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§ 14. Authentication (verification)

All videotape evidence must be authenticated (or verified), a requirement that can be satisfied by testimony from a foundational witness (see § 12) sufficient to support a finding that the matter in question is what its proponent claims.<sup>78</sup> The foundational witness, after being qualified, begins by identifying the subject matter of the videotape, that is, saying what it seemingly is (see § 13), and then goes on to authenticate it by saying that it is, indeed, what it appears to be. There is no particular methodology required to authenticate videotape evidence,<sup>79</sup> and as long as the witness's testimony provides satisfactory proof of the videotape's integrity, strict foundational requirements "are now almost universally rejected as unnecessary."<sup>80</sup>

All contemporaneous videotape evidence is likely to fall under one of the two dominant alternative theories of admissibility, that is, the "pictorial communication" theory or the "silent witness" theory. (See § 5.) In the case of most staged or spontaneous contemporaneous videotape evidence, either the operator of the camcorder (who is likely to be a professional legal videographer in the staged contemporaneous situation) or someone who set up the camcorder and participated in the events and circumstances being recorded, is likely to be able to testify that what was recorded is a fair and accurate portrayal of what occurred. (See § 15.) In the case of anticipated contemporaneous videotape evidence, verification of what has been recorded by a surveillance camera can proceed under the "silent witness" theory if no eyewitness is available; this can take place in

76. See Hughes & Cantor, PHOTOGRAPHS IN CIVIL LITIGATION 183-185 (1973).

77. See *People v Donaldson* (1962) 24 m 2d 315, 181 NE2d 131.

78. See Federal Rule of Evidence 901.

79. Scott, 3 PHOTOGRAPHIC EVIDENCE § 1297 (2d ed Supp 1991).

80. *Id.* at p 114.

any number of ways sufficient to demonstrate the integrity of the videotape evidence. (See § 16.)

Although the authentication process is an important hoop that must always be jumped through, relatively few cases to date have seen an exclusion of videotape evidence on the grounds of improper authentication.<sup>81</sup> This may be because in most cases the judge performs only a screening function. That is, the judge determines whether a reasonable jury could find that the videotape is what its proponent claims, and if this determination is made, the judge then admits the videotape. Any difficulties as to the genuineness of the videotape are then left to the jury in their assessment of the weight to be accorded the evidence.<sup>82</sup> It is arguable, however, that to the degree an entire case might turn on the probative power of an item of videotape evidence, as is often the case with contemporaneous videotape evidence, stricter admission standards should be applied and the judge should treat the authentication process more as raising issues of competence than merely issues of conditional relevance.<sup>83</sup>

#### § 15. -"Fair and accurate portrayal"

It cannot be emphasized enough that, in the vast majority of cases,<sup>84</sup> the single most important factor necessary to satisfy the authentication requirement is the testimony of a percipient witness that what is recorded on the videotape is a fair and accurate portrayal of what the proponent claims it to be.<sup>85</sup> Indeed, it even might be stated, as some commentators have, that the entire foundation process turns on this testimonial averment of a fair and accurate portrayal.<sup>86</sup>

81. Compare Comment, Videotaped Reenactments in Civil Trials, 24 John Marshall Law Review 433, 442 (1991).

82. See *Allen v State* (1978) 146 Ga App 815, 247 SE2d 540, 541 ("If the admissibility of evidence is doubtful, it should be admitted and its weight left to the determination of the jury").

83. Lilly, AN INTRODUCTION TO THE LAW OF EVIDENCE 515 (2d ed 1987). See also Hughes & Cantor, PHOTOGRAPHS IN CIVIL LITIGATION 85-86 (1973); Federal Rule of Evidence 104(b).

84. In the few cases where it is impossible to provide authentication through an eyewitness who can testify to the fairness and accuracy of the portrayal, the "silent witness" theory will be relied on. See §§ 5, 16.

85. See Joseph, Videotape Evidence in the Courts, 26 South Texas Law Journal 453, 479 (1985) ("The fairness and accuracy of the portrayal are key").

