Videotaped Trial Court Proceedings: The Potential Effect on Appellate Review of Credibility Determinations

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Abstract

Appellate courts have traditionally afforded great deference to a trial court’s factual findings, both in jury and non-jury trials.

KEYWORDS: videotape, trials, court
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I. Introduction

Appellate courts have traditionally afforded great deference to a trial court's factual findings, both in jury and non-jury trials. Particular deference has generally been given to the trial court's findings which were based on credibility determinations made by the fact finder. The policy reasons underlying such deferential standards of review range from a constitutional basis in jury trials to a practical or prudential basis; namely, the trial court's superior position to judge the credibility of witnesses. That is, trial courts have a significant advantage over appellate courts in making such factual determinations—they have a unique opportunity to observe the demeanor of witnesses and the accuracy of their recollection. Appellate courts, in contrast, do not have this opportunity, since official trial records have almost exclu-


3. See, e.g., Figo. R. Civ. P. 52(a); Ky. R. Civ. P. 52.01. Both rules state that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." See also Pavia v. Melvin, 66 So. 2d 494 (Fla. 1953); S. Korenreich and Sons, Inc. v. Titan Agencies, Inc., 423 So. 2d 940, 941 (Fla. Dist. Ct. App. 1982).

4. See U.S. CONST. amend. VII. The seventh amendment provides that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the Rules of the common law." Id. Similar provisions are contained in most state constitutions. See Brennan, supra note 1, at 381.

5. See, e.g., United States v. General Motors, 384 U.S. 127, 141 n.16 (1966); United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1984); Lincoln v. Board of Regents, 697 F.2d 928, 939 (11th Cir. 1983); Shopping Ctr. v. Wingo, 483 F.2d 1131, 1136 (4th Cir. 1973); Emery Air Freight v. Corniel, 414 So. 2d 1167, 1168 (Fla. 5th Dist. Ct. App. 1982); Balto, Inc. v. Sherwood's Commercial Brokers, 326 So. 2d 21 (Fla. 1st Dist. Ct. App. 1975).

6. See, e.g., Emery Air Freight, 414 So. 2d at 1168.

7. See, e.g., McConney, 728 F.2d at 1201.

8. See, e.g., Wedding, 483 F.2d at 1136; Lytle v. United States, 635 F.2d 763.
sively been presented on appeal in transcript form.

Trial courts have traditionally employed a number of different court reporting methods in creating an official record of its proceedings. The most common has been court stenography (machine shorthand). Each of these methods produces a record in transcript form. Appellate courts rely on this transcript when reviewing a case on appeal. This type of record affords appellate judges little, if any, opportunity to make credibility determinations based on the testimony of witnesses since they can neither hear nor observe the witness. Therefore, substantial deference has been given to trial court's decisions in these matters.

Recently, however, videotaping has proven itself as a viable alternative to those court reporting techniques most commonly employed. Unlike a transcribed record, videotape allows an appellate court to hear the testimony and observe the demeanor of witnesses.

This Note will examine the issues which may arise from the use of videotape as the official trial record on appeal. First, a brief technical description will be given of the videotaping system presently used in many Kentucky trial courts to produce an official trial record. The feasibility and desirability of a videotaped trial record will also be explored by highlighting the system's key advantages and disadvantages. Second, an overview of current uses of videotape in judicial proceedings, other than as a court reporting method, will be presented. Finally, a detailed analysis will be made of the potential effects which this state-of-the-art videotape technology could have on appellate practice; in particular, the potential effect on appellate review of a trial court's factual findings based on the credibility of witnesses.

II. The Videotaped Record — A Look at the Kentucky System

Courts in various states have considered using videotape as a court reporting method since the advent of video technology. Video technology, however, has only recently advanced to the point where videotape can be used effectively and efficiently to produce an official record of trial court proceedings.

Kentucky has been a pioneer in accepting and implementing the use of videotape as the official trial court record. Accordingly, in June of 1986 the Kentucky Supreme Court issued an order establishing procedures for videotaped appeals. Under the order, a record of trial court proceedings may now serve as the official record on appeal. The order stated that "... the official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings. The order further provides that "... the official videotape recording shall constitute the entire original record on appeal ... [and] no transcript of court proceedings shall be made a part of the record on appeal except as provided in Paragraph 3 of this order."\n
BLACK'S LAW DICTIONARY 1342 (5th ed. 1979). The rule further provides that "the appellant shall order from the reporter a transcript of such parts of the proceeding ... " FED. R. APP. P. 10(b). Likewise, appellate rules governing the use of videotape records on appeals must be established. See, e.g., Order Establishing Procedures for Using Videotape Equipment to Record Court Proceedings, Ky. S. Ct. (Jun. 1986) [hereinafter cited as Order].

Telephone interview with Robert McBeath, Administrative Assistant to the Kentucky Supreme Court (Sept. 24, 1986) [hereinafter cited as McBeath].

Id. at 10-14.

Id. at 1.

Id. at 2. Paragraph 3 of the order does provide, however, that upon request by the appellate court, transcription may be made of any portion of the videotaped proceedings. See, e.g., FED. R. APP. P. 10. The rule provides that "the word-for-word typing of everything that was said 'on the record' during the trial."
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765 n.1 (6th Cir. 1981).
9. Steelman & Conti, An Evaluation of Kentucky’s Innovative Approach to Making a Videotape Record of Trial Court Proceedings (Apr. 1985) (publication of the Nat’l Center for State Courts). For a detailed description and analysis of these other methods see id. at 24-64; see also Greenwood and Dodge, Management of Court Reporting Services (1976) (publication of the Nat’l Center for State Courts).
10. Steelman and Conti, supra note 9, at 25.
11. Id.
12. See supra text accompanying notes 3-5.
13. Steelman and Conti, supra note 9, at 5.
14. Existing statutory or jurisdictional limitations on the use of videotape as an official record on appeal must be amended or eliminated as to allow such use of videotape. See, e.g., Fed. R. App. P. 10. The rule provides that “the transcript of proceedings shall constitute the record on appeal in all cases.” Id. “Transcript” is defined as “the word-for-word typing of everything that was said ‘on the record’ during the trial.”

