

# Silent Witness Authentication of Video Evidence

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Video surveillance recording is often the most powerful evidence that can be presented in a dispositive motion or at trial. This article addresses how video may be successfully presented in support of summary judgment or introduced into evidence at trial after laying a proper foundation under New York State and federal law.

While courts have generally recognized two authentication methods for video, the "pictorial witness" and the "silent witness" methods, the focus here is on the latter.<sup>1</sup> Under the first method, a sponsoring witness has observed the relevant recorded events and can authenticate the video by testifying that it accurately records what the witness observed, as done with a photograph. However, when a witness is unavailable to testify that he personally observed the events recorded, there are greater challenges to admissibility.

In numerous circumstances, eyewitness authentication of video is impossible. For example, if no one personally observed the events recorded, or the witness was killed or cannot recall what was observed, laying a proper foundation is more involved. If an initially available witness is unavailable at the time of trial, and a foundation for admissibility of the video was not established during a previously held deposition, pictorial authentication may also be difficult.

It often occurs that a witness was present during the occurrence giving rise to a claim, but not either before or after it, and, therefore, cannot lay the foundation for the entirety of the video. For example, if the video contains unobserved proof of notice or the creation of a dangerous condition

or of post remedial measures, those unobserved portions of the recording will have to be authenticated through means other than the witness's limited testimony.

In such instances, when a sponsoring witness to the totality of the recorded events is unavailable, an independent silent witness foundation must be provided.<sup>2</sup> Courts address the reliability of the process through which the video was recorded, extracted and preserved. With evidence establishing the reliability of the recording system and extraction process, the court may admit the recording, finding that the video is a "silent witness."

Initially, careful steps must be taken when the video is downloaded or copied (the extraction stage) to ensure the efficient introduction of the video in evidence. Details regarding the recording equipment, history of its installation and use, the recording process, and a sufficient showing relating to the extraction process, will be required to satisfy the silent witness requirements. Video recordings are not "self-authenticating" and, therefore, require sufficient indicia of reliability in order to establish a proper foundation.<sup>3</sup>

## **Two Cases**

Two cases illustrate the difficulties that may be encountered when a witness to the totality of events recorded is unavailable to authenticate the video. In *Read v. Ellenville Nat'l Bank*,<sup>4</sup> the defendant moved for summary judgment in a personal injury action, proffering a bank's surveillance recording in support of its motion. The court rejected the video, finding that it was insufficiently authenticated to support summary judgment.

The Read plaintiff had alleged that she injured her hand while making a night deposit, claiming that the depository door slammed shut before she could withdraw her hand. In support of its motion, the bank offered its closed-circuit video revealing the plaintiff making the deposit, without notable incident. As a foundation, the bank relied exclusively upon an affidavit of an alarm company employee, which stated: "As per your request of 7/14/04 at 9:00 a.m., I am forwarding the following information. A request was made to...copy a specific segment of video from an existing tape from your branch. Once queued up on your CCTV system, an exact copy was created. There are no deviations from the original night drop camera."<sup>5</sup>

In opposition to the bank's motion, plaintiff submitted an affidavit reiterating her claim that the depository door had slammed shut on her hand and arguing that a proper foundation had not been provided for the video.

Ruling in plaintiff's favor, the Appellate Division, Second Department, held that the affidavit was insufficient to properly authenticate the recording. The court noted that neither the affidavit nor counsel's supporting affirmation had explained the relationship between the alarm company and the bank's surveillance system. No facts were provided in the affidavit about the type of video equipment used, how it operated or the extraction process.

*People v. Patterson*<sup>6</sup> involved criminal charges arising from a grocery store robbery. By the time the case came up for trial, the victim was deceased and no other eyewitnesses to the crime were available. For foundational purposes, the prosecutor sought to link a video recording of the robbery to a 911 recording, but failed to call the investigating detective or the individual who had downloaded the video as a witness.