86. See, for example, Beyer & Buckley, Videotape And The Probate Process: The

Most judges are familiar with the "fair and accurate portrayal" formula, and many have come to expect that these words, or some variant, be used. Dubbed "magic words" by one commentator, "they signal a proper foundation is being laid," and although there are minor variations from jurisdiction to jurisdiction, "judges are accustomed to hearing and acting on these magic words." The "magic words" in a particular jurisdiction should be inquired into in order to take advantage of this "trained reflex."<sup>87</sup> Variations of "fair and accurate portrayal" might include "true and correct likeness,"<sup>88</sup> "faithful, fair, and accurate portrayal,"<sup>89</sup> or "correct and accurate likeness."<sup>90</sup> In a case where a videotape is only a minor or collateral item of evidence, and not much time or attention can be spent on its foundation and authenticity, the invocation of the correct variant of the "magic words" will usually ensure admissibility provided other foundational requirements (relevance, identification) are met.<sup>91</sup>

#### § 16. -Authentication under "silent witness" theory

When there is no eyewitness who can state that what has been recorded on the videotape is a fair and accurate portrayal of what it is purported to be (see § 15), such as in the case of a recording by a surveillance camcorder, authentication under the "silent witness" theory (see § 5) becomes necessary. Use of this theory may also be preferable if it is important to have the videotape evidence admitted

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Nexus Grows, 42 Oklahoma Law Review 43, 63 (1989) ("To be admissible, the determinative factor appears to be that the videotape must be established as a true and accurate representation of the events portrayed"); Joseph, Videotape Evidence in the Courts, 26 South Texas Law Journal 453, 479 (1985) ("Proper foundation is laid with proof that the videotape fairly and accurately portrays that which it purports to portray").

87. McElhaney, TRIAL NOTEBOOK 202 (2d ed 1987).

88. *Kortz v Guardian Life Ins. Co.* (1944, CA10 Colo) 144 F2d 676, cert den (1944) 323 US 728, 89 L Ed 584, 65 S Ct 63.

89. *Richardson v Missouri K. T. R. Co.* (1947, Tex Civ App) 205 SW2d 819, writ dismissed.

90. *Molina v State* (1988, Ala App) 533 So 2d 701, cert den (1989) 489 US 1086, 103 L Ed 2d 851, 109 S Ct 1547. See McCORMICK ON EVIDENCE § 214 at p 671 (3d ed 1984) ("[A] photograph [or videotape] . . . becomes admissible only when a witness has testified that it is a correct and accurate representation of relevant facts personally observed by the witness").

91. But see Scott, 3 PHOTOGRAPHIC EVIDENCE § 1451 (2d ed 1969) (strong criticism of use of term "accurate" despite widespread use since real standard is whether photographic evidence is sufficiently correct to be helpful to the court or jury).

as substantive rather than illustrative evidence. (See § 4.) Authentication under the "silent witness" theory requires that there be testimony from a witness capable of establishing the integrity, authenticity, and competency of the photographic evidence.<sup>92</sup> A strong enough showing to convince the trial court that the evidence has not been altered in any way may be required.<sup>93</sup> Specific authentication requirements under this theory have generally not been established by courts because the circumstances under which the videotape evidence was recorded, and the intended use of the videotape evidence, will differ in every case.<sup>94</sup>

Although it is still in the process of development, at least four different methods have so far been used to provide, or have been suggested as being capable of providing, sufficient proof of verification under the "silent witness" theory. These include (1) "Testimony of a photographic expert who determined that the videotape had not been altered in any way and was not built-up or faked";<sup>95</sup> (2) testimony concerning the chain of custody with respect to the videotape;<sup>96</sup> (3) testimony concerning the checking and use of the video camera along with adequate proof of the validity of the videotape process and its proper utilization in the case at hand;<sup>97</sup> or (4) testimony that the videotape evidence introduced at trial was the same as what the witness had inspected immediately after the

92. *Molina v State* (1988, Ala App) 533 So 2d 701, cert den (198~ 489 US 1086, 103 L Ed 2d 851, 109 S Ct 1547; Scott, 3 PHOTOGRAPHIC EVIDENCE § 1297 (2d ed Supp 1991).

93. *Bergner v State* (1979, Ind App) 397 NE2d 1012.

94. *Fisher v State* (1982) 7 Ark App 1, 643 SW2d 571. See also *Bergner v State* (1979, Ind App) 397 NE2d 1012.

