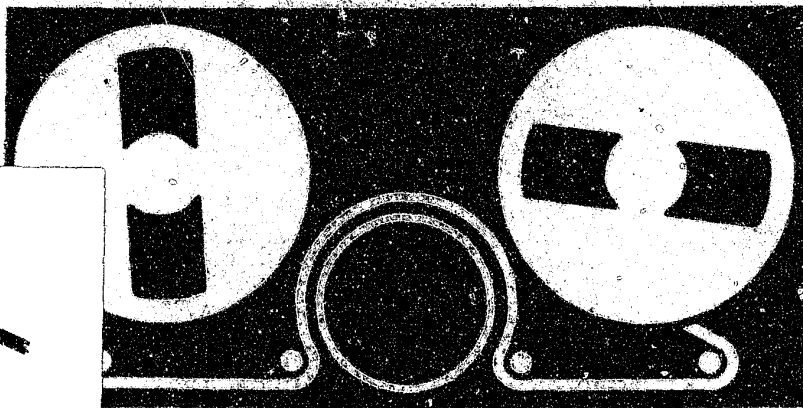


# VIDEO TECHNOLOGY IN THE COURTS



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National Institute of Law Enforcement and Criminal Justice  
Law Enforcement Assistance Administration  
United States Department of Justice



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by

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## ABSTRACT

The history of the use in criminal justice of video technology--both video recording and live, interactive video--is presented. Factors arising from this use that are discussed are: legal issues and the extent to which they have been resolved; perceptual and behavioral issues that have been researched; and evidence of increasing acceptance of video technology in criminal justice. The paper concludes that the ultimate applications of video technology will depend on constitutional decisions and decisions as to its most effective utilization.

## PREFACE

The first edition of Video Technology in the Courts was prepared in support of on-going activities of the Phoenix video telephone project. This revised edition reflects additional milestones in the use of video technology in the courts that did not appear in the first edition. The revisions consist of additions to Table I, "Milestones in the Use of Video Technology in the Courts," and Appendix A, "History of Video Technology in the Courts."

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## EXECUTIVE SUMMARY

This paper presents the history of the utilization, in the courts, of video technology--both video recording and live, interactive video--and some of the issues that have evolved.

The documented advantages and disadvantages of using videotape to record depositions, testimony, evidence, and entire trials for later presentation to a jury and also to supplement or substitute for stenographic recording are discussed.

Also discussed is the more limited experience in using live, interactive video--primarily two-way, closed circuit television (CCTV). Included is a brief description of the most extensive live video project to date in which 17 video telephone sets are being used to form a network linking seven criminal justice agencies in Phoenix and Maricopa County, Arizona.

Evidence of the increasing acceptance of video technology use in criminal justice is presented--including changes in rules of civil and criminal procedure, government efforts to establish equipment standards and usage guidelines, and architectural changes in courtroom design to accommodate video equipment.

The issues that arise from the use of video technology are examined, and the progress that has been made to date in resolving these issues is summarized.

The primary legal issues identified are the constitutional questions that arise from possible infringement of both fifth amendment right to due process and sixth amendment rights to public trial, witness confrontation, and assistance of counsel. Cases involving video technology that have been appealed to higher courts are summarized.

Perceptual and behavioral issues involved in the use of video technology and current documented research in this area--principally with respect to videotape--are described. These issues include the effect of video presentations on the perception of witness personality, stress, and body language. The relationship of the perceptual and behavioral issues to the legal issues is discussed.

Decisions regarding the constitutional acceptability of this technology and determination of its most effective utilization will ultimately define the final applications of video technology in criminal justice.



## I. INTRODUCTION

Retired Associate Justice of the Supreme Court, Tom C. Clark, commented in 1975 on the brevity of the history of organized efforts to modernize the judicial system. Noting the establishment of the National College of the State Judiciary in 1964, the Federal Judicial Center in 1968, the first classes for court administrators at the Institute for Court Management in 1970, and the National Center for State Courts in 1971, Justice Clark stated:

It seems clear from this brief history that the main thrust of the movement for modernization of our judicial system is barely 10 years old. But even in this era of accelerating change, the progress in the application of video technology to the law has set an astonishing pace.<sup>1</sup>

The two basic types of video technology that have been used in the courts are video recording and live, two-way (interactive) video. The first of these is the more common and has been used in a variety of ways to pre-record testimony or events for later showing to a jury and also to preserve testimony, events, and proceedings for the record.

Live, as opposed to tape recorded, video may consist of either two-way closed-circuit television (CCTV) or video telephone. CCTV is cabled television with audio capability that connects two specific locations. Video telephone is two-way television in conjunction with telephone service. The dial-up capability of the video telephone enables the user to connect selectively with any other station on the network. Both CCTV<sup>2</sup> and video telephone permit conversational interaction between parties who can both see and hear each other.

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<sup>1</sup>Clark, Tom C., "Symposium: The Use of Videotape in the Courtroom," Brigham Young University Law Review, 1975, Vol. 2, p. 328.

<sup>2</sup>The abbreviation "CCTV" is used in this paper to refer to two-way CCTV unless otherwise stated.

This paper reviews the historical development of video technology use by the courts and the legal, perceptual and behavioral issues involved. It reviews the advantages and disadvantages that have been reported regarding the use of videotape and it also identifies a number of the issues that affect the use of live video.

While it is evident that video technology is being increasingly adopted and that the literature to date has been predominantly favorable, no attempt is made here to advocate the use of either type of video technology.

## II. HISTORICAL DEVELOPMENT

### A. Video Recording

Videotape became generally available for use in 1956. Videotape recording is electronic rather than photographic recording. The equipment records images and sound as electrical impulses on magnetic tape. The camera is simple to operate, portable, and relatively inexpensive. Generally, no special lighting or multiple microphone arrangements are needed. The videotape recording does not require processing and can be replayed instantly.

Since 1968 court applications of videotape have included (a) the recording of depositions, demonstrative evidence and even complete trials for later showing to a jury and (b) the recording of trial proceedings as a supplement to or substitute for stenographic recording.

In addition, videotape has been used elsewhere in criminal justice to record:

- public demonstrations where there is potential for violence
- search and seizure evidence
- police instructions to suspects regarding their rights
- line-ups (as a substitute for physical line-ups or to ensure that line-up procedures are correct)
- sobriety tests
- police interrogation of suspects
- confessions (for compliance with Miranda and to prove they were voluntarily given).

Considerable literature is available on these uses of videotape.<sup>1</sup> (See bibliography.) Specific advantages that have been cited in the literature for the use of videotape in the courts include that it:

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<sup>1</sup>In this paper, the term "videotape" is used to refer to both the process of electronic recording of sound and images and the recording itself.

- makes better scheduling of judge, courtroom and juror time possible
- saves witness, judge and jury time (particularly in the event of a retrial)
- makes testifying more convenient for the witness
- makes available testimony of expert witnesses who are unwilling to travel
- preserves for the jury the testimony and demeanor of a young, ill, infirm, or aged witness shortly after the crime (before memory of facts weakens or body injuries heal)
- preserves testimony of a dying witness
- saves delay due to unavailability of expert witness
- presents only that evidence to the jury that is admissible and proper (prejudicial expressions of attorneys or judge have been eliminated)
- permits better preparation for trial on the part of attorneys (they would not have to request continuances)
- permits better and shorter opening statements by attorneys in the case of pre-recorded videotaped trial since they know what the evidence will show
- gives attorneys more time to prepare final arguments
- shortens the trial time
- reduces transcript production time
- presents an accurate recording of testimony, including facial expressions and intonation (no error on the part of the court reporter)
- aids in positive identification of the speaker when several are speaking (as opposed to sound-only recording)
- gives the appellate court an opportunity to observe witness demeanor (considered a disadvantage by some).

The above have been cited as advantages of the use of videotape by its proponents.

Less has been written about its disadvantages<sup>1</sup> but some of the problems that have been cited are:

- cost of the equipment
- consumption of more attorney time to prepare and review video-tapes
- potential for improper editing
- existence of laws prohibiting the use of electronic devices or cameras in the courtroom
- unresolved legal issues associated with its use
- greater time required to view a tape rather than scan a typed transcript during appellate review
- possibility that the videotape recording of the trial showing witness and defendant demeanor might tempt the appellate court to become a second trier of the fact rather than of the law
- greater cost of storage, security, and handling.

Articles focussing on the disadvantages of videotape are just beginning to appear. In August, 1975, Samuel J. Brakel, writing in the American Bar Association (ABA) Journal,<sup>2</sup> expressed concern about the optimism with which court use of videotape has been received. In December, 1975, an article regarding pre-recorded videotaped trials (PRVTT) written by the immediate past president of the National Shorthand Reporters Association stated:

The publicity related to McCall v. Clemens, and pre-recorded trials generally, dwells on the saving of court and juror time. Significantly, there is no mention of the time it

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<sup>1</sup>Doret has pointed out that the literature has enthusiastically supported the introduction of videotape and "has been excessively concerned with the advantages of the technique but, perhaps understandably not concerned enough with its practice and normative difficulties." Doret, David M., "Trial by Videotape--Can Justice Be Seen to Be Done?", Temple Law Quarterly, 1974, p. 230.

<sup>2</sup>Brakel, Samuel J., "Videotape in Trial Proceedings: A Technological Obsession?", ABA Journal, August 1975, p. 956.

takes counsel and witnesses to make the tapes, the cost and inconvenience of taking testimony at various locations and times, the possibilities of mechanical failure, the difficulties in clearly understanding the recorded voices, the slowness of preparing typewritten transcripts, and problems encountered by attorneys in preparing appeals or briefs from only a videotape record, and the mounting delays which will result on the appellate level when appellate judges have to sit either singly or as a group and watch the video-tape. The procedures followed in appealing from a pre-recorded video-tape trial on the tapes alone are the same as those for the in-court videotape trial, and the problems inherent in the latter apply with equal force to the PRVTT. Nor have longer trials and more complex litigation been considered. The few cases cited and re-cited in the literature have been short, simple ones.<sup>1</sup>

The National Center for State Courts (NCSC) writes that:

"More experience is needed to truly evaluate the impact of video recorded testimony or evidence. Comparative cost benefit analysis--in terms of dollars, time, and quality of record--have yet to be fully ascertained. Video recordings may save a substantial amount of juror and witness time, and help alleviate court scheduling problems. However, to truly evaluate such savings, time and cost statistics also need to be developed for judges, attorneys and court staff."<sup>2</sup>

#### B. Live Video

While videotape has been increasingly used for a variety of applications since 1968, CCTV has only been used in isolated situations. In one of its earliest court-related uses, CCTV, in a one-way mode, enabled the press seated in another room to observe court proceedings in the Sirhan Sirhan case in Los Angeles in 1968.