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Kentucky has been the pioneer state in accepting and implementing the use of videotape as the official trial court record.¹⁹ Accordingly, in June of 1986 the Kentucky Supreme Court issued an order establishing procedures for videotaped appeals.²⁰ Under the order, video recording of trial court proceedings may now serve as the official record on appeal.²¹ The order stated that “[t]he official record of court proceedings shall be constituted of two (2) videotape recordings, recorded simultaneously, of the court proceedings.”²² The order further provides that “[t]he official videotape recording . . . shall constitute the entire original record on appeal . . . [and] no transcript of court proceedings shall be made a part of the record on appeal except as provided in Paragraph 3 of this order.”²³

BLACK’S LAW DICTIONARY 1342 (5th ed. 1979). The rule further provides that “the appellant shall order from the reporter a transcript of such parts of the proceeding . . . .” FED. R. APP. P. 10(b). Likewise, appellate rules governing the use of videotape records on appeals must be established. See, e.g., Order Establishing Procedures for Using Videotape Equipment to Record Court Proceedings, Ky. S. Ct. (Jun. 1986) [hereinafter cited as Order].
15. Steelman and Conti, supra note 9. From 1973 to 1975, Ohio and Tennessee experimented with the use of videotape as a court reporting method. These efforts were discontinued as a result of excessive cost and technical difficulties with the videotaping system. Id. at 10-14.
16. Telephone interview with Robert McBeath, Administrative Assistant to the Kentucky Supreme Court (Sept. 24, 1986) [hereinafter McBeath].
17. Id.
19. Id.
20. Id. at 1.
21. Id. at 2. Paragraph 3 of the order does provide, however, that upon request by the appellate court, transcription may be made of any portion of the videotaped proceedings which it deems necessary. Id. at 6. Parties are also permitted to attach to their appellate brief an evidentiary appendix containing limited “transcription of only those parts of the videotape recording that support the specific issues or contentions raised in a brief on appeal or that relate to the question of whether an alleged error was properly preserved for appellate review.” Id. at 5.
In 1981, Kentucky began experimenting with videotaping as an alternative method of producing a trial court record. This experimentation resulted from problems encountered with Kentucky's existing court reporting method: namely, excessive costs, unavailability of court reporters, and delays in providing trial transcripts. The video system originally used was installed in the courtroom of the Chief Circuit Judge of Madison County. That system consisted of two fixed location cameras and one movable wide angle camera which was manually operated.

Influenced by the apparent acceptance and success of this system, the Kentucky Administrative Office of the Courts decided to expand the use of videotape as a method of producing a trial record. Chief Circuit Judge Laurence Higgins aided these efforts by permitting this expansion to begin with the installation of a second videotape system in his Jefferson County courtroom.

While Kentucky's plan for expanded use of videotape as a method of court reporting progressed, so did the technology in the field of videotaping trial court proceedings. Jefferson Audio Video Systems, Inc. (JAVS) made the most dramatic and significant advances. Working in conjunction with the Kentucky Administrative Office of the Courts, JAVS developed a sophisticated, state-of-the-art videotaping system explicitly designed to produce a clear and precise videotape of trial court proceedings.

The system consists of six voice-activated microphones; five fixed, wall-mounted color cameras; and a patented computer programmable mixer. This mixer, by providing for interaction between the voice-activated microphones and the wall-mounted cameras, makes the system totally automated. When any participant in the trial proceeding — judge, witness or attorney — begins to speak, the voice activated microphone receiving the voice impulse instantaneously signals the appropriate camera. The camera then automatically focuses on and begins videotaping the person speaking. Therefore, not only can every speaker's voice be recorded, but so too can his or her actions and expressions.

In February 1985, JAVS installed this system in Judge Higgins' courtroom. The results and response to the system have been overwhelmingly positive, as exemplified by Kentucky's continued efforts and commitment toward expanding the use of this videotaping system in their trial courts. The system has been installed, and now operates in eighteen Kentucky circuit courtrooms. JAVS expects this rapid expansion in the use of videotape to continue throughout Kentucky and other states.

This revolutionary court reporting method has been readily accepted and widely praised by judges and attorneys who have participated in videotaped trials. Illustrative of those who have expressed their support and enthusiasm regarding the use of videotape as a court reporting method is Judge Kenneth Corey. Judge Corey's circuit courtroom has been equipped with a JAVS videotaping system. He has expressed tremendous satisfaction with the system and believes that at the present level of technology, videotaping will soon become the trend in court reporting techniques. In his courtroom, "evidence has never been missed and no technical problems whatsoever have been encountered with the system." Judge Corey has found reviewing the

31. Green, supra note 29; see also Steelman and Conti, supra note 9, at 17.
32. Id.
33. Id.
34. Id.
35. See infra text accompanying notes 36-38.
37. Green, supra note 29. Proposals regarding installation of the videotaping system have been made to four other states which expressed interest in its use as a court reporting method. Id.
38. McBeath, supra note 16; see also infra note 41 and accompanying text.
39. Telephone interview with Judge Kenneth Corey, Circuit Court Judge, Jefferson County, Kentucky (Nov. 8, 1986) [hereinafter cited as Corey].
40. Id; see also McBeath, supra note 16.
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videotape to be extremely helpful when writing findings of fact in bench trials.\textsuperscript{48} The videotape enables him to more accurately recall the testimony of a particular witness or the tone of the trial in general.\textsuperscript{44} Most importantly, he can again observe the demeanor of the witnesses before making findings based on their credibility.\textsuperscript{48}

A similar advantage can be enjoyed in jury trials.\textsuperscript{46} While deliberating, the jury may, upon request, review the videotaped testimony of a particular witness.\textsuperscript{48} This allows the jury to recall both the words and the demeanor of the witness.\textsuperscript{48} This is extremely beneficial since both judges and jurors "are subject to defects in their apprehension and their recollection of what the witnesses said and how they talked."\textsuperscript{49}

The JAVS videotaping system has also been found to be cost-effective.\textsuperscript{49} The largest expenditure involves the initial cost of purchasing and installing the sophisticated videotaping equipment.\textsuperscript{50} However, significant savings have been realized in the area of judicial economy,\textsuperscript{51} including actual cost to attorneys, their clients, and the court.\textsuperscript{53}

43. \textit{Id}. "Findings of fact in a bench trial are sometimes not written until months after the trial began." \textit{Id}.

44. \textit{Id}.

45. \textit{Id}.

46. \textit{Id}.

47. \textit{Id}. Prior to allowing a jury to review any segment of the videotape, the trial judge would review that segment and delete any inadmissible or prejudicial evidence. \textit{Id}. If a traditional court reporting method was used and the jury requested to review a portion of a witness' testimony, the court reporter (stenographer) would read that portion of the witness' testimony back to the jury after being edited by the trial judge for inadmissible or prejudicial evidence. \textit{Id}.

48. \textit{Id}.

49. J. \textsc{Frank}, \textsc{Courts on Trial: Myth and Reality in American Justice} 22 (1973).

50. \textit{Id}. For an in-depth cost-benefit analysis of the videotaping system, see Steelman and Conti, supra note 9, at 29-64.

51. Green, supra note 29. Currently, the cost of the system ranges from approximately $40,000 to $59,000, depending on the amount of optional equipment purchased. \textit{Id}.

52. Corey, supra note 39. Judge Corey stated that "the use of videotape has made trial proceedings much more efficient. . . . Trials can begin earlier and continue later. . . . Because the system is automated, there are never any of the delays or problems generally associated with traditional court reporting methods which involve a human element" — namely sickness, tardiness or personality conflicts. \textit{Id}.