Finding, inter alia, that the surveillance video had not been properly authenticated, the Court of Appeals reversed the conviction. As to the recording, the court emphasized that videotapes are ordinarily admissible under standard evidentiary rules as long as "reliable authentication and foundation (including technically acceptable self-authentication techniques)" are provided.

The Patterson court indicated that a judge's decision to admit or exclude video evidence would be reviewed under an abuse of discretion standard. The court held that, like photographs, videotapes may be authenticated by testimony either of a witness to the events or of the operator, installer or maintainer of video equipment. The court held that chain of custody evidence may also buttress or permit an inference of reliability.

Recognizing the need to promote the use of developing technologies without sacrificing reliability, the court surveyed relevant multijurisdictional law. Ultimately, the Patterson court held that the record contained insufficient foundation for the prosecution's use of the video because it "lack[ed] authentication to justify the use of a stationary commercial store security camera and videotape."<sup>7</sup> Although the court did not explicitly use the "silent witness" nomenclature, Patterson directly avows that basis for the admission of video.<sup>8</sup>

## **Reliability**

Once the video, a species of demonstrative evidence, has been authenticated, effectively, it becomes direct evidence of the events recorded. Implicit in this method is the premise that the video is the equivalent of the senses and memory of a sponsoring witness.<sup>9</sup> In *Zegarelli v. Hughes*,<sup>10</sup> a personal injury case in which a private investigator covertly surveilled the plaintiff, the Court of Appeals referenced the silent witness method, citing *Patterson*. The court indicated that authentication requirements could be satisfied by testimony, whether from the videographer or another competent witness, to the effect "that a videotape truly and accurately represents what was before the camera."<sup>11</sup>

Reliability, the cornerstone for admissibility under the silent witness theory,<sup>12</sup> is determined by several variables, with some degree of fluidity. Collectively, the cases enumerate several steps that may be necessary to authenticate a video pursuant to the silent witness theory, addressing each stage of the process, including: (1) the nature of the recording device; (2) its mode of operation and usual reliability; (3) the extraction method; (4) how the extracted footage was copied; (5) the absence of any alteration/enhancement of the video, or, (6) if it was enhanced, the manner in which

that enhancement was performed; (7) testimony that the copy fairly and accurately depicts what was visible on the monitor during the extraction; and (8) chain of custody proof.

In *Brady v. Koby*,<sup>13</sup> the Supreme Court, New York County, relied upon a silent witness foundation in admitting into evidence elevator surveillance video, which captured an assault. The court referred to the actual video as the "silent witness" and indicated that the foundational requirements are fluid given the varying circumstances encountered with video evidence.

"However, as with all evidence, the proponent of silent witness evidence must establish its accuracy and competency. Thus, certain aspects of the more traditional authentication requirements applied to photographs and film motion pictures, such as chain of custody or proof that the camera was installed and working correctly, may be necessary to authenticate the item of videotape evidence." A videotape "may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted." The proponent must convince the "court to a relative certainty that the photographic evidence has not been altered in any significant way." (Citations omitted)<sup>14</sup>

In considering the admissibility of surreptitious video of a plaintiff, the court in *Leo v. LIRR*,<sup>15</sup> referenced the Advisory Committee Notes to FRE 901, which cite the New York Court of Appeals decision in *Zegarelli*<sup>16</sup> as an authoritative source underpinning the application of Rule 901 to video.

In precluding the introduction of the video, the Leo court observed that the majority of jurisdictions have held that video may be authenticated by testimony from "the operator, recorder, installer, or maintainer of the equipment that the videotape is an accurate representation of the subject matter depicted" and explained that a foundation for video may be established by testimony regarding the checking, operation, and handling of the recording equipment.<sup>17</sup>

In *United States v. Pageau*,<sup>18</sup> the U.S. District Court for the Northern District of New York considered the admissibility of prison surveillance video. The court held that, although a sponsoring eyewitness was not available, the video was nonetheless admissible given the government's testimony about the installation, activation and operation of the cameras; the recording device; and proof regarding chain of custody.<sup>19</sup>