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<sup>1</sup>Kosky, Irving, "Videotape in Ohio: Task 2," Judicature, December 1975, p. 235.

<sup>2</sup>NCSC, Video Support in the Criminal Courts, p. 21.

In 1972, the video telephone was first used in bail bond hearings to link defendants being held in a Chicago police substation to a court two and one-half miles away. CCTV has been used in a similar fashion in Philadelphia since 1974. In addition, the system is used in Philadelphia to connect law students at the central police station to defendants at a substation to permit interviews. The law students then make recommendations to the court regarding pre-trial release.

In 1973, CCTV was used in the presentation of court testimony by a crime laboratory expert in Independence, Missouri, to a municipal court in Kansas City, Missouri. In 1975, video teleconferencing was used by lawyers in New York City to present appellate arguments to U.S. Court of Claims judges in Washington, D.C.

In 1975, television was used in Sacramento County Superior Court, California, to provide a link between two Symbionese Liberation Army defendants in one room with the courtroom in which their murder trial was being conducted. In that case, the defendants at times elected to view their trial from outside the courtroom and, at other times, were removed from the courtroom on order of the court because of their disruptive behavior. Television was also used in 1975 in the U.S. District Court, Sacramento, when Lynette Fromme elected to remove herself from the courtroom.

The current video telephone project in Phoenix, Arizona, represents the most extensive attempt to employ live video technology to date. This project is a joint undertaking by the Law Enforcement Assistance Administration (LEAA) and the American Telephone & Telegraph Company (AT&T) using experimental equipment. The project involves the use of a network comprised of 17 video telephone sets to link seven criminal justice agencies. The participating agencies use video telephones in 11 administrative and courtroom applications at various stages in

the criminal justice process to substitute for in-person conversations. The applications range from use of the video telephone by a substation police officer to access central records in order to identify a suspect to use by an investigating probation officer to interview a convicted felon at county jail to obtain information for a pre-sentence report.

The Phoenix project provides an opportunity to observe criminal justice agency use of the video telephone, gain practical experience with the procedural and technical problems involved and to identify advantages and disadvantages associated with its use.

C. Milestones in the Development of Video Technology in the Courts

Milestones in court use of video technology are summarized in Table I. A more complete history including guidelines published, workshops, state and federal rule changes and higher court rulings is presented in Appendix A.

D. Establishment of Standards and Guidelines

In anticipation of more widespread use of video technology in the future, the federal government, particularly the LEAA National Institute of Law Enforcement and Criminal Justice (NILECJ), has supported the development of standards and guidelines for equipment and usage.

Video Support in the Criminal Courts was published in January, 1974, by the National Center for State Courts under a NILECJ grant. The second of the four volumes, Users Guide to Performance Standards and Equipment Costs, recommends equipment configurations for legal applications as well as requirements for video performance.

In November, 1974, as a result of its videotape pilot projects, the Federal Judicial Center published Guidelines for Pre-Recording Testimony on Videotape Prior to Trial. The guidelines were developed



TABLE I  
MILESTONES IN THE USE OF VIDEO TECHNOLOGY  
IN THE COURTS

YEAR	STATE OR JURISDICTION	EVENT
1962	Michigan	First use of CCTV to enable law students to view court proceedings.
1968	Illinois	Use of videotape as a supplement to stenographic reporting.
	California	First use of CCTV to enable media representatives to view a trial.
1971	Ohio	First use of videotape to present all testimony and judge's instructions to a jury in a civil case.
	Florida	Use of videotape to present expert medical testimony in a personal injury case.
1972	Ohio	First use of videotape to present all testimony and judge's instructions to a jury in a criminal case.
	Illinois	First use of video telephone to conduct a bail bond hearing.
1973	Missouri	First use of CCTV to present expert testimony from one city to a court in another city.
	Ohio	First use of videotape as the sole recording of a criminal trial.
1974	Pennsylvania	First use of video telephone for preliminary arraignment of a defendant.
1975	California	Use of CCTV to enable defendants to view part of their own murder trial.
	Arizona	First use of video telephone to present testimony by a probation officer in a probation revocation hearing.
	Arizona	First use of video telephone to arraign a jailed defendant.
	New York/ Washington	First use of teleconferencing for attorneys in one state to present appellate arguments to judges in the District of Columbia.
	California	First use of videotape to present testimony of a U. S. President in a criminal trial.
1976	Arizona	First use of video telephone to present police officer testimony in a Justice Court preliminary hearing.
	Arizona	First use of three-way video conferencing by a superior court judge to hear pre-trial motion arguments presented by a county attorney and a public defender from other locations.
	Arizona	First use of video telephone to present testimony involving cross-examination of witnesses (criminalist, police officer, jailed accomplice) in criminal trials.
	Arizona	First use of video telephone for sentencing in a probation revocation proceeding.

as a result of experience gained in U.S. District Courts in Pittsburgh, Philadelphia, Cleveland, and Detroit.

The Law Enforcement Standards Laboratory of the National Bureau of Standards (NBS) is presently developing videotape equipment standards.<sup>1</sup> A draft of Standards for Videotape Recorders for Courts is expected to be submitted to the sponsor, NILECJ, in July, 1976. In addition, NBS is preparing Guidelines for CCTV for Courts and this draft is expected to be submitted to NILECJ in December, 1976.

E. Courtroom Design to Accommodate Video Technology

In January, 1973, The American Courthouse was published by the Institute of Continuing Legal Education of the University of Michigan. This work, which contains a section on technology utilization, was the product of the American Bar Association-American Institute of Architects Joint Committee on Design of Judicial Facilities.

A recently constructed model courtroom, circular in design, was opened in June, 1975, in the District of Columbia. This prototype courtroom is in daily use and is serving as the design proving ground for a new District of Columbia Superior Court/Court of Appeals facility. Facilities for videotape viewing as well as CCTV evidence display are provided in the prototype courtroom. The new building, which will contain 45 courtrooms, is presently under construction and is scheduled for completion in late 1977 or early 1978.

The Mercer Circuit Court, Harrodsburg, Kentucky, completed in January, 1976, is the most recently constructed courtroom making

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<sup>1</sup> An earlier NBS document, Potential Uses of Court Related Video Recording was published in 1972 under a grant from NILECJ. This work consisted of a state-of-the-art review of video recording including equipment, systems, their suitability for court use, and the legal environment affecting the use of video recording.

extensive use of technology. CCTV cameras outside the second floor courtroom are monitored in the Sheriff's Office on the first floor of the same building. Inside the courtroom, a stationary camera focuses on the witness, another on the evidence table which is in the center of an oval pit, and a third provides a wide-angle view of the courtroom. In addition, a portable tripod camera with a zoom lens is available. There are four monitors for juror viewing (one monitor for each three jurors) and one monitor for each counsel and the judge.

The purpose of the Mercer Circuit Court video system is to permit the showing of videotapes in the courtroom, to record trials and to permit videotaping of trials for later showing to a jury.

Architectural adaptations in courtroom design that permit use of video equipment, such as those in the District of Columbia Superior Court/Court of Appeals facility and the Mercer Circuit Court, are indicative of the growing acceptability of and planning for video technology utilization by the courts.

#### F. Use of Video Technology in Legal Education

The use of CCTV in legal education is not new. Two courtrooms in Washtenaw County, Michigan, Circuit Court have been equipped with CCTV to permit the viewing of court proceedings by law students at the University of Michigan since 1962.

In 1970, Hastings College of the Law in San Francisco opened the first moot courtroom in the U.S. permanently equipped with CCTV. The school videotaped student court sessions for legal education purposes. "Videotape has since become a valuable feedback tool for students in

trial practice courts, and the TV system has become an indispensable part of the classes in evidence in personal injury cases."<sup>1</sup>

As video tape gains greater acceptance and a wider usage in the courtroom, its extension into the classroom will be even more rapid. The use of video technology in legal education programs is virtually unlimited. The day will arrive soon (particularly with the advent of more intensive post-JD specialty education programs required by a profession which is increasingly more specialized) when video programs will be beamed over closed-circuit networks to law firms and reception centers throughout a state, or even nationwide as an instructional tool for new associates, or a means by which lawyers sharpen their skills and keep abreast of developing areas of the law. Upon arriving at the office, lawyers will spend an hour or so viewing a continuing legal education program (pretaped or live) in their offices over a closed-circuit network or they may watch a cassette tape of a lecture, panel or demonstration presented at an earlier program which they were not able to attend or which was specially prepared for distribution to law offices. And the use of satellites to transmit TV programs will provide a worldwide network over which programs may pass. Programs originated in New York might someday be viewed live in Hawaii.<sup>2</sup>

Extensive use is made of video technology in the "Courtroom of the Future" of the McGeorge School of Law, University of the Pacific. A court technician in a sound-proof booth at the back of the circular courtroom controls all tamper-proof videotaping and sound recording of court proceedings as well as electronically-operated security devices to screen persons for firearms and to lock the courtroom by

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<sup>1</sup>Rush, Paul Edward, "Legal Educators Advocate Video Tape," Educational Broadcasting, November/December, 1973, p. 11.

<sup>2</sup>Ibid.

remote control. The technician can provide the courtroom and jury room with instant replays of portions of the trial and document displays via television monitor. In addition, he controls the raising and lowering of a central evidence display pedestal and controls the camera which permits close-ups of evidence displays on the monitors.