53. Aside from the original expense of purchasing the necessary equipment, see supra note 51, videotaping trial court proceedings costs the court $10 per day for recording and $100 per month for maintenance. Green, supra note 29. The taped record is immediately available to the attorneys for $15 per day. Other court reporting meth-

III. Present Uses of Videotape in Judicial Proceedings

A. Child Sexual Abuse Cases

Videotaping children who were victims of or witnesses to sexual abuse has become a common and successful practice in a number of jurisdictions in recent years.\textsuperscript{55} Many states,\textsuperscript{56} including Florida,\textsuperscript{57} have enacted legislation which provides for the videotaping of such testimony when "there is a substantial likelihood that a victim or witness who is under the age of sixteen would suffer at least moderate emo-


55. \textit{Id}.

56. The system provides for easy reference to any portion of the videotape via a digital display of the tape's running time, showing the month, day, year, hour, minute and second. Green, supra note 29.

57. \textit{See Order, supra note 14, at 5, which states that} "[t]he reference in a trial to a segment of the videotaped recordings shall be made in the presence of the child, and the tape, the month, day, year, hour, minute and second at which the reference begins as recorded on the videotape. For example: (TAP 606: 06/15/85: 14:24:05)."

58. \textit{See supra text accompanying notes 42-53.}


60. For example, Minneapolis, Minnesota has videotaped interviews with child sexual abuse victims for the past three years. \textit{Videotaping: Device for Fighting Child Abuse}, A.B.A. J., Apr. 1984, at 36. The taped interviews are conducted in a private setting using anatomically correct dolls to aid the child in describing the abuse.\textit{Id}.

videotape to be extremely helpful when writing findings of fact in bench trials. The videotape enables him to more accurately recall the testimony of a particular witness or the tone of the trial in general. Most importantly, he can again observe the demeanor of the witnesses before making findings based on their credibility.

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The JAYS videotaping system has also been found to be cost-effective. The largest expenditure involves the initial cost of purchasing and installing the sophisticated videotaping equipment. However, significant savings have been realized in the area of judicial economy, including actual cost to attorneys, their clients, and the court.

The use of videotape as a court reporting method has also been criticized. Some believe that judges and attorneys will find reviewing the taped record unwieldy, more difficult, and more time consuming than reviewing a trial transcript. This argument has little merit, however, because of the system's advanced reviewing capabilities. The videotaping system as developed, along with appropriate procedures governing the use of videotape as the official record, make reviewing the tape as easy and efficient as reviewing a written transcript. In short, the unique advantages experienced through the use of a videotaped record make it superior to traditional court reporting methods.

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tional or mental harm if required to testify in open court."85 If the trial
court orders videotaping, the taped testimony could be played at trial in
lieu of live testimony.86

There are two purposes for allowing videotaped testimony at trial: 1) to prevent psychological trauma to the child,84 and 2) to capture the
child’s "physical reactions, body language, and facial expressions of
fear, anger and avoidance."86 These factors would be lost by merely
reading a transcript of the child’s testimony into evidence.86

B. Depositions and Pre-recorded Trials

Most jurisdictions now have rules which permit videotaped depositions
as an alternative method of obtaining the testimony of unavailable
witnesses.87 Such testimony has traditionally been recorded stenographi-
cally, thereby creating a written deposition.88 A written deposition,
however, has a distinct disadvantage compared to live testimony.89 It
does not allow the trial court to observe the demeanor of the witness,
which is critical in determining credibility.90 But videotaped deposi-
tions, like live testimony, enable the court to observe the demeanor
of the witness.91 A court can therefore better determine credibility.

Videotape has also been used to conduct a pre-recorded trial.92 In
an Ohio murder trial, the attorneys had the testimony of the various
witnesses videotaped over the course of several weeks.93 The trial judge
edited the videotaped testimony for inadmissible and prejudicial evi-
dence,94 and then presented the videotape to the fact finder to be

 viewed for disposition of the case.95 Although defense counsel originally
requested that a jury of twelve view the taped testimony, they subse-
sequently asked that the case be heard by a three-judge panel.96 Again,
the credibility of the witnesses could be more accurately evaluated
since they could be seen and heard by the fact finder.

C. Education and Instruction

The videotaping of judicial proceedings also plays an important
role in legal education and instruction.77 Florida State University Law
School has videotaped oral arguments heard by the Florida Supreme
Court since 1985.78 Lawyers and law students have watched the video-
tapes of these appellate arguments in order to "see what makes judicial
interest, to review tactics, and to improve their presentation."79

Similarly, Dade County, Florida, plans to implement an educa-
tional program involving the use of videotape as an instructional
device.80 Installation of the videotaping system now used in Kentucky has
been scheduled for a Dade County courtroom.81 Trial court proceedings
will be videotaped and made available for educational purposes to
judges, lawyers, and law students.82

IV. Effect of Videotape on Standards of Appellate Review

A. Overview of the Issues

The Kentucky system has proven that videotaping trial court pro-
ceedings is not only a viable alternative, but a highly desirable method
of creating an official trial record.83 Expanded use of videotape as a
court reporting technique will inevitably give rise to conflict. The most
controversial issue will likely involve the effect videotaping will have on

62. Id.
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68. See Murray, supra note 67, at 1403.
69. Id. at 1402.
70. Id.
71. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Frank, supra note 54, at 26.
78. Id.
79. Id.
80. Telephone interview with David McGriff, Criminal Justice Coordinator for
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81. Id.
82. Id.
83. See supra text accompanying notes 30-53.
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65. MacFarlane, supra note 59, at 136. Florida also provides by statute for the use of closed circuit television, not only in sexual abuse cases, but in any judicial proceeding in which the court finds it necessary to protect the child victim or witness from severe mental or emotional harm. Fla. Stat. §§ 92.54, 92.55 (1985).
68. See Murray, supra note 67, at 1403.
69. Id. at 1402.
70. Id.
71. Id.
73. Id.
74. Id.
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existing standards of appellate review of factual findings made by a trial court — in particular, those factual determinations based on the credibility of witnesses. With a videotape record, appellate courts will be able to observe and hear witnesses’ testimony, as opposed to reading a “cold” record.

Thus, when videotape constitutes the official record on appeal, the question arises: to what extent, if any, should an appellate court be bound by the deferential standards of review traditionally afforded to factual findings which were based on credibility determinations made by the trial court? To that extent attorneys will argue for, and appellate courts may be inclined to engage in, more extensive review of a trial court’s credibility determinations.

Presently, only Kentucky uses videotape as a method of creating a trial court record,84 and it has done so in only a limited number of its trial courts.85 Consequently, few appeals have been heard from videotaped trials86 and none in which counsel has argued for less deferential or independent review of credibility determinations based on the videotaped record.87 However, innovative lawyers, appealing from a videotaped trial, will inevitably see the opportunity to argue for a more intrusive review of a trial court’s credibility determinations.

