhat less than in the earlier case. □

Committee Column

Video Tape and the Legal Profession

By Sherwood Allen Salvan, Chairperson

Committee on Word Processing, Information Handling,
Computers and Legal Research

The first documented attempt to use video tape in the courts was on a motion to re-argue filed in the Court of Appeals in 1972¹. While other jurisdictions (such as Ohio², Colorado, Illinois, and Florida) have long since recognized the need to experiment with this tool, the courts of our State have been reluctant to follow the contemporary trend. Advocates of its use have appealed to the legal community on many occasions to find support,³ but they have not received a very encouraging response.

The first lower court decision authorizing videotape use in civil actions acknowledged the "great procedural significance in the efficient and economic administration of justice"⁴ that this tool could provide. However, subsequent attempts to have this tool recognized proved futile,⁵ until the Appellate Division First Department, in a per curiam decision,⁶ permitted its use for the purposes of preserving medical testimony. Following this decision, the Judicial Conference recommended in its 1977 Report to the Legislature, that provision for allowing videotape depositions be recognized in the CPLR. Effective September 1, 1978 CPLR 3113 was amended to reflect this change.

Since that time there have appeared many advertisements in professional journals offering the services of video tape equipment and technicians for uses ranging from depositions to the documentation of wills. While the legal community's response to these ads is unknown, the demonstrated use in civil litigation in New York County has not been overwhelming.

In the criminal justice area, a case of first impression was presented when the Bronx District Attorney sought leave to use video tape for the purposes of perpetuating the testimony of a witness.⁷ From a practitioner's viewpoint, the use of video tape in criminal matters had previously been approved by implication when the then President Gerald Ford submitted in the case *United States v. Fromme*.

Although it would appear on the surface that several Constitutional arguments could be raised limiting the use of video tape in the criminal justice field, it is in this area of practice where it has been experimented with most frequently. The Bronx District Attorney's office is to be credited with obtaining federal funds necessary for the use of videotape in surveillance, and documentation of confessions. In Suffolk County, for a limited time, arraignments made with closed circuit television eliminated the necessity of transporting prisoners from the precinct to the district courts. Other prosecutors' offices have followed similar routes, and defense attorneys have been frequently confronted with the responsibility of making discovery demands to determine if this tool has been used to record undercover transactions.

Video tape has been actively used outside the civil and criminal practice areas. Public interest programs dealing with community issues are presently being aired via cable television in the County of New York, and many metropolitan law schools are using this tool for clinic workshops in oral argument, trial advocacy, and client consultation techniques. Numerous continuing education programs have used this tool to present lectures by prominent members of the profession to preserve the visual impact unique to this medium, while providing access to a large number of people.

On August 17th of this year the Court of Appeals announced that it intended to transcribe the presentation of oral arguments via the use of videotape.⁸ While this step is significant in eliminating the traditional ban of cameras in courtrooms, it does not take the full step taken by other jurisdictions where oral arguments have been presented by closed circuit television, without counsel being required to appear in court.

The handwriting is on the proverbial wall; and the impact of technology within the legal community will undoubtedly become a matter of standard procedure not only within the educational areas, but in practice and judicial administration areas as well. It will not surprise this writer if the 80's produce a 24 hour television law channel with satellite transmissions being the frequent and normal means of transmission.

FOOTNOTES:

¹*People v. Goodman*, 31 N.Y. 2d. 262 (1972), motion to reargue via the use of video tape denied.

²*McCall v. Clemens*, (No. 39301, C.P. Erie County Ohio, 1971). Judge McCrystal is to

To the Editor

Suggestions to Speed Settlements for Infants

Recently I was retained to represent a young mother, as the natural guardian of an infant, to secure a monthly maintenance allowance for the infant's current medical and educational needs. It brought to my attention a recurring problem in this area of practice which should be remedied.

The infant was born in April 1979 and sustained severe brain damage with mental and physical retardation resulting from the cumulative omissions of the attending physicians and hospital at the time of birth.

In October 1990, after a hearing, an infant compromise order was entered. Because of the severity of the injuries, and the immediate and long term needs of the infant, a structured settlement was the most beneficial method of accomplishing this desired result, as it provided not only for long term payments over the life of the infant, but required that immediate payment be directly deposited into a designated bank account for his current needs, as well. The order provided that the mother, as natural guardian, could apply to the court for permission to make withdrawals, if "needed" for the medical, educational and maintenance needs of the infant.

It must be assumed that when this compromise order was approved, it was fully appreciated that there was a current need to provide for the infant, but as is often the case with an infant compromise order, there was no self-executing provision in the order which addressed this issue.

In instances such as this, the natural guardian is then compelled to re-apply to the court for permission to make current monthly withdrawals, and/or other relief. Additional fees and time delays are encountered.

Because the Surrogate's Court is more familiar with the accountings required of guardians, an order conferring jurisdiction to the Surrogate's Court is then obtained and the natural guardian must file another petition to be appointed as the guardian of the property in the Surrogate's Court. Indeed the Surrogate's Court cannot act without an order from the court where the compromise order was entered, conferring jurisdiction.

To assist the infant, to reduce the cost of multiple applications; and in the interest of judicial economy, it is suggested that when an infant compromise order is initially entertained, the court should do the following:

1. Appoint the natural guardian, if qualified, to be the guardian of the person and/or property of the infant;
2. Establish a monthly budget allowance to be currently withdrawn from the settlement proceeds by the guardian, if needed;
3. Confer concurrent jurisdiction upon the Surrogate's Court; and
4. Require all accounting to be filed in the Surrogate's Court with the Guardianship Clerk.

The mandate of CPLR 1208 is not substantially enlarged by implementing these procedures at the time when the infant's compromise hearing is conducted, and if this is accomplished at that time, it will provide immediate access to the settlement funds for the infant's needs and eliminate duplicitous costs.

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