95. Scott, 3 PHOTOGRAPHIC EVIDENCE § 1297 (2d ed Supp 1991). See also *Bergner v State* (1979, Ind App) 397 NE2d 1012, 1017 (expert witness testified that photographic evidence was not a composite and had not been altered or retouched in any way); *State v Molasky* (1983, Mo App) 655 SW2d 663, 668, cert den (1984) 464 US 1049, 79 L Ed 2d 187, 104 S Ct 727 (videotape expert verified that tape had not been altered).

96. See *State v Luster* (1982) 306 NC 566, 295 SE2d 421. See also *State v Cannon* (1988) 92 NC App 246, 374 SE2d 604, app dismd, review gr, in part *State v Redmon* (1989) 324 NC 249, 377 SE2d 761 and review den, motion den *State v Cannon* (1989) 324 NC 249, 377 SE2d 757 and revd on other grounds, in part *State v Cannon* (1990) 326 NC 37, 387 SE2d 450 (videotape admitted after police officer testified to having had exclusive care and custody of video camera since night of robbery).

97. See MCCORMICK ON EVIDENCE § 214 (3d ed 1984). See also *State v Luster* (1982) 306 NC 566, 295 SE2d 421.

vidotape had been recorded.<sup>98</sup> Of course, using these methods in combination,<sup>98</sup> along with any testimony by a percipient witness able to verify the fairness and accuracy of at least some portion of the subject matter of the videotape evidence, I would tend to make a stronger showing.

#### § 17. Editing, alteration, and duplication Editing

The type and extent of editing that is permissible generally depends on when the editing was done with respect to the original recording of the videotape,<sup>2</sup> what type of videotape evidence is in question, and what, if anything, the trial court requests or agrees to. With some types of videotape evidence (for. example, staged retrospective videotape evidence such as a day-in-the-life video or a reconstruction) it is usually acceptable to add titles and appropriate narration,<sup>3</sup> but inasmuch as contemporaneous videotape evidence is to be used as substantive evidence with independent probative effect (see § 4) it is best to entirely avoid any editing of such evidence.<sup>4</sup> In general, however, most editing of videotape evidence usually does not render it inadmissible, but instead goes to its weight.<sup>5</sup> Nevertheless, any editing done subsequent to the original filming is always potentially questionable,<sup>6</sup> and whenever videotape evidence has been

98. *State v Kistle* (1982) 59 NC App 724, 297 SE2d 626, petition den (1983) 307 NC 471, 298 SE2d 694.

99. See *Fisher v State* (1982) 7 Ark App 1, 643 SW2d 571 (videotape of theft with no eyewitnesses admitted under "silent witness" theory where store owner testified to setting up videotape camera, proper functioning of camera, continuous custody of tapes, no gaps in tape, inability of anyone to turn off camera without being seen on tape, and contents of tape).

1. See *Grimard v Carlston* (1978, CAI Mass) 567 F2d 1171, 24 FR Serv 2d 1195.

2. Videotape may be edited in camera (that is, during the actual process of filming) or postproduction. As to the technical aspects of editing videotapes, generally, see *Videotape Evidence*, 44 AM JUR TRIALS 171, §§ 16-30.

3. As to addition of narration and titles, see *Videotape Evidence*, 44 AM JUR TRIALS 171, § 30.

4. See *Scott*, 3 PHOTOGRAPHIC EVIDENCE § 1298 (2d ed 1969).

5. See *Videotape Evidence*, 44 AM JUR TRIALS 171, §§ 31, 32.

6. To the degree that in-camera editing or other inherent distortional effects of the videotape process were part of the actual recording of the videotape in question, such editing will typically not be objectionable, unless for some reason it renders the videotape evidence extremely prejudicial or misleading-but then

edited under the control of the offering party (or to the offering party's knowledge was edited prior to coming into that party's possession), then the proponent should make the finder of fact aware of this during the authentication process.<sup>7</sup>

Of course, some editing may be necessary to make the evidence admissible in the first place,<sup>8</sup> or to comply with specific trial court requests generated by a preliminary viewing. If a videotape has been edited at the request of the trial court after pretrial or in camera review, for example to remove irrelevant or prejudicial material (see § 26) or to correct an audio or video imperfection or distortion,<sup>9</sup> then such editing will of course have no effect on admissibility. In this connection, counsel should bear in mind that when material is to be excised from a videotape, it can be done at the playback stage itself through the audio or video controls of the television or video monitor, as well as through the process of editing. For the proponent of the evidence, who will likely be held accountable by the jury for any interruptions or unprofessionalism in the presentation of the videotape evidence, it is much preferable to have the videotape edited rather than to rely on playback controls. In order to have the time to properly perform such editing, an advance ruling on the admissibility of the videotape evidence is recommended.