An appellate court’s willingness to engage in less deferential or independent review will depend primarily on what that court perceives to be the rationale underlying existing deferential standards of review. This section of this Note will examine how an appellate court might find authority to support an expanded scope of review of credibility determinations when videotape constitutes the official record on appeal. Separate discussions will examine the potential effect of videotaping on credibility determinations in jury and nonjury trials, since existing standards of review and underlying rationales are different for each.

B. Findings by the Trial Judge: The Clearly Erroneous Standard.

1. Federal Courts

In federal88 appellate courts, an extremely deferential standard of review is accorded to findings based on the credibility of witnesses.89 The trial judge’s findings will be overturned on appeal only when they are clearly erroneous.90 Generally, a finding will be held to be clearly erroneous when, “although there is evidence to support it, the reviewing court... is left with the definite and firm conviction that a mistake has been committed.”91

For decades, the various federal circuit courts of appeal have disagreed about the application of this “clearly erroneous” standard to findings of fact and credibility determinations based on evidence presented to the trial court in documentary or deposition form.92 Three well-defined interpretations of the clearly erroneous standard emerged.93 The first interpretation provides that the standard applies equally to all factual determinations “regardless of the nature of the evidence from which they were deduced.”94 The second interpretation provides that the clearly erroneous standard applies to factual determinations based on evidence presented in documentary or deposition form, but allows for closer than normal judicial scrutiny.95 Under this

84. Kentucky is the only state which presently uses videotape in many of its trial courts as a complete substitute for traditional court reporting methods. McBeath, supra note 16. See also Green, supra note 29.
85. See supra text accompanying notes 36-37.
86. McBeath, supra note 16.
87. Id.
88. See Fred R. Civ. P. 52(a).
89. See supra note 88 and accompanying text.
90. Id.
93. Id.
94. Virginia Note, supra note 92, at 518.
95. See, e.g., Bulls Corner Restaurant, Inc. v. Director of the Emergency Management Agency, 759 F.2d 300, 502 (5th Cir. 1985); Bohart v. Mutual Life Ins. Co. Management Agency, 759 F.2d 300, 502 (5th Cir. 1985); Bohart v. Mutual Life Ins. Co. Management Agency, 759 F.2d 300, 502 (5th Cir. 1985); Bohart v. Mutual Life Ins. Co. Management Agency, 759 F.2d 300, 502 (5th Cir. 1985); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1349 (5th Cir. 1982); Seaboard Coast Line R.R. Co.
96. See supra note 29.
existing standards of appellate review of factual findings made by a trial court — in particular, those factual determinations based on the credibility of witnesses. With a videotape record, appellate courts will be able to observe and hear witnesses' testimony, as opposed to reading a "cold" record.

Thus, when videotape constitutes the official record on appeal, the question arises: to what extent, if any, should an appellate court be bound by the deferential standards of review traditionally afforded to factual findings which were based on credibility determinations made by the trial court? To that extent attorneys will argue for, and appellate courts may be inclined to engage in, more extensive review of a trial court's credibility determinations.

Presently, only Kentucky uses videotape as a method of creating a trial court record, and it has done so in only a limited number of its trial courts. Consequently, few appeals have been heard from videotaped trials and none in which counsel has argued for less deferential or independent review of credibility determinations based on the videotaped record. However, innovative lawyers, appealing from a videotaped trial, will inevitably see the opportunity to argue for a more intrusive review of a trial court's credibility determinations.

An appellate court's willingness to engage in less deferential or independent review will depend primarily on what that court perceives to be the rationale underlying existing deferential standards of review. This section of this Note will examine how an appellate court might find authority to support an expanded scope of review of credibility determinations when videotape constitutes the official record on appeal. Separate discussions will examine the potential effect of videotaping on credibility determinations in jury and nonjury trials, since existing standards of review and underlying rationales are different for each.

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93. Id.
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approach, the appellate court gives less deference to the trial judge's findings, thereby reducing the burden of proving that his findings were clearly erroneous. The third interpretation provides that the standard does not apply to factual determinations based on evidence presented in documentary or deposition form. Thus, complete and independent review of credibility by the appellate court is appropriate. Debate among the federal appellate courts has focused on these last two interpretations of the clearly erroneous standard. It is these last two interpretations which may also provide the basis for other appellate courts to more extensively review a trial judge's credibility determinations when videotape constitutes the official record on appeal.

Although the third interpretation holds the clearly erroneous standard to be completely inapplicable while the second provides for a less deferential application of the rule, the rationales supporting both interpretations are identical. Only the degree to which the deferential standard is abrogated differentiates the two approaches.

Appellate courts which have adopted either of these interpretations have held that the primary rationale for deferring to the trial judge's credibility determinations is that the trial judge is in a "superior position" to make such findings; only he can observe the testimony and demeanor of the witnesses. When factual findings and credibility determinations are based on evidence presented to the trial judge in documentary or deposition form, however, the trial judge does not have an opportunity to observe witnesses. Therefore, he does not enjoy any such advantage over the appellate court.

In such circumstances, the reviewing court is in as good a position

96. See Bohart, 743 F.2d at 325 n.12; Sierra Club, 695 F.2d at 968.
98. See supra text accompanying notes 95-97.
99. See, e.g., Lydle, 635 F.2d at 765 n.1; Wedding, 483 F.2d at 1136; A.J. Indus., Inc. v. Dayton Steel Founding Co., 394 F.2d 357, 361-62 (6th Cir. 1968); Seaggrave, 212 F.2d at 394. The United States Supreme Court has also stated, in dicta, that the rationale behind the clearly erroneous standard is the trial court's unique opportunity to evaluate the demeanor of witnesses. United States v. General Motors, 384 U.S. 127, 141 n.6 (1966). This is commonly referred to as the "superior position" rationale behind the clearly erroneous standard.
100. A.J. Industries, Inc., 394 F.2d at 361-62; Seaggrave, 212 F.2d at 394. See also Oliver, supra note 95, at 678-82.
101. Id.
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In such circumstances, the reviewing court is in as good a position as the trial judge to make credibility determinations.102 Numerous appellate courts have therefore found that the rationale supporting the clearly erroneous standard breaks down when factual findings and credibility determinations are based on documentary or deposition-type evidence.103 Once this rationale has fallen, appellate courts have been willing to engage in more intrusive review of factual findings and credibility determinations.104

a. The “Inapplicable” Interpretation of the Clearly Erroneous Standard

The United States Court of Appeals for the Sixth Circuit held the clearly erroneous standard inapplicable for findings based on evidence presented at trial in documentary or deposition form in Seagrave v. Mount.105 In Seagrave,106 corporate stockholders in a derivative suit sought injunctive relief from the corporation and its executives.107 Virtually all testimony was presented to the district court in deposition form.108 The court neither saw nor heard the witnesses testify.109 The court of appeals affirmed the judgement of the district court,110 but only after making its own complete and independent determination of the credibility of the witnesses, based on their deposition testimony.111 The appellate court held that the findings of the district court were not controlling.112 The reviewing court found it was in as good a position as the district court to judge the credibility of the witnesses.113 Similarly, in Wedding v. Wingo114 a federal district court based its credibility determinations on testimony presented on an audio re-