The "Courtroom of the Future" provides for viewing of courtroom proceedings by representatives of the press and communications media from a separate room provided with one-way glass. A public viewing room which could be used in the event of a disruptive audience is also provided with CCTV.

Intended as an experimental facility, the "Courtroom of the Future" was dedicated in October, 1973, after seven years of research. In addition to its primary purpose of training law students, it is used by faculty and students for studies to improve the physical environment of the courtroom and to explore the effective use of technology in the judicial process.

### III. LEGAL ISSUES

#### A. Use of Cameras in the Courtroom

The widespread prohibition against television cameras and photograph-taking in the courtroom is a fact that bears on the use of live video. It is unknown at this time whether the federal and state rules prohibiting photographs, cameras, and broadcast television for news purposes will be interpreted to apply to videotape cameras, CCTV cameras and video telephone cameras used as part of the judicial process and under the control of court personnel. Presumably they will not.

Rule 53 of the Federal Rules of Criminal Procedure stipulates:

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.<sup>1</sup>

Many states have similar rules of procedure that prohibit photograph taking in state courtrooms. Some rules specifically prohibit broadcast television. Colorado is a notable exception in that it has permitted trial coverage by television at the discretion of the judge since 1956. The state of Colorado has guidelines to regulate media coverage as well as a broadcast coordinator to handle radio and television requests from Denver stations, to request permission of the trial judge for media coverage, and to coordinate procedures with the judge.

Texas also permitted broadcast television for some years. The Billie Sol Estes case is probably the most well-known involving media coverage in Texas. In 1965, the U.S. Supreme Court reversed the Estes

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<sup>1</sup>Regulation of Conduct in the Court Room, Federal Rules of Criminal Procedure, Rule 53.

conviction, finding that the defendant had been deprived of his 14th amendment right to due process by the televising of his "heavily publicized and highly sensational" criminal trial. In this case the presence of television cameras was a disturbing influence within the courtroom itself and also resulted in extensive publicity regarding the case in the community. At least partly as a result of the Estes case, broadcast television is now permitted in Texas courtrooms only for ceremonial proceedings.

The rules regarding cameras are beginning to change. In 1974, Canon 35 of the American Bar Association (ABA) Code of Judicial Conduct, which prohibited the use of cameras in the courtroom, was replaced by Canon 3A(7). The new canon permits the use of "electronic or photographic means"<sup>1</sup> for the presentation of evidence, the perpetuation of a record and for the recording of court proceedings. The latter must be with the consent of the parties, must not interfere with the dignity of the proceedings and may be used for educational purposes only after all appeals have been exhausted.

In February, 1976, Canon 3(7A) of the Alabama Canons of Judicial Ethics went one step further than the ABA canon. In addition to permitting cameras in the courtroom to record proceedings for later use by educational institutions, the Alabama canon permits a trial or appellate judge to authorize broadcasting, televising, recording or taking of photographs during a hearing at the discretion of the judge. The canon requires that the Supreme Court first authorize a plan to ensure that such activity does not detract from the dignity of the proceedings, distract witnesses or interfere with the fairness of the trial. In addition, the canon requires the written consent of all

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<sup>1</sup>Canon 3A(7), ABA Code of Judicial Conduct, p. 59C.

parties. Certainly there is nothing in the Alabama canon to prohibit use of videotape, CCTV or video telephone cameras in the courtroom.

#### B. Rules of Civil and Criminal Procedure

Procedure for the courtroom is established by rules of criminal procedure. Some of these rules must now be interpreted in light of video technology. For example, in Arizona, does remote participation via video telephone or CCTV in a court proceeding meet the requirements of the Arizona Rules of Criminal Procedure that "the court... address the defendant personally in open court," that the defendant "be present at the hearing," and that "A hearing...be held before the sentencing court..."? The Federal Rules of Criminal Procedure apply to all criminal proceedings in U.S. District Courts similarly require that "the defendant shall be present...", that "...the testimony of witnesses shall be taken orally in open court...", and that "The defendant shall be present at the arraignment, at every stage of the trial....," etc.

Appropriate excerpts from the Arizona rules and Federal rules which relate to the use of live video in the courts are presented in Appendix B. These tend to be representative of procedural rules.

#### C. Rule Changes

A number of civil and criminal rules of procedure have been changed in recent years to permit court use of video technology. Most of these pertain to the videotape recording of testimony. Rule 30(b)(4) of the Federal Rules of Civil Procedure was the first to permit recording of depositions "by other than stenographic means" in July, 1970. Rule 30(b)(4) as well as subsequent rule changes are summarized in Table II.



TABLE II  
RULE CHANGES AFFECTING VIDEO TECHNOLOGY

EFFECTIVE DATE	RULES	CHANGE	RULE NUMBER
July 1970	Federal Rules of Civil Procedure	Permits recording of depositions by other than stenographic means upon proper notice to all parties or on order of the court.	30(b)(4)
July 1972	Ohio Rules of Civil Procedure	Permits pre-recorded videotaped trial with agreement of all parties or on order of the court.	40
September 1972	Ohio Rules of Superintendence	Specifies that the court consider feasibility of recording witness testimony when a continuance is requested due to unavailability of a witness.	14
December 1972	Michigan General Court Rules	Permits recording of depositions by videotapes.	315
January 1973 (amended)	Ohio Rules of Superintendence	Permits videotaping of discovery, grand jury or court proceedings and outlines procedures.	10 and 15
April 1973	Pennsylvania Rules of Civil Procedures	Permits recording of depositions by videotape whether or not the witness is available to testify.	4017.1
December 1974	ABA Code of Judicial Conduct	Permits photographic or electronic recording in the courtroom at the judge's discretion provided the parties and witnesses consent, the participants are not distracted, or the dignity of the proceedings impaired. The reproduction can be used only for instructional purposes in educational institutions after all direct appeals have been exhausted.	3(A)7
July 1975	Maricopa County, Arizona Superior Court Local Rules of Practice	Permits arraignment via video telephone of defendants entering "not guilty" pleas provided defendants sign a waiver of physical presence.	XII
July 1975	Federal Rules of Evidence	Permits introduction of videotape as evidence.	Public Law 93-595
February 1976	Alabama Canons of Judicial Ethics	Permits a trial or appellate judge to authorize broadcasting, televising, recording or taking of photographs during a hearing provided the Alabama Supreme Court has authorized a plan to ensure that it does not detract from the dignity of the proceedings, distract witnesses, or interfere with the fairness of the trial and provided all parties have given written consent.	Canon 3(7A)

Regarding the obstacles presented by rules of procedure to utilization of video technology, a preliminary assessment of video telephone use in criminal justice notes:

Until the questions are litigated to the highest court, they cannot be answered with ultimate assurance. Even if the answer were in the negative, however, it would not be determinate if it were based solely on a construction of the rule in question (rather than the Constitution), for each rule is subject to amendment by the rule-making process or to displacement by an Act of Congress. At this level, then, the issue, in short, is ultimately one of policy, not law. If the adoption of video telephone technology would be, on balance, a helpful addition to the criminal justice system as we now know it, there is no insuperable legal reason not to add it. The most troublesome issues in this area, therefore, would not stem from the construction of court rules or statutes. They would come in the form of constitutional adjudication.<sup>1</sup>

#### D. Constitutional Issues

A number of constitutional questions arise from the use of video technology in the courtroom. These include questions involving possible infringement of the fifth amendment rights to due process and against self-incrimination and the sixth amendment rights<sup>2</sup> to public trial, to be confronted with witnesses, and to have assistance of counsel.

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<sup>1</sup>Blakey, G. Robert, "Application of the Video Telephone to the Administration of Criminal Justice: A Preliminary Assessment," Journal of Police Science and Administration, p. 50.

<sup>2</sup>The fourteenth amendment made the fifth and sixth amendment rights incorporating the principles of fair trial incumbent upon the states.

Appendix C contains relevant excerpts from both the U.S. and Arizona State Constitutions.<sup>1</sup>

Since videotaped testimony usually serves as a substitute for live testimony while testimony presented via video telephone or CCTV actually consists of live testimony,<sup>2</sup> the constitutional questions involved in the use of these two types of video technology are not always the same.<sup>3</sup> Table III summarizes and compares some of the legal issues and questions involved in the use of videotape and live video.

The right to due process is an issue in the presentation of both videotaped and live testimony. In People v. Moran, a California Court of Appeals rejected arguments that the defendant was deprived of due process "as the video tape medium unduly distorts the appearance and demeanor of its subject and, therefore, does not accurately transmit the demeanor of the witness and the dramatic components of the testimony."<sup>4</sup> In this case, the court found that the advantages and disadvantages of the effect of the medium fell equally on both sides and that there was no inherent unfairness in its use. In addition, while conceding that testimony through a television set differs from

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<sup>1</sup>The Arizona Constitution is more explicit in its requirements for confrontation in that it states that "the accused shall have the right to appear and defend in person . . . to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf . . ." while the U.S. Constitution merely states that the accused has the right "to be confronted with the witnesses against him."

<sup>2</sup>Blakey, op, cit., pp. 50-51

<sup>3</sup>For a discussion of legal issues involved in the use of videotape, see NCSC, Video Support in the Criminal Courts, pp. 8-18.

<sup>4</sup>People v. Moran, 39 Cal. App.3d 398, 114 Cal. Rptr. 413, 420 (1974).

