

## Insanity Defenses — 'Dire' Need of Study

To the Editor:

The provisions of the CPL, as they relate to the defense of mental incompetency, leave me, and I am sure others, distressed. They are inadequate, ambiguous, and incapable of solving a sensitive problem required in the preparation of an insanity defense. Neither case law, court-appointed psychiatrists, nor committees seem to relieve the difficulties.

Judge Tyler's decision (NYLJ article Nov. 24, page 1) fails to observe some practical problems faced in this area that are expressed in the form of: high costs of private psychiatric services; "rubber stamp" techniques of court-appointed psychiatric services; a general ignorance shared by the Bar and the Bench in understanding the area of psychiatry; ambiguities in case law and statute; failure of the court-appointed psychiatrists to investigate the truth of the statements given by defendants; reluctance of defendants to be examined either by private or court-appointed psychiatrists; the inability of the defense attorney from restraining his client from shouting his guilt in open court; and the fact that if a defendant is convicted of an A Felony, even if there is some serious question as to his mental competency, he is not entitled to bail.

I was assigned to represent a defendant who had a past record of incestuous rape. His mother either committed suicide or was thrown from a roof. The defendant was on an out-patient basis at Bellevue when he committed the assault for which I was called upon to represent him. He was arrested in the night and appeared at night court. The attorney who represented him that evening convinced him to plea, and then the Court ordered a 730 hearing to determine if he was competent to proceed. The psychiatrists did not check his record, but were able to find out that he was a patient at Bellevue and receiving thorasine on a daily basis. he was found fit and wanted to withdraw his plea. I was then appointed.

The judge who accepted the plea was reluctant to have the defendant reexamined and also avoided a hearing to decide if the plea was entered voluntarily. After twelve court appearances, and several in-court threats that convinced the clerks and court officers that this defendant was suffering from a mental disorder another examination was ordered.

pear for his court-appointed examination he was so heavily drugged that he almost passed out in front of the psychiatrist. The psychiatrist responded by telling the defendant to lift his head off the desk. At the hearing to controvert the finding of competency the same psychiatrist admitted that he had asked several questions because he felt like being facetious. The trial court dismissed this admission of the "psychiatrist" and affirmed the report.

When the case came to trial the defendant jumped bail. Three months later I was contacted by phone by the defendant. He had been arrested for hitchhiking somewhere upstate. He told me that he was coming back, nothing else. Two weeks ago I received a telephone call from the State Highway Patrol. They had gotten my number by monitoring the telephone call that the defendant made. They explained that they knew the defendant had jumped bail when they arrested him but it was only for a misdemeanor and did not feel that a hold was necessary. Although the defendant was arrested with chains on his wrists, and kept saying that he wanted to see God no mental examination was ordered.

The police were calling me now, however, because they had found a body chained to a tree, stripped of its flesh, and they were hoping it was a suicide instead of a homicide. The defendant's dental chart from high school allowed them to close out a possible homicide file.

There is every reason to believe that Judge Tyler is not incorrect in commenting on the unethical practices of some attorneys when they raise spurious defenses in this area of the criminal practice, but it is equally true that this area of the law is in dire need of further study and understanding by the Bar, the Bench, and those to whom the responsibility of examination is entrusted to.

A life, when lost, cannot be reborn with precedence, the administration of a court calendar, or the legislative intent found in a committee report or footnote. Competent psychiatric skill, as well as a more learned understanding of this field certainly seems like an initial step in preventing any further "errors".

Sherwood Allen Salvan  
New York, N.Y.

# Letters To the Editor

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The judge who accepted the plea was reluctant to have the defendant reexamined and also avoided a hearing to decide if the plea was entered voluntarily. After twelve court appearances, and several in-court conferences that convinced the clerks and court officers that this defendant was suffering from a mental disorder another examination was ordered.