96. See Bohart, 743 F.2d at 325 n.12; Sierra Club, 695 F.2d at 968.
97. See, e.g., Lytle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981); Gay Lib v. University of Missouri, 558 F.2d 848, 853 n.10 (8th Cir. 1977); Wedding v. Wingo, 483 F.2d 1131, 1136-37 (6th Cir. 1973), aff’d, 418 U.S. 461 (1974); Seagrave v. Mount, 212 F.2d 389, 394 (6th Cir. 1954). See also Oliver, supra note 95, at 669.
98. See supra text accompanying notes 95-97.
99. See, e.g., Lytle, 635 F.2d at 765 n.1; Wedding, 483 F.2d at 1136; A.J. Indus., Inc. v. Dayton Steel Founding Co., 394 F.2d 257, 361-62 (6th Cir. 1968); Seagrave, 212 F.2d at 394. The United States Supreme Court has also stated, in dicta, that the rationale behind the clearly erroneous standard is the trial court’s unique opportunity to evaluate the demeanor of witnesses. United States v. General Motors, 384 U.S. 127, 141 n.16 (1966). This is commonly referred to as the “superior position” rationale behind the clearly erroneous standard.
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101. Id.
c. The “Less Deferential” Interpretation of the Clearly Erroneous Standard

Other federal appellate courts have held that while the clearly erroneous standard is not completely inapplicable when findings are based on documentary or deposition-type evidence, the standard should be applied with less deference.181 Thus, the United States Court of Appeals for the Eleventh Circuit182 held that “[w]hen . . . the district court reaches its [factual] determinations solely of the basis of deposition, affidavits, and documents, the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated.”183 This precise reasoning was also applied by the United States Court of Appeals for the Fifth Circuit.184 The court held that although it was bound by the clearly erroneous standard, “the degree of deference to be accorded a district courts findings of fact is lower when the case is submitted wholly on documents . . . .”185 Similarly, in A.J. Industries v. Dayton Steel186 the defendant presented to the district court the testimony of five of its nine witnesses in deposition form.187 While

115. Id. at 1132.
116. Id. at 1137.
117. Id.
118. 212 F.2d at 389.
119. id. at 1337.
120. See infra notes 122-31 and accompanying text; see also Sierra Club, 695 F.2d at 967-68; Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d at 197, 200 (5th Cir. 1983).
121. See supra note 94 and accompanying text.
122. Seaboard, 690 F.2d at 1343.
123. Id. at 1349.
125. Id. (quoting Onaway Transp. Co., 695 F.2d at 200).
126. 394 F.2d 357 (6th Cir. 1968).
127. Id. at 361.

affirming the judgment of the district court,188 the court of appeals stated that the conclusiveness generally afforded to the district court’s credibility determinations was somewhat weakened because a significant portion of the testimony was presented by deposition.189 The court reasoned,190 as did the Fifth and Eleventh Circuit Courts of Appeal,191 that the rationale behind the clearly erroneous standard did not support the application of the extreme deference generally afforded to a district court’s credibility determinations. The appellate court was in as good a position as the district court to make such findings.

Appellate courts which adopt the “superior position” rationale behind the clearly erroneous standard192 may be inclined to extend their reasoning to justify independent or less deferential review of credibility determinations in cases in which videotape constitutes the official record on appeal. Videotape not only records the words of a witness, but also his reactions, facial expressions, and physical appearance.193 Every word, along with each significant gesture and movement made by the witness which could have been observed by the trial judge, is captured on videotape194 and is available to the appellate court. Hence, the rationale supporting the clearly erroneous standard would again appear to break down. The videotape would allow an appellate court the same opportunity that the trial court had to observe the testimony and demeanor of witnesses.195 The trial court would no longer be in a position superior to the appellate court to make credibility determinations. Independent, or less deferential review of such determinations could therefore be justified.

c. The “Strict” Interpretation of the Clearly Erroneous Standard

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Other federal appellate courts have held that while the clearly erroneous standard is not completely inapplicable when findings are based on documentary or deposition-type evidence, the standard should be applied with less deference.136 Thus, the United States Court of Appeals for the Eleventh Circuit137 held that “[w]hen . . . the district court reaches its [factual] determinations solely on the basis of depositions, affidavits, and documents, the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated.”138 This precise reasoning was also applied by the United States Court of Appeals for the Fifth Circuit.139 The court held that although it was bound by the clearly erroneous standard, “the degree of deference to be accorded a district courts findings of fact is lower when the case is submitted wholly on documents . . . .”140 Similarly, in A.J. Industries v. Dayton Steel141 the defendant presented to the district court the testimony of five of its nine witnesses in deposition form.142 While

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125. Id. (quoting Onaway Transp. Co., 695 F.2d at 200).
126. 394 F.2d 357 (6th Cir. 1968).
127. Id. at 361.
128. Id. at 362.
129. Id. at 361-62.
130. Id.
131. See supra notes 122-25 and accompanying text.
132. See supra text accompanying note 99.
133. See supra notes 32-33 and accompanying text.
134. Id.
135. Id.
136. See supra note 94 and accompanying text.
derogation of the clearly erroneous standard.\textsuperscript{137} Courts applying this interpretation hold that the rationale for deferring under the clearly erroneous standard is not limited to the trial judge's superior position to observe witnesses.\textsuperscript{138} They hold that judicial economy, stability, and uniformity in judicial decision-making require that the clearly erroneous standard be applied equally, regardless of the form in which evidence is presented to the trial court.\textsuperscript{139} The use of videotape as the official trial record would not cause this rationale to break down. Therefore, under this interpretation, more intrusive appellate review of credibility determinations could not be justified.

Federal Rule of Civil Procedure 52(a), which codifies the clearly erroneous standard for federal appellate courts,\textsuperscript{140} has recently been amended to reflect this latter interpretation.\textsuperscript{141} This appears to settle the standard of review issue for federal appellate courts. As such, it would seem to preclude federal appellate courts from engaging in independent or less deferential review of a trial court's credibility determinations, regardless of the manner in which evidence was presented at trial.