TABLE III  
COMPARISON OF CONSTITUTIONAL ISSUES INVOLVED IN USE OF  
VIDEOTAPE AND LIVE VIDEO

ISSUE	VIDEOTAPE	LIVE VIDEO
Self-Incrimination	<ol style="list-style-type: none"> <li>1) Does admission of videotaped confession as evidence violate defendant's right against self-incrimination?</li> <li>2) Does use in trial of videotapes of breathalyzer and coordination-performance tests of driver under influence of alcohol violate his right against self-incrimination?</li> </ol>	Self-incrimination does not appear to be an issue in use of live video.
Due Process	<p>Does television medium accurately transmit the demeanor of a witness appearing on videotape?</p> <p>Is flow of information to jury significantly affected by use of videotape and television medium?</p>	<p>Does television medium accurately transmit the demeanor of a witness appearing via live video from a remote location?</p> <p>Is flow of information (including body language) to attorney affected by remoteness of witness?</p> <p>Does the use of the video telephone by the court to arraign only those persons held in jail (while those released on bond are arraigned in person) constitute a violation of due process?</p>
Confrontation	<p>Is physical presence of defendant required at videotaping sessions?</p> <p>Can defendant's confrontation rights be adequately protected when videotaped testimony of witness is used in trial and questions come up which were not covered in cross-examination during videotaping.</p> <p>Defendant's right to be present at every stage of the trial presents a problem of transporting the defendant to videotaping locations. NCSC suggests the possibility of a voluntary waiver on the part of the defendant of his right to be present when represented by counsel and also questions whether or not this would be generally acceptable.<sup>1</sup></p>	<p>Does remote testimony by a police officer in a preliminary hearing and by a probation officer in a probation revocation hearing meet confrontation requirements?</p> <p>Do trials differ from preliminary or probation revocation hearings as far as the right of confrontation is concerned?</p> <p>Can availability of the video telephone reduce reliance on hearsay evidence?</p>
Assistance of Counsel	Use of videotape could preclude effective cross-examination of witnesses when questions are raised at trial that were not asked during video recorded depositions. <sup>2</sup>	Is counsel's effectiveness in cross-examination limited by remote appearance of police or expert witness?
Public Trial	Does videotaped trial violate the right to a public trial?	Does testimony by police or expert witness via live video from a remote location satisfy the requirement for "public" trial?

<sup>1</sup>"Video Support in the Criminal Courts," National Center for State Courts, May 1974, p. 17.

<sup>2</sup>Ibid., p. 9.

live testimony the court found that the process does not significantly affect the flow of information to the jury.<sup>1</sup>

The right of confrontation also pertains to the use of both videotaped and live video testimony. In People v. Moran, a dying witness's videotaped preliminary hearing testimony was admitted at the trial. The defendant claimed that the use of the tape deprived him of his sixth amendment right of confrontation. The court found no denial of confrontation rights in view of the announced expectation at the preliminary hearing that the testimony would be used at the trial and the unusually extensive cross-examination during the preliminary hearing.

The confrontation question has also been posed regarding the use of CCTV to enable a disruptive defendant to view his trial proceedings from a location other than the courtroom.<sup>2</sup> However, in Illinois v. Allen, the Supreme Court ruled that "...a defendant can lose his right to be present at trial if, after he has been warned... he nevertheless insists on conducting himself in a manner so disorderly, disruptive and disrespectful of the court that his trial cannot be carried on with him in the courtroom."<sup>3</sup> It appears, then, that the use of CCTV to enable a disruptive defendant to view his trial proceeding from a location outside the courtroom would not face constitutional obstacles.

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<sup>1</sup>Moran, Ibid.

<sup>2</sup>ABA, Function of the Trial Judge, pp. 89-90

<sup>3</sup>Illinois v. Allen, supra, at 351.

In its discussion on the disruptive defendant, the ABA Standards relating to The Function of the Trial Judge, state:

It has been suggested that modern technology provides methods of dealing with disruptive defendants without removing them from the trial or without cutting them off from constant communication with their attorneys. Suggestions have ranged from the use of an isolation booth in the courtroom to the provision of video and audio links between the courtroom and the removed defendant. There remain serious doubts whether these measures would be effective to prevent disruption and distraction. Even the absent defendant can seriously interfere with his attorney's ability to follow the proceedings and participate effectively if the attorney is tied to an open communication link with an obstreperous defendant. In any event, there is no obligation on the court to provide extraordinary measures to protect the right of a defendant to be in the courtroom if the defendant, after appropriate warnings, makes his presence inconsistent with orderly progression in the trial process.<sup>1</sup>

Perhaps, then, a jurisdiction need not go to the expense of providing live video for a disruptive defendant who has been removed from the courtroom. Regarding this point, Justice Douglas stated in his Allen opinion:

"...when a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible under the circumstances."<sup>2</sup>

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<sup>1</sup>ABA, Function of the Trial Judge, pp. 89-90

<sup>2</sup>Illinois v. Allen, supra, at 351.

The Missouri Supreme Court addressed the confrontation question as it pertained to the use of live video in Kansas City v. McCoy. In this case, which involved marijuana possession, the criminalist testified via CCTV. Regarding the criminalist's remote testimony by live video, the court observed:

While Dr. Yoong was not physically present in the courtroom, his image and his voice were there; they were there for the purpose of examination and cross-examination of the witness as much so as if he were there in person; they were there for the defendant to see and hear and, by the same means, simultaneously for him to be seen and heard by the witness; they were there for the trier of fact to see and hear and observe the demeanor of the witness as he sat miles, but much less than a second, away responding to questions propounded by counsel.

The court did not err in the admission of this evidence by use of closed circuit television.<sup>1</sup>

The dissenting opinion by Judge Bardgett stated dissatisfaction with this case for deciding the confrontation issue.

In my opinion, the facts of this case do not portray a sufficiently clear picture of the use of closed circuit television with respect to confrontation and cross-examination rights under the Sixth Amendment for this court to really come to grips with the problem.

Here, there was no serious contention that the substance was not marijuana and defense counsel did not even undertake to cross-examine the expert witness. We do know that there were four people in the room with the witness who were not shown on television, and there was no representative of the defendant there at all. We also know that there can be no handling<sup>2</sup> of exhibits between either counsel and the witness.<sup>2</sup>

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<sup>1</sup>Appeal from Jackson County Circuit Court to Missouri Supreme Court in Kansas City v. McCoy, p. 5.

<sup>2</sup>Ibid., Dissenting Opinion, pp. 1-2.

In addition to the constitutional questions of due process and confrontation, the use of live video also involves questions relating to the effectiveness of counsel,<sup>1</sup> and the right to a public trial.

While denial of due process was the major issue in Estes v. Texas, Justice Harlan made the following observation regarding the right to a public trial in the Estes case:

Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in open court than in secret proceedings....A fair trial is the objective, and 'public trial' is an institutional safeguard for attaining it.

Thus, the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered.<sup>2</sup>

It would appear, then, that the right to a public trial would not be violated if either videotaped or live video testimony were presented in open court since: "A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process."<sup>3</sup>

While there have not yet been any definitive decisions on the constitutionality of video technology use in court proceedings, a number of cases have been appealed based on its use. To date, at

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<sup>1</sup>This issue is discussed in Section IV.

<sup>2</sup>Estes V. Texas, 381 U.S. 532, 85 S.Ct. 1628, 1662 (1965).

<sup>3</sup>Id., at 1663.



least six cases involving the use of video technology have reached state supreme courts or a U.S. Court of Appeal. Five of these involved the admissibility of videotapes. The sixth, Kansas City v. McCoy, is the only case to date involving the use of live video to reach a state supreme court. These six cases are summarized in Table IV. The issues of self-incrimination and fair trial were raised in cases involving the use of videotape. Confrontation was the only constitutional issue raised in regard to use of live video. In each of these cases reaching higher courts, the use of video technology has been upheld.

There will, of course, be no definitive decisions regarding video technology use until the issues outlined in this section have been ruled upon by the U.S. Supreme Court. If, after review by the Supreme Court, all obstacles related to constitutional issues have been overcome, decisions regarding its use will be based on the economic and social issues involved.

On the other hand, if use of video technology fails to win the sweeping approval of the Supreme Court, i.e., if live video testimony is not acceptable in a criminal trial, it must then be determined at what point it is acceptable:

The rules of evidence that apply to different types of proceedings vary with the character of the proceedings. The most stringent rules apply to the criminal trial. Preliminary hearings, and other administrative proceedings all variously apply less stringent rules than the criminal trial. Consequently, it can be concluded that if there is no viable objection to the use of video telephone testimony in a criminal trial, its use in other types of proceedings should not pose difficult issues.<sup>1</sup>

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<sup>1</sup>Blakey, op. cit., p. 52.

TABLE IV  
HIGHER COURT DECISIONS INVOLVING VIDEO TECHNOLOGY

Florida Supreme Court	<u>Paramore v. State of Florida</u> 229 So. 2d 855 (1969)	Upheld admissibility of videotaped confession in murder trial.	Court held that it was not necessary to prove continuity of possession for videotape to be admitted into evidence provided that it was an accurate reproduction of the entire interview between the officer and the appellant. Also held that the rule governing admissibility of photographs as evidence applies to both motion pictures and videotape.
Missouri Supreme Court	<u>State v. Lusk</u> 452 S.W.2d 219 (1970)	Upheld admissibility of videotaped confession in murder trial. 5th amendment rights not violated.	Defendant questioned admissibility of videotaped confession in his murder trial, asserting denial of his rights against self-incrimination. The court found videotape recording to be a combination of tape recording and moving pictures and to have the same footing as a sound motion picture.
Illinois Supreme Court	<u>Illinois v. Ardella</u> 49 Ill. 2d 517 (1971)	Upheld admissibility of videotaped coordination-performance tests in drunk driving case. Neither 4th nor 5th amendment rights violated.	Following an accident involving the defendant, Cook County sheriff's officers administered breathalyzer tests to the defendant and then videotaped his responses to coordination-performance tests after reading him his full <u>Miranda</u> rights. The videotape was used as evidence in a bench trial in the Circuit Court of Cook County over defendant's objections.
U.S. Court of Appeal Eights Circuit	<u>Hendricks v. Swenson</u> 456 F 2d 503 (1972)	Upheld admissibility of videotape of voluntary confession in murder trial.	Appealed on claim that trial court should have suppressed videotaped statements to police on grounds they were obtained by coercion. Court found that defendant had been properly advised of Constitutional rights and that statements were freely given.
Vermont Supreme Court	<u>Vermont v. Moffitt</u> 133 Vt. 366 (1975)	Upheld admissibility of videotaped police and expert testimony in a drunk driving case. 14th amendment rights not violated; use of videotaped testimony not prohibited by Canon 35.	The videotapes of the testimony of a policeman, chemist and pathologist who were cross-examined in the defendant's presence were edited by the judge in the presence of the attorneys. The edited videotapes were presented to the jury between live opening and closing statements. Appealed on the basis that videotaped trial testimony deprived the defendant of his right to fair trial guaranteed by the 14th amendment due to the psychological effect on the jury caused by the removal of the jurors in time and space from the witnesses; the entertainment aspect as deteriorating the somberness of trial; distortion of information communicated; jury distraction brought about by the process itself and the equipment utilized in projection, and the lack of procedural safeguards. Also appealed on basis of violation of Canon 35 of the ABA Code of Judicial ethics.
Missouri Supreme Court	<u>Kansas City v. McCoy</u> 525 S.W.2d 336 (1975)	Upheld presentation of expert testimony in a municipal court via CCTV in a marijuana case. 6th amendment not violated; confrontation does not require physical presence.	A case involving remote testimony by a police crime laboratory criminalist via CCTV was appealed on the grounds of denial of defendant's right to confrontation in that the criminalist was not physically present in court.