The defendant missed his first two scheduled appointments. He refused to attend a private examination I had arranged for him. When he did appear for his court-appointed examination he was so heavily drugged that he almost passed out in front of the psychiatrist. The psychiatrist responded by telling the defendant to lift his head off the desk. At the hearing to controvert the finding of competency the same psychiatrist admitted that he had asked several questions because he felt like being facetious. The trial court dismissed this admission of the "psychiatrist" and affirmed the report.

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Sherwin S. Salvan  
New York, N.Y.

## Public Interest Law Forum for The Young Lawyer

By Sherwood Allen Salvan

This column is a regular feature of the Law Journal and is written by members of the Council of New York Law Associates who comment on the law and public affairs as they relate to the so-called public interest area. The articles reflect ideas of the authors and do not necessarily represent positions taken by the Council.

### Videotape: In the Public Interest

Technology's influence has finally been recognized in the State of New York, as the Appellate Division, First Department, in a per curiam decision<sup>1</sup> has permitted the linking of a deposition via the technology of videotape. It is in the interest of the public and the legal community to inquire into the utility of technology as adaptable for use within the legal community to determine if the quality of the profession's output can be improved.

Presently our society is being profoundly altered by the introduction of new communication and technologies. However, the legal profession is still using nineteenth century systems. Tape cassettes, videotape, computers and similar tools, presently used in other professions, have only begun to exert their influence on the legal structure.

While other jurisdictions such as Ohio, California, Colorado and Florida have long since recognized the need to respond and experiment with new technologies, the Juried<sup>2</sup> of New York has largely failed to explore the use of similar systems. New York, previously recognized as the innovator in declaratory case law, still retains the distinction of having the largest number of cases filed, but no longer is considered an innovator in either case law or practice innovations.

Our failure to adopt the changing modes of technology has resulted in the following: a continuing drain on the limited resources of time and energy available to members of the Bar to practice our profession, a severe taxing of court administrative systems reflected in an overcrowding of the judicial calendars; an overt attitude of the jurist to force settlement of cases; higher costs for all the parties concerned; and possible prejudice of clients' rights. It is suggested that the use of videotape technologies will assist in lessening the probability of these failures from continuing.

#### Background

Originally created as a device for recording commercial television, videotape has since become accepted as a basic information-keeping technique for business, education, government and individual use.

In the legal community, the first publicized use to date was in a case in Ohio,<sup>3</sup> where the Judge James McCrystal conducted the entire trial of a personal injury action via videotape. The voir dire, opening and closing arguments were presented live; and the trial, which would have taken five days, was reduced to a total of two hours and forty minutes of court tape and the original tape, with the objections, was retained in the event an appeal was filed.

Motion pictures have long since been recognized as an acceptable means of offering to prove the fact in question; videotape, superior to the film process in terms of feasibility, immediate replay, cost and labor overhead factors, has not been granted similar privileges of recognition. If courts or bar associations will not act, the responsibility rests upon those who must practice under the present conditions. It is suggested that videotape should be admitted when:

1. It is demonstrated that the recording device was capable of taking testimony;
2. It is demonstrated that the operator of the equipment is qualified;
3. The recording can be verified for authenticity and correctness;
4. Safeguards to prevent distortion or impropriety can be established;
5. Identification of speakers and a showing of voluntariness;
6. It is subscribed to in accordance with the provisions of the CPLR.

#### Suggested Applications

The recent use of a videotaped deposition of President Ford and the recent experiment in the Court of Claims permitting oral arguments to be presented via video technologies from New York to Washington, D.C., are but limited expressions of the use of this medium. In the criminal law area, aside from the invariable feature that video transcripts would be available immediately, lineups, confessions, Miranda warnings, arraignments, drunk-driving tests and surveillance activities are uniquely pictorialized via videotape. A disinterested party of prosecution might be lessened if the People were able to secure testimony of witnesses either unable to testify or in danger of dying.