\begin{footnotesize}
\begin{enumerate}
\item[137.] Id.
\item[139.] Id.; see also Brennan, Standards of Appellate Review, 33 Def. L.J. 377, 379 (1984).
\item[140.] Fed. R. Civ. P. 52(a).
\item[141.] Fed. R. Civ. P. 52(a) (amended 1985). The rule as amended states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." Id. (emphasis added). The rule was amended for the purpose of resolving conflict among the circuits as to the application of the clearly erroneous standard and promoting uniformity and stability in the application of the rule. Fed. R. Civ. P. 52(a) Advisory Committee's Note. The United States Supreme Court interpreted the clearly erroneous standard to apply equally regardless of the nature and form of the evidence upon which the trial court based its factual findings. Anderson, 105 S. Ct. at 1512. Although the Anderson case was decided more than one month before the federal rule amendment, it is clear that the federal amendment was adopted in response to the note to the advisory committee's comments. See supra text accompanying note 99.
\item[142.] See supra text accompanying note 99.
\item[143.] Ky. R. Civ. P. 52.01.
\item[144.] Id.
\item[145.] See supra text accompanying notes 95-135. See also Lytle, 635 F.2d at 765 n.1; Wedding, 483 F.2d at 1136-37.
\item[146.] Ky. R. Civ. P. 52.01.
\item[147.] Only those appellate courts which adopt the "superior position" rationale behind the clearly erroneous standard would consider engaging in more intrusive review of credibility determinations.
\item[148.] Presently, the Florida rules do not provide for the use of videotape as a method of creating an official trial record. Videotape has been used, however, in child abuse cases and for educational purposes. See supra text accompanying notes 58-65 and 75-80.
\item[149.] See, e.g., Simmons v. State, 305 So. 2d 178 (Fla. 1974). See also Moti v. Matsushita Electric Corp., 380 So. 2d 461 (Fla. 3d Dist. Ct. App. 1980); CIC Leasing Corp. v.
\item[150.] Id.
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2. State Courts

State appellate courts, however, may still maintain the "superior position" rationale as the basis for the clearly erroneous standard, irrespective of the recent federal interpretation.

In Kentucky, the state rules of civil procedure codify the clearly erroneous standard for factual findings and credibility determinations made by a trial judge. The rule states that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This language is identical to that of the federal rule prior to its latest amendment. Many federal appellate courts interpreted this precise language to allow for independent or less deferential review of a trial court's credibility determinations where the appellate court was in as good a position as the trial court to judge credibility. Therefore, the present language of the Kentucky rule leaves the door open for state appellate courts to subscribe to the "superior position" rationale behind the clearly erroneous standard. As such, it also provides Kentucky appellate courts with strong support for engaging in independent or less deferential review of credibility determinations in cases in which videotape constitutes the official record on appeal.

Similarly, Florida appellate courts could certainly find support for a more intrusive degree of appellate review of credibility determinations if videotape were used as the official trial record. Although the clearly erroneous standard has not been codified in Florida, it continues to be the judicially recognized standard for reviewing factual findings and credibility determinations made by a trial judge. For example, in

142. See supra text accompanying note 99.
143. Ky. R. Civ. P. 52.01.
144. Id.
145. See supra text accompanying notes 95-135. See also Lytle, 635 F.2d at 765 n.1; Wedding, 483 F.2d at 1336-37.
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149. See, e.g., Simmons v. State, 305 So. 2d 178 (Fla. 1974). See also Mori v.
CIC Leasing Corp. v. Dade Linen and Furniture Corp., 250 Florida's Third District Court of Appeal stated that "it is basic that an appellate court will not disturb the finding of fact of a trial judge unless it is clearly erroneous."181

While the rationale behind this standard has never been specifically articulated, Florida appellate courts may very well follow the "superior position" rationale. In Emery Air Freight v. Cornil, 248 Florida's Fifth District Court of Appeal held that when the fact-finding function is performed by the trial judge and he "has an opportunity to observe the witnesses, their demeanor, candor or lack of it, he must determine whether the testimony of such witnesses is worthy of belief."183 Such determinations will be afforded great deference by the appellate court.184 This identical position had previously been adopted by Florida's First District Court of Appeal.185 In Bali, Inc. v. Sherwood's Commercial Brokers of Daytona Beach, Inc.186 the written record of the trial court proceedings contained much conflicting testimony.187 In affirming the trial court's judgment, the appellate court again deferred to the trial judge's credibility determinations. The court reasoned that "[t]he able trial judge who heard the testimony was in a better position to resolve the conflicts and judge the credibility of the witnesses than is [the appellate] court."188 These cases189 indicate that Florida appellate courts may subscribe to the "superior position" rationale behind the clearly erroneous standard. That is, that the primary reason for deferring to a trial judge's credibility determinations is his "superior position" to observe the witnesses and their demeanor.190 These cases also suggest that such deference to the trial court would not be required if the appellate court were in as good a position as the trial judge to make such determinations. This was further suggested in Redondo v. Jesus.191 In Redondo,192 the trial court denied the defendant's motion for a new trial based on the trial judge's determination of the credibility of a witness.193 The witness' testimony was presented to the trial court in deposition form.194 The Third District Court of Appeal reversed and remanded, holding that "[s]ince the trial court had no opportunity to observe [the witness'] demeanor, we are not required . . . to accept the trial court's determination of [his] credibility."195 This case again indicates application of the "superior position" rationale — since the appellate court was in as good a position as the trial court to make credibility determinations, more intrusive review was appropriate. Similarly, the use of videotape as the official record on appeal would place an appellate court in as good a position as the trial judge to make such determinations.196 Thus, the "superior position" rationale would again break down, leaving Florida appellate courts free to reject the trial court's credibility determinations and engage in their own independent or less deferential evaluation of credibility.

3. Practical Effect of a Videotaped Record on the Clearly Erroneous Standard

The recent amendment to federal rule 52(a), which codified the clearly erroneous standard197 and similar state interpretations may reject the "superior position" rationale as the primary one supporting the clearly erroneous standard. Despite these interpretations, the use of videotape may nonetheless have a significant impact on appellate review of factual findings based on credibility determinations. While ap

160. 426 So. 2d at 1146.
161. Id.
162. Id. at 1146-47. Redondo involved an evidentiary hearing to determine whether a jury member had heard or concealed information during voir dire and thereby deprived the parties of a fair trial. The trial judge determined, on the basis of the juror's deposition testimony, that the juror had not lied or concealed any information. Id.
163. Id.
164. See id.
165. See supra text accompanying notes 32-33.
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pellate courts in many jurisdictions may refrain from expressly engaging in independent or less deferential review, videotape may, in practice, make the clearly erroneous standard easier to satisfy. An appellate court’s ability to observe the testimony of witnesses may significantly affect its decision as to whether or not a finding based on that testimony was clearly erroneous.

Generally, an appellate court will hold the findings of a trial judge which were based on the credibility of a witness to be clearly erroneous when the court is left with the firm and definite conviction that a mistake had been committed. An appellate court may be more likely to have such a conviction after reviewing a videotape of the witnesses’ testimony, rather than a transcript of that testimony. A transcript fails to capture tones of voice, hesitations of speech and other demeanor clues that often convey a different meaning than the words, standing alone would indicate. In such a case, an appellate court “has to operate in the partial vacuum of the printed record.” As Karl Llewellyn noted, however, “[w]e know that [an appellate] court’s ‘smell’ for the ‘facts’ beneath the officially given ‘facts’ is frequently, not just semioccasionally, a factor in the deciding.” Appellate judges, like trial judges and jurors, are human and therefore will undoubtedly be influenced to some degree, albeit unconsciously, by the appearance and demeanor of a witness. To that extent, so too may the judges’ determination be influenced regarding whether or not a finding based on a witness’ testimony was clearly erroneous. An appellate court’s decision whether a finding was clearly erroneous will be based not on the words of the witness alone, but on the meaning of those words as embraced and modified by the witness’ silent testimony — his demeanor.