The level at which use of live video is determined to be constitutionally acceptable will, at least in part, determine the economic feasibility of its use--since the greater the volume of usage, the lower the cost per individual use.

#### IV. PERCEPTUAL AND BEHAVIORAL EFFECTS

Perceptual and behavioral factors involved in the use of video technology include its effects on:

- perception of witness personality
- stress felt by a witness
- observation of witness body language.

These effects are being discussed separately from the legal issues although it is recognized that the perceptual and behavioral factors ultimately relate to the constitutional rights to a fair trial, to confront witnesses, and to have the effective assistance of counsel.

##### A. Perception of Witness Personality

According to Marshall McLuhan, an audience will perceive an individual differently through different media.<sup>1</sup> That is, the personality of an individual "comes across" differently on television than in person. This was evident in a Long Beach, California, study that focused on students' perceptions of a teacher's personality. Half of the subjects viewed a live teacher delivering a 20-minute lecture; the other half saw a videotape of the same teacher giving the same lecture. Results of the study indicated that television did make a difference. The group viewing the teacher on television shared little empathy with or feeling for the television personality. Analysis showed that the television affected perception of specific personality variables. The television image was less likely to be perceived as "enthusiastic" or as "a go getter" and was generally viewed as less "forceful" than the in-person image.<sup>2</sup>

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<sup>1</sup> McLuhan, Marshall, Understanding Media: The Extensions of Man.

<sup>2</sup> McMenamin, Milton J., "Was McLuhan Right?", Educational and Industrial Television, October 1975, p. 45.

An interesting observation has been made regarding the importance assumed by a witness seen testifying on a television screen relative to an attorney in the courtroom. Because the picture of the witness tends to dominate the screen, his testimony and evidence appear to assume greater importance, and the appearance, mannerisms, theatrics, etc. of the attorney seem to become less important.<sup>1</sup> This effect may be desirable from the point of view of rational decision making or in the interest of justice; however, it is unlikely that trial attorneys would view it in this light.

Exactly the opposite may be the case with witness testimony via video telephone or CCTV. In this situation, the attorney, rather than merely observing the videotaped image with the jurors, would be interacting with the witness. The attorney would be in the courtroom in "living color" with the police or expert witness reduced to a black-and-white, head-and-shoulders display on the television screen. The television image of the witness might be perceived as "less forceful" and the theatrics of the attorney might, conversely, have greater impact on the jurors.

B. Stress Felt by Witness

In the videotaping situation, the witness is not on the witness stand adjacent to the judge and under the scrutiny of the jury. While he is subject to the "scrutiny" of the camera, the atmosphere is different and presumably less "charged"<sup>2</sup> than that in the courtroom. One observer postulates:

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<sup>1</sup> McCrystal, James L. et al., "First Videotape Trial: Experiment in Ohio," Defense Law Journal, Vol. 26, 1972, p. 276.

<sup>2</sup> Doret, op. cit., p. 244-45.

"A witness who testifies out-of-court...will not have the same psychological compulsions towards testifying accurately and completely as an in-court live witness...."<sup>1</sup>

The atmosphere in the courtroom can have a sobering effect on the witness. The courtroom provides "ritual impressions"<sup>2</sup> to remind the witness that he is testifying under oath which are not present in the videotaping environment.

While these observations refer to the videotaping of witness testimony, they may also apply to some extent to the use of live video. In any case, the atmosphere from which remote live testimony is presented is different from that of the courtroom. What effect this may have on the witness is unknown. It is possible that testifying by either videotape or live video has a positive effect on recall in that the atmosphere from which the witness is testifying is more relaxed.<sup>3</sup>

The atmosphere is also somewhat different for the trial attorney in the case of examining a witness who is appearing via CCTV or video telephone. The attorney cannot move physically close, i.e., violate the "territorial integrity" of the witness in order to make him less comfortable and thereby create a more stressful environment as he could if the witness were in the courtroom.

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<sup>1</sup>Brakel, op. cit., p. 957

<sup>2</sup>Stiver, Charles E., "Video-Tape Trials: A Practical Evaluation and a Legal Analysis," Standord Law Review, 1974, p. 630

<sup>3</sup>McCrystal, op. cit., p. 277.

C. Observation of Witness Body Language

The extent to which a cross-examining attorney might rely, either consciously or unconsciously, on "body language" signals is not known, but the observation has been made that "...live testimony and testimony presented through a television set differ; the latter fails to convey all of the sense impressions available to a juror watching a live examination."<sup>1</sup>

"...the medium cannot capture the total psychological and physical essence of a witness--persuasiveness, credibility, hesitance and forcefulness are indicated through arm, hand, or eye movements or other bodily changes, as well as general reactions to or interactions with counsel, judge, jury, or other participants."<sup>2</sup>

It is also not known to what extent these body language clues affect decision making or judgment. However, behavioral science research interest in body language has developed from the belief that nonverbal behavior reveals people's feelings, and, further, that nonverbal behavior communicates or reveals feelings even when people do not wish to communicate them.<sup>3</sup>

It was hypothesized by Ekman and Friesen<sup>4</sup> that, due to social conditioning, facial expressions are more subject to conscious control than are body movements. They found that when subjects were asked what part of the body should be controlled when trying to deceive, facial expression was more often mentioned than body movement. They then attempted to determine whether more accurate judgments regarding deception could be made from the body than from the

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<sup>1</sup>Stiver, op. cit., p. 623.

<sup>2</sup>Brakel, op. cit., p. 957.

<sup>3</sup>Ekman, Paul, and Friesen, Wallace V., "Detecting Deception from the Body or Face," Journal of Personality and Social Psychology, 1974, p. 289.

<sup>4</sup>Ibid.

face. Their results were somewhat ambiguous but indicated that body movements were a more accurate indicant of deception--but only when the observers had first seen a sample of each person's normal behavior (that is, when he was not trying to be deceptive).

Since in the case of remote testimony by both live video and videotape, the witness's image is limited to a head-and-shoulders display, any extra body language "clues" to attorneys regarding stress, deception, etc. would be lost.

Schefflen has also experimented with body language, or more specifically, "body positioning" or "posture." He believes that postural configurations are reliable indicators of certain aspects of communications.

Just as language consists of a hierarchy of increasingly more inclusive units, so a communications system as a whole is an integrated arrangement of structural units deriving from kinetic, tactile, lexical, and other elements.<sup>1</sup>

While Schefflen admits that "this extended view of communication beyond language is new and only slightly bolstered by research..."<sup>2</sup>, we do not know to what extent these "signals" are unconsciously read by others and thereby play a part in judgment.

Other related research involves the pupil of the eye. The pupil dilates and constricts involuntarily in response to strong emotional states as well as to changes in light intensity.

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<sup>1</sup>Schefflen, Albert E., "The Significance of Posture in Communications Systems," Psychiatry, November, 1974, p. 320.

<sup>2</sup>Ibid, p. 320.



It is said that magicians doing card tricks can identify the card a person is thinking about by watching his pupils enlarge when the card is turned up, and that Chinese jade dealers watch a buyer's pupils to know when he is impressed by a specimen and is likely to pay a high price.<sup>1</sup>

Hess has conducted research into the relationship between emotions, attitude and pupil size. By photographing the pupils of subjects as they were shown different types of pictures, he showed that pupils constrict in reaction to stimuli viewed as negative and dilate in reaction to interesting or pleasing stimuli.

The results suggest that our technique, by which we measure a response that is not under the control of the person being tested, may yield more accurate representations of an attitude than can be obtained with even a well-drawn questionnaire or with some devious "projective" technique in which a person's verbal or motor responses are recorded in an effort to uncover his real feelings.<sup>2</sup>

Again, it is not known to what extent any of these factors plays a part in the "sizing up" and appraisal of a witness, how these might affect the line of questioning pursued by an attorney, and what effect they might have on the eventual outcome of a hearing.

#### D. Current Research

All known research related to the perceptual and behavioral effects of video technology has been concerned with the use of videotape rather than live video.

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<sup>1</sup>Hess, Eckhard H., "Attitude and Pupil Size," Scientific American, April 1965, p. 46.

<sup>2</sup>Ibid, p. 52.