In the case of most contemporaneous videotape evidence whether it be, for example, the chance recording of an automobile accident, a voluntary criminal confession during a videotaped arrest, or the recording of a living will or prenuptial agreement—almost any editing done subsequent to the original recording (other than that required to remove irrelevant or prejudicial material or to

the objection is really one as to prejudice, not as to editing. For a discussion of in-camera editing, see Videotape Evidence, 44 AM JUR TRIALS 171, §§ 19, 20.

7. See Hughes & Cantor, PHOTOGRAPH IN CIVIL LITIGATION 194 (1973).

Conversely, the opponent who suspects editing that has not been revealed should request the opportunity to cross-examine (or, technically, conduct a voir dire examination of) the verifying witness before a decision on admissibility is made, and then make appropriate inquiries during that cross-examination. See § 22.

8. For example, by deleting obviously irrelevant or excessively prejudicial material (§ 26), or by enhancing, deleting, or otherwise addressing significant audio or video technical difficulties (§ 27), or by rearranging the sequence of segments or the overall chronology in an aboveboard manner designed to aid the factfinder's understanding.

9. This may be accomplished either by deletion or electronic enhancement. See §27.

correct technical defects) will diminish the videotape's ability to accurately recreate the events and circumstances in question as they were recorded, and will thus detract from the videotape evidence's usefulness to the trier of fact. Any such editing, then, begins to leave the realm of simple editing and enter the realm of material alteration.

#### Material alteration

A material alteration of videotape evidence results from editing that affects, or may possibly affect, the rights of the persons interested in the videotape.<sup>10</sup> Surreptitious alteration is never acceptable or condoned with respect to any type of videotape evidence, and brings with it the many issues associated with spoiled evidence and obstruction of justice. (See § 28.) The absence of any material alteration, and in some cases any alteration at all, is specifically mandated under the verification requirements associated with the "silent witness" theory (see § 16) and the older seven-pronged formula originally applied to audio tape recordings (see § 10).

#### Duplicates

Duplicates are admissible to the same extent as are originals unless there is a serious question raised as to the accuracy of the duplicate or the authenticity of the original.<sup>11</sup> To the extent that an item of videotape evidence is a duplicate, including a "dub" from another format, this information should be brought out in the authentication process by the offering party (or if necessary or appropriate, by the opposing party; see § 22). The number of generations from the actual, original videotape recording to the present duplicate should also be announced. Inaccuracies or slight alterations between generations may eventually build on each other and amount to a material alteration.

#### § 18. Chain of custody

The requirement of a continuous chain of custody first developed with respect to items of original real evidence. Through the testimony of one or a number of successive custodians of the item in question, it was necessary to account for its exact whereabouts from the moment it first came into custody until the moment it was offered into evidence. This substantially reduced the possibility that the item being offered into evidence was not the original, authentic

10. Compare UCC § 3-407.

11. See Videotape Evidence, 44 AM JUR TRIALS 171, § 32.



item.<sup>12</sup> The chain-of-custody requirement was applied to film motion pictures early on, but in 1969 the Supreme Court of Florida held in one of the seminal videotape evidence cases<sup>13</sup> that continuity of possession was not necessary in order for a videotaped confession to be admissible. (See § 10.) Today, chain of custody is rarely considered a necessity, and "as long as satisfactory evidence of the integrity of a . . . videotape is presented, stringent foundational requirements, such as proof of a continuous chain of custody, are now almost universally rejected as unnecessary."<sup>14</sup>

Although no longer required (except, perhaps, in the rare case of a jurisdiction still applying the seven-pronged formula; see § 10), the establishment of a continuous chain of custody can still be an important bolstering factor in the admissibility of otherwise hard to authenticate videotape evidence. Under the "silent witness" theory, for example, chain of custody can be one of the factors used to prove the integrity of an item of videotape evidence when no eyewitness can testify to the videotape's fair and accurate portrayal of what occurred. (See § 16.) Moreover, if digital editing and desktop video render videotape evidence as a whole more "susceptible to alteration by tampering or contamination, [then] sound exercise of the trial court's discretion may require a substantially more elaborate foundation."<sup>15</sup> One obvious, time-tested building block for such a more elaborate foundation is the establishment of a continuous chain of custody.