C. Findings by a Jury: Sufficiency of the Evidence

The framers of the United States Constitution granted the Supreme Court the power to review factual determinations made by a jury. The fear that jury findings would become freely reviewable,

170. Frank, supra note 49, at 23.
171. Id.
173. See Frank, supra note 49, at 146-56.
174. Id. at 152.
175. U.S. Const. art. III, § 2. It provides that “[t]he Supreme Court shall have

and thus meaningless, prompted the passing of the seventh amendment. The seventh amendment provides that “no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” Congress intended this to act as a check on the power of appellate courts to review jury findings. Nearly every state constitution now contains similar guarantees.

This does not mean, however, that a jury’s factual determinations may never be reexamined by an appellate court. A jury verdict cannot stand without an [adequate] evidentiary basis. An evidentiary basis will generally be held sufficient if there is substantial evidence to support the verdict. A mere scintilla of evidence will not be sufficient. Therefore, jury facts can be reexamined, but only to the extent necessary to determine whether substantial evidence exists.

All federal and most state appellate courts test this substantial evidence requirement by a reasonable conflict or reasonable man standard. A court will inquire whether “reasonable and fair minded men in the exercise of impartial judgment might reach a different conclusion.” If reasonable minds could not differ as to the conclusion to be drawn then there was no substantial evidence to support the verdict.

appellate jurisdiction, both as to Law and Fact with such exceptions and under such regulations as Congress shall make.”
177. U.S. Const. amend. VII.
178. Id.
179. See Note, supra note 176, at 69.
180. See Brennan, supra note 139, at 381.
182. Childress II, supra note 181, at 880.
183. See, e.g., Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969).
184. See also Childress I, supra note 181, at 287-88.
186. Boeing, 411 F.2d at 374. See also Hulse, 424 So. 2d at 192.
187. Id. This issue is generally presented on appeal of a trial court’s granting or denying a directed verdict or its decision on a judgement N.O.V. motion. See Childress II, supra note 181, at 880.
pellate courts in many jurisdictions may refrain from expressly engaging in independent or less deferential review, videotape may, in practice, make the clearly erroneous standard easier to satisfy. An appellate court’s ability to observe the testimony of witnesses may significantly affect its decision as to whether or not a finding based on that testimony was clearly erroneous.

Generally, an appellate court will hold the findings of a trial judge which were based on the credibility of a witness to be clearly erroneous when the court is left with the firm and definite conviction that a mistake had been committed. An appellate court may be more likely to have such a conviction after reviewing a videotape of the witnesses’ testimony, rather than a transcript of that testimony. A transcript fails to capture tones of voice, hesitations of speech and other demeanor clues that often convey a different meaning than the words, standing alone would indicate. In such a case, an appellate court “has to operate in the partial vacuum of the printed record.” As Karl Llewellyn noted, however, “[w]e know that [an appellate] court’s ‘smell’ for the ‘facts’ beneath the officially given ‘facts’ is frequently, not just semioccasionally, a factor in the deciding.” Appellate judges, like trial judges and jurors, are human and therefore will undoubtedly be influenced to some degree, albeit unconsciously, by the appearance and demeanor of a witness. To that extent, so too may the judges’ determination be influenced regarding whether or not a finding based on a witness’ testimony was clearly erroneous. An appellate court’s decision whether a finding was clearly erroneous will be based not on the words of the witness alone, but on the meaning of those words as embraced and modified by the witness’ silent testimony — his demeanor.

C. Findings by a Jury: Sufficiency of the Evidence

The framers of the United States Constitution granted the Supreme Court the power to review factual determinations made by a jury. The fear that jury findings would become freely reviewable, and thus meaningless, prompted the passing of the seventh amendment. The seventh amendment provides that “no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” Congress intended this to act as a check on the power of appellate courts to review jury findings. Nearly every state constitution now contains similar guarantees.

This does not mean, however, that a jury’s factual determinations may never be reexamined by an appellate court. “A jury verdict cannot stand without an [adequate] evidentiary basis.” An evidentiary basis will generally be held sufficient if there is substantial evidence to support the verdict. A mere scintilla of evidence will not be sufficient. Therefore, jury facts can be reexamined, but only to the extent necessary to determine whether substantial evidence exists.

All federal and most state appellate courts test this substantial evidence requirement by a reasonable conflict or reasonable man standard. A court will inquire whether “reasonable and fair minded men in the exercise of impartial judgment might reach a different conclusion.” If reasonable minds could not differ as to the conclusion to be drawn then there was no substantial evidence to support the verdict.

appellate jurisdiction, both as to Law and Fact with such exceptions and under such regulations as Congress shall make.”

177. U.S. Const. amend. VII.
178. Id.
179. See Note, supra note 176, at 69.
180. See Brennan, supra note 139, at 381.
182. Childress II, supra note 181, at 880.
183. See, e.g., Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969). See also Childress I, supra note 181, at 287-88.
184. Boeing Company, 411 F.2d at 374.
185. See, e.g., id. at 374; See also Hulse v. Blue Cross/Blue Shield, Inc., 424 So. 2d 191, 192 (Fla. 5th Dist. Ct. App. 1983).
186. Boeing, 411 F.2d at 374. See also Hulse, 424 So. 2d at 192.
187. Id. This issue is generally presented on appeal of a trial court’s granting of a directed verdict or its decision on a judgement N.O.V. motion. See Childress II, supra note 181, at 880.

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An appellate court must then reverse, even though the verdict was based on a factual determination made by the jury.

The question then remains: how might the use of videotape as the official record on appeal affect this standard of reviewing credibility determinations which form the basis of a jury verdict? Because the “reasonable conflict” standard has a constitutional basis, the argument asserted with the regard to the clearly erroneous standard cannot be used. It cannot be contended that the rationale behind the standard breaks down when videotape is used and thus allows independent or less deferential review.

It can be argued, however, that a videotape record will make a jury verdict, based on testimonial evidence, easier to overturn on appeal. Findings based on the testimony of a single witness could constitute substantial evidence to support a jury verdict. Conversely, such testimony may be so incapable of belief that reasonable minds could not differ and thus would not be entitled to any weight on appeal. This type of evidence would, therefore, be deemed insufficient to constitute substantial evidence to support the jury verdict.