Research at the J. Rueben Clark School of Law, Brigham Young University (BYU) compared juror reactions to different modes of trial presentation including live, color videotape, black and white videotape, audio tape, and read transcript. The BYU group found that:

...all three electronic methods of presentation were superior to the read transcript method in their ability to approximate juror perceptions of live testimony, though each of these methods demonstrated unique advantages and disadvantages when compared to the other two.<sup>1</sup>

Extensive research related to courtroom use of videotape has been conducted at the Department of Communications of Michigan State University (MSU) under a grant from the National Science Foundation. The MSU two-year research effort consisted of a series of studies designed to answer the following questions regarding videotape:

Did its use or its nature modify the information it was transmitting...to the jurors? If so, how? More specifically, might such factors as verdict or retention of trial-related information be affected by the use of videotape? ....What, if any are the differences in juror response to live and videotaped trials?<sup>2</sup>

The final report of this research effort, Effects of Videotaped Testimony on Information Processing and Decision-Making in Jury Trials, was published in December, 1975. The MSU final report states:

Within the procedural confines of our research, there is no evidence to suggest that the use of videotape exerts any deleterious effects on the juror responses studied; in fact, as far as retention of trial-related information is concerned, it appears that videotaped testimony sometimes results in higher retention levels.<sup>3</sup>

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<sup>1</sup>Williams, Gerald R., et al., "Juror Perceptions of Trial Testimony as a Function of the Method of Presentation: A Comparison of Live, Color Video, Black-and-White Video, Audio, and Transcript Presentations," Brigham Young University Law Review, 1975, No. 2, p. 408.

<sup>2</sup>Miller, Gerald R. and Siebert, Fred S., Effects of Videotaped Testimony on Information Processing and Decision-Making in Jury Trials, pp. 1-2.

<sup>3</sup>Ibid., p. 75.

In January of 1976, Michigan State began a new research effort funded by National Science Foundation. This research project, entitled "The Influence of Videotape on Juror Response to Court Material," will attempt to answer the following questions:

- "1. What are the effects of the deletion of inadmissible testimony on individual juror verdicts, individual juror perceptions of attorney credibility, and verdicts of six-person juries?
2. What are the effects of introducing segments of videotaped testimony into an otherwise live trial?
3. What are the effects of certain videotape production techniques on juror verdicts and perception of trial participants?"<sup>1</sup>

The McGeorge School of Law, and Ernest H. Short & Associates, with the support of LEAA and the California Office of Criminal Justice Planning, has also been involved in research on the use of videotape. One of the purposes of their efforts was to evaluate the behavioral impact of video recording on participants and case processing. Their study of psychological and behavioral impacts of videotape on the legal system focused on:

- "(1) The impacts of videotape recording on witness behavior and witness testimony.
- (2) The impacts of videotape recording on legal participants' behavior (i.e., judges and attorneys) and courtroom decorum.
- (3) The impacts of videotape playback of testimony and evidence on juror attitudes and behavior."<sup>2</sup>

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<sup>1</sup>Michigan State University, SCAN: Legal Communication Research News, Department of Communications, East Lansing, Michigan.

<sup>2</sup>Short, Ernest H. and Associates, and McGeorge School of Law, University of the Pacific, Videotape Recording in the California Criminal Justice System, March 1975, p. 42.

The findings of this research as summarized by Ernest H. Short were as follows:

Based on the data collected during this project, there was no evidence for concluding that witnesses were more nervous or experienced greater stress when their testimony was videotaped than when it was not videotaped. Statistical tests performed on various measures of witness decisiveness indicated that videotape recording had no measurable impact on the decisiveness or responsiveness of witnesses giving testimony. In addition, our analysis indicated that witnesses' overall attitudes toward the proceedings, as well as their willingness to serve as witness again, did not differ significantly for videotaped witnesses when compared to witnesses whose testimony was not videotaped.

These findings do not imply that videotape has no effect on the psychological stress of witnesses or on witness demeanor. It is entirely possible that videotape recording produces stresses that either are so small as to be undetectable or so short-lived as to be unmeasurable. In fact, although we did not collect specific data to test this hypothesis, informal interviews with participants indicate that although witnesses may be aware of the presence of videotape apparatus, this awareness is of little consequence when compared with the pressures and demands made upon witnesses as part of the normal testimony process. For example, although no witnesses indicated that videotape made them nervous or bothered them in any way, they did indicate that factors such as intensity of attorney questioning, presence of the defendant/suspect, and sensitivity of their testimony were stress producing and made them nervous.<sup>1</sup>

The report continues:

Examining the possible effects of videotape recording on attorneys, we found no evidence to indicate that the style of attorney presentation was affected by videotape recording. An analysis of the number of

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<sup>1</sup>Short, Ernest H., et al., Videotape Recording in the California Criminal Justice System: Impacts and Costs, p. 12-13.

prosecution and defense objections entered in both videotaped and nonvideotaped proceedings indicated that attorneys being videotaped were no more likely to enter an objection than attorneys not being videotaped. In addition, analyses based on interviews with participating attorneys and judges, and measurements taken by research personnel during the course of the project found no significant differences in the degree of attorney preparation in videotaped and nonvideotaped proceedings.<sup>1</sup>

In regard to the research on use of videotape that has been accomplished to date, Gordon Bermant observes:

....there is a need for sound testable theory relating the rational processes of legal decision making to the non-rational effects of changes in media of communication. As a minor contribution to such theoretical development, the following hypothesis is offered for experimental test: the more evenly balanced or ambiguous the legal issues on the two sides of a case, the more influential will be the extralegal factors in the case, including the medium through which the case is presented to the jury. This simple idea, if properly refined and operationalized, could serve as the theoretical foundation for a number of interesting and practical experiments.<sup>2</sup>

Regarding research on the behavioral impacts of video technology, the following caution has been raised:

Despite the fact that the usefulness of video technology to the courts hinges upon its ability to promote the administration of justice without impairing individual rights, there is a paucity of empirical research dealing with its behavioral impacts on the judicial process.<sup>3</sup>

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<sup>1</sup>Ibid.

<sup>2</sup>Bermant, Gordon, "Critique--Data in Search of Theory in Search of Policy: Behavioral Responses to Videotape in the Courtroom," Brigham Young University Law Review, 1975, p. 485.

<sup>3</sup>Short, Ernest H. and Associates, and McGeorge School of Law, op.cit., p. 42.

## SUMMARY AND CONCLUSION

Videotape has been used to record depositions, testimony, evidence, and even complete trials for later showing to a jury as well as to record court proceedings as a supplement to or substitute for stenographic recording.

Live, interactive video has been used to date only in isolated instances to provide a link between the courtroom and a remote location for training of law students, bail bond hearings, arraignment of jailed defendants, and for attorneys in one city to present arguments to appellate judges in another city. It has also been used to "extend" the courtroom to permit viewing of proceedings by the media or a disruptive defendant in another room. It is currently being tried experimentally in Phoenix, Arizona in a variety of criminal justice applications.

In expectation of more widespread use of video technology, equipment and procedural guidelines have been prepared for videotape; guidelines are currently being established for CCTV. Architectural planning for the accommodation of video equipment in courtrooms is further evidence of the growing acceptance of video technology. In addition, a number of rules of civil and criminal procedure that limited court use of video technology have been changed--primarily to permit use of videotape.

The constitutional issues involved in the use of videotape have been explored and are being tested in the courts. To date, five cases involving appeals based on the use of videotape have reached state supreme courts or a U.S. Court of Appeals. In these specific challenges, the higher courts found no denial of right against self-incrimination in the introduction as evidence of videotaped confessions and performance-coordination tests, and no denial of due process in the use of videotaped police and expert testimony.

The legal questions raised by the use of live video differ from those raised by the use of videotape although most of the underlying constitutional issues--defendant's right to due process, to confront witnesses, to have the effective assistance of counsel and a public trial--are the same for the two types of technology.

Exploration of the legal issues related to the use of live video has just begun. The 6th amendment right to confront witnesses is the only issue to be raised to date in an appeal involving the use of live video. The appeal in that case, Kansas City v. McCoy, in which the criminalist presented testimony via CCTV in a marijuana possession case, was based on a denial of the defendant's confrontation rights. While

the use of CCTV was upheld in the McCoy case, the dissenting opinion expressed was that the case was not an adequate one upon which to address the question of confrontation since no cross-examination was involved.

In addition to the constitutional questions raised by use of video technology, there are perceptual and behavioral issues. Research has been and is currently being conducted on the perceptual and behavioral factors related to videotape use. While there is no known comparable research related to the use of live video, the factors affecting its acceptance--such as the effect of the medium on the perception of witness personality, the absence of the effect of the aura and ritual of the courtroom on the stress felt by the witness while testifying, and the lessened ability of the attorney and jury to view and assess body language of a testifying witness--would seem to be similar.

These issues raise questions regarding the adequacy of video technology to meet the requirements imposed by the defendant's constitutionally guaranteed right to a fair trial. Decisions coming from the current and growing experience with video technology as well as from court decisions regarding its constitutional acceptability for court use will determine the final applications of the technology to criminal justice use.