#### § 19. Videographer

There is no longer any requirement that the videographer be the foundational witness. Nevertheless, in many cases the videographer is an obvious choice, especially in the case of professional legal videography where the foundational testimony of a seemingly neutral third party will often help the proponent's case. (See § 12.)

With spontaneous videotape evidence the videographer may be a passerby with no legal or other relationship to the parties, or may simply choose to remain unknown (for example, in the case of someone mailing in a videotape to the police). With automatic surveillance equipment there is no videographer to speak of other

12. See Lilly, AN INTRODUCTION TO THE LAW OF EVIDENCE 516 (2d ed 1987).

13. *Paramore v State* (1969, Fla) 229 So 2d 855.

14. Scott, 3 PHOTOGRAPHIC EVIDENCE § 1297 at p 114 (2d ed Supp 1991) (citing cases).

15. MCCORMICK ON EVIDENCE § 212 at p 668 (3d ed 1984).

than the person who set up the equipment. In certain cases, however, where the features of the camcorder used become an issue in the authentication process (see § 20), it may be helpful to have the videographer present and available to testify even if someone else is serving as the primary foundational witness.

#### § 20. Videotape equipment used

Although stringent technical foundation requirements have long been applied to photographs and film motion pictures, from its inception videotape evidence has mostly escaped such requirements. (See § 10.) The type of videotape equipment used to produce an item of videotape evidence, however, is still important to establishing a proper foundation in certain situations. In order to establish authentication under the "silent witness" theory (see § 16), for example, it may be useful to have testimony concerning the checking and operation of the video camera.

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The type, brand, and format of camcorder used may also be important in establishing the integrity of the videotape evidence and the likelihood of material alteration. Where serious questions have been raised as to the authenticity of an item of videotape evidence, the exact type of camcorder used can furnish an expert with important facts and clues as to the likelihood of tampering. (See § 28.) For example, if the camcorder used was a high-quality Hi-8 unit but the videotape evidence in question is of a much poorer quality than a Hi-8 unit would have typically produced, this may indicate a number of generations between the actual, original recording and the evidence now being presented. More generations, simply, means more opportunity for tampering. Finally, if the primary foundational witness is also the videographer, it may be necessary for credibility purposes for that person to demonstrate an understanding of and familiarity with the camcorder sufficient to have generated the item of videotape evidence in question.

#### § 21. Physical conditions and circumstances at taping

One of the traditional stringent foundation requirements applied to film motion pictures was "proof of circumstances under which film was taken," including weather conditions, lighting arrangements, and other physical circumstances that were especially rele

16. See *Fisher v State* (1982) 7 Ark App 1,643 SW2d 571. See also *State v Cannon* (1988) 92 NC App 246, 374 SE2d 604, app dismd, review gr, in part *State v Redmon* (1989) 324 NC 249,377 SE2d 761 and review den, motion den *State v Cannon* (1989) 324 NC 249, 377 SE2d 757 and revd on other grounds, in part *State v Cannon* (1990) 326 NC 37, 387 SE2d 450.

vant to the medium of film photography.<sup>17</sup> Although these stringent requirements are generally no longer applied to videotape evidence (see § 10), it may still be useful as part of the identification process for the foundational witness to indicate when, where, and under what conditions the videotape was recorded.<sup>18</sup> Especially in cases where the foundational witness is not the videographer, such preliminary questions help to establish the witness's familiarity with the events or circumstances in question as they appeared at the time of the recording.<sup>19</sup>

A more detailed recital of the physical conditions and circumstances at the time of the taking of the videotape may also be in order if any serious doubts have been raised as to the authenticity of the videotape or if there are any unusual lighting or sound conditions that need explanation in order to make the videotape evidence more understandable to the trier of fact.

17. Hughs & Cantor, PHOTOGRAPHS IN CIVIL LITIGATION 181 (1973)

18. See, for example, *State v Newman* (1971) 4 Wash App 588, 484 P2d 473, review den (1971) 79 Wash 2d 1004

19. See Scott, 3 PHOTOGRAPHIC EVIDENCE §1451 (2d ed 1969)

20. As to discovery and pretrial review by opposing counsel, see *Videotape Evidence*, 44 AM JUR TRIALS 171, §§ 71-73.