When an appellate court uses a trial transcript as the official record on appeal, the judges have before them for consideration only the “words” of a witness — a typewritten or printed record of the testimony. If videotape were used as the official record, however, an appellate court would be able to see and hear a witness, just as he was seen and heard at trial. Not only would the appellate court consider the words of the witness, but the witness’ appearance and demeanor would become factors in determining whether his testimony was so unbelievable that findings based on it should not constitute substantial evidence to support a verdict. Therefore, an appellate court reviewing a videotaped trial record may find the testimony of a witness incapable of belief because of his appearance and demeanor rather than because of the testimony itself. That same testimony may not have been found completely unbelievable had review been based solely on a written record.

188. See supra text accompanying note 186.
189. See supra notes 178-80 and accompanying text.
190. See Brennan, supra note 139, at 384.
191. Id.
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convicted of crimes; and every week, for similar reasons, someone loses his life's savings, his livelihood, his job. Most of such injustices stem not from lack of justice in the legal rules but from mistakes in fact-finding.\textsuperscript{201}

While it is true that no judge or legal system can assure perfect justice, "the unattainability of the ideal is no excuse for shirking the effort to obtain the best available."\textsuperscript{202} The task of the judge must still be to seek to achieve justice.\textsuperscript{203} This requires that everything feasible be done to increase the probability of ascertaining the true facts of a case.\textsuperscript{204}

Probably ninety-five percent of all cases end at the trial court level.\textsuperscript{205} Therefore, in any case within that ninety-five percent in which factual mistakes were made by the trial court, a potential injustice occurred which will never be corrected or even reviewed. Furthermore, in those cases which are appealed, traditional deferential standards of review generally require the appellate court to accept the trial court's factual findings.\textsuperscript{206} Therefore, any injustice which occurred at the trial level because of factual mistakes will most likely go undisturbed.\textsuperscript{207}

It is a myth that an appellate court "can and will safeguard litigants against the trial judges' mistakes concerning the facts."\textsuperscript{208} In reference to an appellate court's limited ability to correct a trial court's factual mistakes, Judge Jerome Frank stated that "[p]erhaps, if on appeal we used records consisting of talking motion pictures of trials, this particular difficulty could be overcome."\textsuperscript{209}

The technology now exists which allows trial court proceedings to be clearly and accurately recorded on videotape.\textsuperscript{210} Reviewability of such tapes has been made as easy and efficient as reviewing a written record. Therefore, an appellate court reviewing a challenged factual finding which was based on the credibility of a witness can review the videotaped testimony of that witness as easily as it could review the written testimony. Review of the videotaped testimony, however, allows an appellate court to consider not only the words spoken by the witness but the "unspoken words" as well — which often relate a different meaning than the words alone.\textsuperscript{211} An appellate court, reviewing the videotape record would therefore be able to make a more informed and knowledgeable decision, even under traditional standards of review. Appellate review would merely be based on a record which reflects more accurately the testimony upon which a challenged factual finding was based. Thus, justice would be better served without exhausting any additional appellate resources and without usurping the trial court's primary fact finding function.

VI. Conclusion

Videotape is an efficient and desirable method of creating an official record of trial court proceedings. State and federal courts should give strong consideration to this high quality and cost-effective court reporting method.

Videotape may also have the significant effect of expanding an appellate court's power to review credibility determinations made by the trial court. In reference to the desirability of expanded appellate review Judge John C. Godbold noted:

If guarded use of this power is made, the essential distinction between courts of appeals and trial courts will not be abrogated nor will the integrity of the [trial] courts be undermined. Instead of supplanting the existing structure of the judiciary, the power to find facts at the appellate level will supplement and enrich this structure.\textsuperscript{212}

Appellate courts which do begin to review videotape records may well refrain from expressly engaging in independent or less deferential review of a trial courts factual findings and continue to abide by traditional deferential standards of review. They will nonetheless be unconsciously influenced by the additional information which they will necessarily synthesize — gestures, tone of voice and other non-verbal clues. As our legal system is one which continuously strives toward achieving justice, this unconscionable effect on appellate courts should be viewed as a

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\textsuperscript{202} Id. at 36.
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\textsuperscript{204} See FRANK, supra note 193, at 222.
\textsuperscript{205} Id. at 33.
\textsuperscript{206} See supra notes 1-3 and accompanying text.
\textsuperscript{207} See FRANK, supra note 193, at 33.
\textsuperscript{208} Id. at 223.
\textsuperscript{209} United States v. Rubenstein, 151 F.2d 915, 921 n.5 (2d Cir. 1945) (Frank, J., dissenting).
\textsuperscript{210} See supra text accompanying notes 29-33.
\textsuperscript{211} Id.
\textsuperscript{212} Godbold, Fact Finding by Appellate Courts — An Available and Appropriate Power, 12 COLUM. L. REV. 365, 381 (1982).
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favorable and promising one. Appellate courts will merely have more complete and accurate information upon which to base their decision — while still applying traditional deferential standards of review. Thus, justice will best be served.

Chris M. Salamone

A Spirited Call to Require Alcohol Manufacturers to Warn of the Dangerous Propensities of their Products

I. Introduction

Alcoholism affects approximately twenty-two million Americans.¹ Cancers of the mouth, tongue, pharynx, and esophagus, as well as diseases of the liver and kidney, are more common in alcoholics than in non-alcoholics.² A direct relationship exists between alcohol consumption and birth defects.³ Fetal Alcohol Syndrome (FAS)⁴ is “one of the most serious sets of birth defects”⁵ in the United States and is the only birth defect that is “potentially preventable.”⁶

Notwithstanding these medical findings, many are unaware of the hazards associated with alcohol.⁷ Although the public “generally knows that alcohol abuse can cause serious health problems for the abuser,” the public is not “sufficiently aware of all the specific short and long term effects of alcohol” on a person’s health and well being.⁸ Despite

² Medical Consequences of Alcohol, Summary of the Fifth Special Report to the U.S. Congress on Alcohol and Health, ALCOHOL. HEALTH AND RES. WORLD, Fall 1984, at 19 [hereinafter Summary].
³ Harwood & Napolitano, Economic Implications of the Fetal Alcohol Syndrome, ALCOHOL. HEALTH AND RES. WORLD, Fall 1985, at 38.
⁴ Fetal Alcohol Syndrome (FAS) is a birth defect resulting from fetal exposure to alcohol. At least one feature from each of the following three categories must be present before a child is diagnosed as having FAS:
   (1) Growth retardation before and/or after birth;
   (2) A pattern of abnormal features of the face and head, including small head circumference, small eyes, or evidence of retarded formation of the midfacial area, including a flattened bridge and short length of the nose, and flattening of the vertical groove between the nose and mouth, i.e., the philtrum;
   (3) Evidence of central nervous system abnormality, including, for example, abnormal neonatal behavior, mental retardation, or other evidence of abnormal neurobehavioral development.

Summary, supra note 2, at 27.
⁵ Id.
⁶ Goeringer & Morosco, Preventing Fetal Alcohol Syndrome, ALCOHOL. HEALTH AND RES. WORLD, Fall 1983, at 31.
⁸ NATIONAL COUNCIL ON ALCOHOLISM, A CASE FOR HEALTH WARNING LA-