APPENDIX A  
HISTORY OF VIDEO TECHNOLOGY  
IN THE COURTS



# APPENDIX A

## HISTORY OF VIDEO TECHNOLOGY IN THE COURTS

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
January 1962	CCTV used to connect courtroom and law school to permit viewing of trials by law students.	Washtenaw County, Ann Arbor, Michigan		Originally: James R. Breakey, Jr. Currently: William F. Ager, Jr.; Ross W. Campbell.	
1967	A videotape of a convicted murderer recreating the crime while under a drug administered at the Menninger Clinic was admitted into evidence and shown to a jury.		State of Kansas v. Kidwell 434 P 2d 316		Defendant was granted a second trial and the prosecuting attorney used the videotape as supportive evidence for reducing the charge to manslaughter.
September 1968	Experimental use of videotape in courtroom as a substitute for or supplement to stenographic reporting.	Circuit Court of Cook County, Second Municipal District, Skokie, Illinois		Harold W. Sullivan	All proceedings in Skokie branch were videotaped for three weeks. Judges unanimously agreed that the replays were superior to any transcriptions they had experienced.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
February 1971	U.S. Court of Appeals, 7th Circuit, reversed judgment in a personal injury case based on evidentiary and factual issues established by videotapes.		Zollman v. Symington Wayne Corp. 438 F 2d 28		Zollman claimed defective design and was awarded damages by the U.S. District Court of Indiana for the personal injuries sustained when an automobile fell from a hoist manufactured by the defendant. Tests were performed and videotaped but the accident could not be duplicated. Court of Appeals held that Zollman's misuse of the hoist rather than the defective design caused the accident.
1971	National Bureau of Standards sponsored a one-day conference for a guidance panel of criminal justice personnel on court-centered uses of video recording.	Washington, D.C.			Focused on the use of videotape to present evidence, to record trials, and the use of videotapes of trials for educational purposes.
November 1971	Illinois Supreme Court ruled that neither 4th nor 5th amendment rights of defendant were violated by the use of his videotaped responses to coordination-performance tests as evidence.		State of Illinois v. Ardella 276 N.E. 2d 302		Following an accident involving the defendant, Cook County sheriff's officers administered breathalyzer tests to the defendant and then videotaped his responses to coordination-performance tests after reading him his full <u>Miranda</u> rights. The videotape was used as evidence at the trial over the defendant's objection.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
1969	Florida Supreme Court upheld the admissibility of videotaped confession in a murder conviction.		Paramore v. State of Florida 229 So. 2d 855 (1969)		Court held that it was not necessary to prove continuity of possession for videotape to be admitted into evidence provided that it was an accurate reproduction of the entire interview between the officer and the appellant. Also held that the rule governing admissibility of photographs as evidence applies to both motion pictures and videotapes.
1970	Journal article predicting videotaped trial				"Enter - The Video Tape Trial," by Alan E. Morrill, 3 <u>John Marshall Journal of Practice and Procedure</u> 237, 1970.
April 1970	Missouri Supreme Court upheld admissibility of videotaped confession in a murder trial		State v. Lusk		Defendant questioned admissibility of videotaped confession in his murder trial, asserting denial of his right against self-incrimination. The court found videotape recording to be a combination of tape recording and movign pictures and to have the same footing as a sound motion picture.
July 1970	Rule 30 (b) (4) Federal Rules of Civil Procedure amended.				Permitted the recording of depositions by "other than stenographic means" on order of the court.
1970	Federal Judicial Center established four videotape pilot projects in federal courts.	U.S. District Courts Cleveland Detroit Philadelphia Pittsburgh		Thomas D. Lambros  Joseph F. Weiss, Jr.	Established for the purpose of encouraging use of videotape, evaluating its potential and developing guidelines for future use.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
November 1971	First case in which all testimony and also the judge's instructions were pre-taped and presented to the jury via CCTV.	Court of Common Pleas, Erie County, Sandusky, Ohio	McCall v. Clemens Civil No. 39,301	James L. McCrystal	All testimony was pre-recorded and then edited by the judge in his chambers. The edited tape was later played to the jury in a logical sequence. The attorneys made live opening statements and closing arguments.
December 1971	Videotaped testimony of an orthopedic surgeon presented in a personal injury case.	Pinellas County Circuit Court, St. Petersburg, Florida	Gibson v. Hickey & Co.	William A. Patterson	A certified shorthand reporter administered the oath and recorded the deposition in the normal manner. Both attorneys were present to question the out-of-state physician.
March 1972	U.S. Court of Appeals, Eighth Circuit, held that the 5th Amendment rights of the defendant were not impinged by videotaping of his voluntary confession or by the showing of the video taped confession to a jury.		Hendricks v. Swenson 456 F 2d 503 (1972)		Appealed on claim that trial court should have suppressed videotaped statements to police on grounds they were obtained by coercion. Court found that defendant had been properly advised of Constitutional rights and that statements were freely given.
July 1972	<u>Potential Uses of Court Related Video Recording</u> published by National Bureau of Standards.				A state-of-the-art review of video recording in the courts including equipment system availability and rules affecting use of video recording in court-related applications. Funded by National Institute for Law Enforcement and Criminal Justice (NILECJ).
July 1972	Ohio Supreme Court Civil Rule 40 became effective.				Permits pre-recorded videotaped trial with agreement of all parties or on order of the court.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
August 1972	First use of videotape for all portions of both a civil and a criminal trial except selection of the jury and opening statements by attorneys.	Court of Common Pleas, Summit County, Ohio		James V. Barbuto	
September 1972	Ohio Rules of Superintendence Rule 14				Specifies that the court consider feasibility of recording witness testimony when a continuance is requested due to unavailability of a witness.
November 1972	First bail bond hearing via video telephone	Cook County Circuit Court, Chicago		Arranged by Peter Bakakos	Prisoners participated in Bu... Court hearing from a police district station 2 1/2 miles away. No waivers of right to physical presence were required. There have been no court challenges of this procedure. (Video telephone equipment is still available but is not being used.)
December 1972	Michigan General Court Rule 315 became effective				Permits recording of depositions by videotape.
January 1973	<u>The American Courthouse</u> published				Study of Court design prepared by Joint Committee on Design of Judicial Facilities of American Bar Association (ABA) and American Institute of Architects (AIA) in cooperation with the Ford Foundation and the Institute for Continuing Legal Education of the University of Michigan.
January 1973	Ohio Rules of Superintendence Rules 10 and 15 amended				Permits videotaping of discovery, grand jury or court proceedings and outlines procedures.
February 1973	First use of closed circuit television (CCTV) for expert testimony from crime laboratory to court.	Kansas City Municipal Court, Missouri	Kansas City v. McCoy 525 S.W.2d 336 (1975)	Elmo Hargrave	Testimony by a criminalist at the Regional Crime Laboratory in Independence was presented via CCTV to Kansas City Municipal Court 12 miles away. Funded by Law Enforcement Assistance Administration (LEAA). (One time use only.)

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
April 1973	Pennsylvania Rules of Civil Procedure				Permits recording of depositions by videotape whether or not the witness is available to testify.
April 1973	First recording of a criminal trial solely by videotape.	Court of Common Pleas, Ohio	Blankenship	Clifford Rader	Videotaped recording was made possible by an amendment to the Ohio Supreme Court Rules of Superintendence. The Rule forbidding broadcasting, televising, recording or taking photographs in the courtroom was changed to allow "the use of electronic photographic means for the presentation of evidence, for the perpetration of a record, or for other purposes of judicial administration."
47 May 1973	Franklin County Common Pleas Court began using videotape as the sole means of recording criminal trials.	Ohio			A 15 month experimental project funded by LEAA and Franklin County. In November, 1974, the project was extended for one year using county and LEAA funds.
October 1973	"Courtroom of the Future" at McGeorge School of Law, University of the Pacific, Sacramento, California dedicated.				Includes a court technicians' room behind one-way glass with TV monitors, videotape recording equipment and security system to lock the courtroom. Provides for visual projection of evidence, equipment for screening of persons coming into courtroom for firearms possession, for CCTV viewing of proceedings by an unruly defendant and a press and communications media room behind one-way glass.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
January 1974	<u>Video Support in the Criminal Courts</u> published by National Center for State Courts.				Four volumes prepared under NILECJ grant. Vol. 1: Project Summary; Vol. 2: Users Guide to Performance Standards and Equipment Costs; Vol. 3: List of Case and Reference Material Abstracts; Vol. 4: Equipment Technical Analysis and User Experience.
48 March 1974	Legal Communication workshop presented by Department of Communication, Michigan State University (first in a series of three).	Atlanta			Michigan State provided information on the status of its two-year study, "The Effects of Videotaped Testimony on Information Processing and Decision Making in Jury Trials." Legal practitioners exchanged information on their uses of videotaped information in court proceedings. Funded by Research Applied to National Needs Program of National Science Foundation (NSF).

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
June 1974	First Preliminary Arraignment (Initial Appearance) of defendant via CCTV.	Philadelphia Common Pleas and Municipal Court			After the prisoner at the sub-station is positively identified and his criminal history checked, he is interviewed by law students at the central police station 5 miles away via CCTV to obtain information regarding release on OR or bail. The history and recommendation are given to the judge in the central police court-room who then conducts the bail bond hearing with the defendant via CCTV. This is accepted as an administrative procedure by the Public Defender and Court Administrator as arraignment is not regarded as a critical stage in the defendant's case. (In current, regular use.)
July 1974	First District Court of Appeal ruled that use of a witness's videotaped testimony given at preliminary hearing did not violate defendant's 5th or 6th amendment rights.		State of California v. Moran Cal. App. 3d 398, 114 Cal. Rptr. 413		A murder witness who was dying of cancer and not expected to survive until the murder trial was extensively cross-examined during the preliminary hearing. This testimony was videotaped and reviewed by the court and counsel before presentation at the trial. Appealed on the basis that the videotape medium distorted the demeanor of the witness violating the defendant's right to due process and on denial of defendant's right to confrontation.



DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
November 1974	<u>Guidelines for Pre-Recording Testimony on Videotape Prior to Trial</u> published by Federal Judicial Center.				Based on pilot projects established in federal courts in 1970.
December 1974	ABA Code of Judicial Conduct amended to permit cameras in the courtroom.				Canon 35 replaced by Canon 3A(7) authorizing the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, and for the recording of court proceedings for educational purposes with the consent of the parties and provided the recording does not impair the dignity of the proceedings.
January 1975	Public Law 93-595, Federal Rules of Evidence, enacted.				Permits introduction of videotapes as evidence. Effective 180 days after enactment.
January 1975	2nd Legal Communication Workshop presented by Michigan State,	San Francisco			Dr. Gerald Miller reported on Phase II of Michigan State's research on videotaped testimony. Ernest H. Short described 73 possible video applications in 6 California counties. Percy Tannenbaum, Guy Kornblum, and Gordon Bermant presented papers, and McGeorge School of Law "Courtroom of the Future" facilities were toured.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
March 1975	CCTV used to connect murder defendants to courtroom.	Sacramento County Superior Court, California		Elvin Sheehy	Two members of the Symbionese Liberation Army watched their murder trial from a viewing room in the courthouse basement rather than from the courtroom.
June 1975	Vermont Supreme Court ruled that videotaped testimony did not interfere with defendant's 14th amendment rights or Canon 35 of ABA Code of Judicial Ethics.	Bennington District Court, Vermont.	Vermont v. Moffitt (Driving while under the influence of intoxicating liquor). 133 Vt. 366(1975)	John P. Morrissey	The videotapes of the testimony of a policeman, chemist and pathologist who were cross-examined in the defendant's presence were edited by the judge in the presence of the attorneys. The edited videotapes were presented to the jury between live opening and closing statements. Appealed on the basis that videotaped trial testimony deprived the defendant of his right to fair trial guaranteed by the 14th amendment and violated Canon 35 of the ABA Code of Judicial Ethics.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
June 1975	First testimony by a probation officer via video telephone in probation revocation hearing. (Defendant absent.)	Maricopa County Superior Court, Arizona		C. Kimball Rose	Judge heard testimony of probation officers (3 blocks away) via video telephone in two cases of probationers who had left the jurisdiction and whose whereabouts were unknown.
June 1975	District of Columbia prototype courtroom completed.				This "in-the-round" courtroom is to serve as the design proving-ground for a new Superior Court/ Court of Appeals facility. Provides for videotape viewing and for CCTV evidence display.
July 1975	Arizona Supreme Court approved an administrative rule change for Maricopa County Superior Court permitting use of video telephone in arraignment procedures.	Maricopa County Superior Court, Arizona			Permits arraignment via video telephone of defendant entering a "not guilty" plea if defendant signs a Waiver of Physical Presence at Time of Arraignment in Superior Court.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
July 1975	First Superior Court arraignment of jailed defendants by video telephone.	Maricopa County Superior Court, Arizona		C. Kimball Rose	Three defendants in Maricopa County Jail pled "not guilty" to felony charges via video telephone to judge in his chambers in another building. (Since then "not guilty" pleas of jailed defendants have been routinely handled by video telephone.)
July 1975	First testimony by probation officer via video telephone in probation revocation hearing with defendant present.	Maricopa County Superior Court, Arizona		C. Kimball Rose	A probation officer testified via video telephone to a judge in chambers three blocks away. The public defender and defendant were in chambers and observed the probation officer on the video telephone screen.
July 1975	3rd Legal Communication Workshop presented by Michigan State	Chicago			Review of research efforts at Michigan State, Brigham Young University, Ernest H. Short & Associates. Final workshop in series of three funded by NSF.
July 1975	Federal Rules of Evidence				Permit introduction of videotapes as evidence.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
July 1975	Missouri Supreme Court ruled that use of the CCTV for expert testimony did not violate the defendant's right to confrontation.		Kansas City v. McCoy (Possession of marijuana)		A case involving remote testimony by a police crime laboratory criminalist via CCTV was appealed to Jackson County Circuit Court on the grounds of denial of defendant's right to confrontation and to Missouri Supreme Court.
October 1975	First federal appellate hearing with attorneys presenting arguments from one state to judges in another state.	U.S. Court of Claims, Washington, D.C.	Merritt-Chapman & Scott v. U.S. Government (Civil)	Byron Skelton Robert Kunzig Philip Nichols, Jr.	Using PICTUREPHONE MEETING SERVICE, Court of Claims judges at Chesapeake & Potomac Telephone facilities in Washington, D.C. heard arguments presented by attorneys from New York Telephone Company facilities.
November 1975	First videotaped sworn testimony by a U.S. President in a criminal trial.	Washington, D.C.	U.S. v. Fromme	Thomas J. MacBride	A videotape was made of President Ford's testimony under oath as to what he heard and saw on September 5th when Lynette Alice Fromme pointed a gun at him. Defense attorney questioned the President in the presence of two prosecuting attorneys and U. S. District Court Judge MacBride who came from Sacramento.

DATE	EVENT	LOCATION	CASE	JUDGE	REMARKS
December 1975	<u>Effects of Videotaped Testimony on Information Processing and Decision-Making in Jury Trials</u> published by Michigan State University.				Final report of work conducted for NSF.
February 1976	New Alabama rule permitting use of camera in courtroom became effective.	Alabama Canons of Judicial Ethics			Permits a trial or appellate judge to authorize broadcasting, televising, recording or taking of photographs during a hearing provided that the Supreme Court has authorized a plan to ensure that it does not detract from the dignity of the proceedings, distract witnesses or interfere with the fairness of the trial and provided all parties have given written consent.
March 1976	First use of video telephone by a police officer to present testimony in a Justice Court preliminary hearing	South Phoenix Justice Court, Phoenix, Arizona.		Ronald D. Johnson	A police officer presented testimony from a substation via video telephone to a justice court five miles away in a marijuana possession case.
March 1976	First use of video conferencing by a superior court judge for communication with county attorney and public defender to hear pre-trial motions.	Maricopa County Superior Court		Roger G. Strand	Using the video telephone in his chambers on the 7th floor of the courthouse, a Superior Court Judge presided over a pre-trial motion hearing. The public defender presented oral argument via video telephone from his office three blocks away and the county attorney presented arguments from the 4th floor of the courthouse.

**APPENDIX B**

**COMPARISON OF FEDERAL AND ARIZONA  
RULES OF CRIMINAL PROCEDURE  
RELATED TO USE OF VIDEO TECHNOLOGY**

APPENDIX B

COMPARISON OF FEDERAL AND ARIZONA RULES OF CRIMINAL PROCEDURE  
RELATED TO USE OF VIDEO TECHNOLOGY

ARIZONA RULES

INITIAL APPEARANCE

Rule 4.1.a.

"A person arrested shall be taken before a magistrate without unnecessary delay...."

PRELIMINARY HEARING

Rule 5.1.a.

"...a preliminary hearing shall commence before a magistrate...unless (2) the hearing is waived;...."

Rule 5.3.a.

"All parties shall have the right to cross-examine the witnesses testifying personally against them..."

PRESENCE OF DEFENDANT, WITNESSES, AND SPECTATORS

Rule 9.1

"...a defendant may waive his right to be present at any proceeding by voluntarily absenting himself from it."

FEDERAL RULES

INITIAL APPEARANCE

Rule 5(a)

"...shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, ...."

PRESENCE OF THE DEFENDANT

Rule 43

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35."



## ARIZONA RULES

### ARRAIGNMENT

#### Rule 14.2

"The defendant shall be arraigned personally before the trial court."

### PLEAS OF GUILTY AND NO CONTEST

#### Rule 17.1

"...Such plea shall be accepted only when made by the defendant personally in open court..."

#### Rule 17.2

"...Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him...of the charge ...possible sentence....constitutional rights...and right to plead not guilty."

#### Rule 17.3

"Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court and determine that he wishes to forego the constitutional rights of which he has been advised, that his plea is voluntary..."

## FEDERAL RULES

### ARRAIGNMENT

#### Rule 10

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

### PLEAS

#### Rule 11

"A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and...."

ARIZONA RULES

FEDERAL RULES

TRIAL BY JURY; WAIVER; SELECTION AND  
PREPARATION OF JURORS

Rule 18.1.b.

"Waiver. The defendant may waive his right to trial by jury with consent of the prosecution and the court.

"(1) Voluntariness. Before accepting a waiver the court shall address the defendant personally, advise him of his right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent.

"(2) Form of Waiver. A waiver of jury trial under this rule shall be made in writing or in open court on the record."

TRIAL

Rule 19.3.c. PRIOR RECORDED TESTIMONY

(1) Admissibility. Statements made under oath by a party or witness during a previous judicial proceeding or a deposition under Rule 15.3 shall be admissible in evidence if:

(i) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and

(ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

ARIZONA RULES

FEDERAL RULES

(2) Limitations and Objections. The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing; except that the former testimony offered under this section is not subject to:

(i) Objections to the form of the question which were not made at the time the prior testimony was given.

(ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

JUDGEMENT, PRE-SENTENCE REPORT, PRE-SENTENCING HEARING, SENTENCE

Rule 26.3.a.

"Setting Date. Upon a determination of guilt, the court shall set a date for sentencing. Sentence shall be pronounced not less than 15 nor more than 30 days after the determination of guilt unless the court, after advising the defendant of his right to a pre-sentence report, grants his request that sentence be pronounced earlier."

Rule 26.9

"Presence of the Defendant; Sentencing in Absentia. The defendant is entitled to be present at a pre-sentencing hearing and shall be present at sentencing. However, failure of the defendant to appear for sentencing shall not delay the pronouncement and entry of judgement and sentence..."

## ARIZONA RULES

### REVOCATION OF PROBATION

Rule 27.7.a.(1) Revocation Arraignment.  
"The revocation arraignment shall be held...before the issuing or assigned judge."

Rule 27.7.b.(1) Violation Hearing.  
"A hearing to determine whether a probationer has violated a written condition or regulation of probation shall be held before the sentencing court..."

Rule 27.7.b.(2)  
"The probationer shall be present at the hearing."

Rule 27.8. Admissions by the Probationer.  
"Before accepting an admission by a probationer that he has violated a condition or regulation of his probation, the court shall address him personally...."

Rule 27.9.e. (2) Revocation of Probation in Absentia.  
If the probationer fails to appear at the time set for the hearing...the court ...may

(1) Hear evidence in support of each violation;"

### LOCAL RULES

Rule 36  
"Any court may make and amend rules governing its practice not inconsistent with these rules. No such rule shall become effective until approved in writing by the Supreme Court."

## FEDERAL RULES

### REVOCATION OF PROBATION

Rule 32(f)  
"The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed."

## APPENDIX C

### EXCERPTS FROM RELEVANT AMENDMENTS OF THE U.S. CONSTITUTION AND THE ARIZONA STATE CONSTITUTION

## APPENDIX C

### EXCERPTS FROM RELEVANT AMENDMENTS OF THE U.S. CONSTITUTION AND THE ARIZONA STATE CONSTITUTION

#### U.S. CONSTITUTION

##### 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

##### 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

##### 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

##### 14th Amendment

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

#### ARIZONA CONSTITUTION

##### Section 8. Right to Privacy

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

##### Section 10. Self-incrimination; Double Jeopardy

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

##### Section 4. Due Process of Law

No person shall be deprived of life, liberty, or property without due process of law.

##### Section 24. Rights of Accused in Criminal Prosecutions

In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

##### Section 3. Supreme Law of the Land

The Constitution of the United States is the supreme law of the land.

APPENDIX D  
BIBLIOGRAPHY

APPENDIX D  
BIBLIOGRAPHY

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