Civil litigation will benefit from the preservation of testimony of witnesses either unavailable or incapable of testifying in court, but the most immediate benefit will appear in the reduction of the overall time-cost factors. Thus, the cost of expert witness testimony will be reduced as there will no longer be a need of having the witness appear in court and wait to be called. If video technology is accepted as a means of presenting the entire case to a jury, it is acknowledged that the pretrial time required for preparation will be increased; however, since the tape is prepared, the total in-court time will be lessened. Thus attorneys and jurors will not be required to be present when the tape is played; jurors' time commitment will no longer be a factor in selection; settlements can be evaluated based upon the quality of the testimony taped and edited, rather than on a speculative theory of how the testimony will unfold at the trial; and an appraisal of the points available for an appeal would be known after the courts edit the tape, and prior to the presentation to the jury.

#### Other Advantages

If this tool were limited to pretrial depositions of testimony, there is little doubt that the likelihood of capturing a juror's attention via videotape is superior to a reading of a lengthy written transcript. The medium should not be limited to this obvious use. Real or demonstrative evidence incapable of being presented in court could be taped, and the integrity of such evidence would be preserved in its original expression without the factor of time affecting its character. Jurors, unable to comprehend a portion of the testimony, may replay that portion or request questions to be answered by the judge, and thereby eliminate any confusion that may have arisen. The applications of the use of videotape are limited by the resourcefulness of those who are entrusted with its use.

Since that time, advocates of the use of technologies related to videotape and other modes of transmitting and storing information have attempted to persuade the legal community to adopt rules governing its use and acceptance. Justice Opoldo<sup>4</sup> and Justice Frank<sup>5</sup> of New York have acknowledged the utility of this medium, but substantial recognition by other members of the judiciary has not been noted.

#### Other Jurisdictions

The consequence of a continuing, acute shortage of available personnel trained in court reporting made it necessary for the State of Alaska to rely exclusively, and exclusively on electronic recording for all trial and hearings in that state. The problems of sparsely populated states, such as Alaska, have not limited the need for using this medium in other jurisdictions. Thus, Illinois<sup>6</sup> recognized the need for electronic recordings simply because of lack of sufficient numbers of court reporters available to cover all of the courts, and because of a serious question about the level of competency of those available.

Suggesting, for the moment, that the needs existing in other jurisdictions do not exist in this state, the question to be answered is whether the introduction of existing technologies to the legal structure will provide a substantial benefit for all concerned.

#### Within New York

Presently, various administrative, or quasi-judicial proceedings, are recorded by means of electronic recording devices. The continued reluctance to use related technologies in all areas will permit the weak points of our legal structure to continue to undermine the basic legal sound foundation.

Videotape is an audio-visual information storage unit capable of exact recording duplications of visual actions and audio declarations of the events as they occur. It provides an instant audio-visual transcript, and its cost is competitive to existing systems of transcription, rather than prohibitive.

New York has the heaviest calendar of cases of any jurisdiction; it is not sparsely populated; and might well lay claim to having the greatest number of competent court reporters than any other jurisdiction. Yet a written transcript cannot be produced instantly; errors appear; costs are sometimes so high that they preclude an appeal; written transcripts neither provide the vividness nor the objectivity of a visual-auditory transcription; and the fact remains that a reporter cannot transcribe every detail of the proceedings.

A suggested reading "between the lines" is often mandatory to interpret the general intensity of the trial or hearing that was transcribed. This results in a substantial loss of the factual event as it occurred. In answer to these problems the courts of this state have responded with a sparsity of decisions,<sup>7</sup> and the bar associations have neglected to create committees to study the possible effects resulting from the use of this medium.

#### Admissibility

Prior to the *Frank* decision there was ample case law in New York permitting surrogate forms of transcription.

Appellate Division must be applied for its decision, the court failed to establish any guidelines for the admissibility of tapes, and suggested some disturbing guidelines for its future use.