In *United States v. Ikezi*,<sup>20</sup> the U.S. Court of Appeals for the Second Circuit considered the admissibility of surveillance video of a criminal defendant and co-conspirators. The court held that the video was admissible under FRE 901(b)(9) based upon the government's "evidence that agents set up the equipment, tested it and verified the nature of the taped meeting with the informant." Generally, the federal circuits have applied the silent witness methodology in appropriate cases.<sup>21</sup>

## **Practical Steps**

Given the elements required for introduction of video into evidence based on the silent witness method, steps must be taken at the acquisition stage to assure that foundational challenges can be surmounted. Where the technician who performed the extraction is available to testify regarding the system's reliability; the equipment's operation; the manner of extraction; and, how the copy was secured and produced in court, the requisite foundation may be established. The proponent of the video should elicit information including the type of recording system utilized; how it operated; the manufacturer and equipment age; system components, i.e., DVR or computer; and whether the cameras were hard-wired, wireless, motion-activated, or equipped with zoom or infrared capacity, for example.

Details relating to the extraction should be elicited from the video technician. The manner in which the search for the relevant portion of the recording was conducted, and whether the metadata (date and time stamp) correctly reflect real time should be elicited. The method of extraction should be described, in particular, whether the USB port was functioning properly and utilized, or some other means was required, such as downloading directly onto a disc, or, as a last resort, cloning the hard drive.

The video technician should be prepared to testify that the copy produced in court is a fair and accurate depiction of what was viewed on the monitor during the download. The technician should also provide adequate chain of custody information, having labeled the copy with a date and signature. A clear statement that the footage was not altered and that it is the same as the copy extracted from the system is also critical. Additional testimony will be required if the video is enhanced that is sufficient to establish reliability. In such circumstances, it is wise to preserve, disclose and present to the trial judge the original unenhanced copy along with the revised version. Early consideration of the means by which you will ultimately move your video into evidence is essential. Securing the requisite proof of authenticity, including affidavits and technician reports at the extraction stage will result in the efficient introduction of video into evidence in support of a dispositive motion and at trial.

### **Endnotes:**

1. The "pictorial testimony" method relies upon a sponsoring eyewitness who observed the events recorded. The "silent witness" method focuses on the reliability of the system and processes producing the recording. See, e.g., 1-4 New York Evidentiary Foundations §12 LexisNexis; 2d edition (June 17, 2015).
2. The silent witness methodology is accepted in the majority of federal and state jurisdictions. Georgia and West Virginia appear to be the exceptions. *Phagan v. State*, 268 Ga. 272 (1997), and *Catlett v. MacQueen*, 180 W. Va. 6 (1988).

3. *Leo v. Long Island R.R.*, 307 F.R.D. 314 (S.D.N.Y. 2015) (FRE 902 does not apply to surveillance video).
4. 20 A.D.3d 408 (2d Dept. 2005).
5. 20 A.D.3d at 409.
6. 93 N.Y.2d 80 (1999).
7. 93 N.Y.2d at 85.
8. See also *People v. Byrnes*, 33 NY2d 343 (1974) and *People v. Costello*, 128 A.D.3d 848 (2d Dept. 2015).
9. "Video does not lie." Retired Detective Eric Grimes, NYPD Technical Assistance Response Unit, Principal of Video Extraction, Inc. ([www.videoextract.com](http://www.videoextract.com))
10. 3 N.Y.3d 64 (2004).
11. 3 N.Y.3d at 69, quoting *People v. Byrnes*, 33 NY2d 343.
12. See Fed. R. Evid. 901(b)(9): "Evidence describing a process or system and showing that it produces an accurate result." Reliability is often the linchpin. See, e.g., Fed R. Evid. 702.
13. 2009 N.Y. Misc. LEXIS 3967 (Sup. Ct., N.Y. Co.).
14. 2009 N.Y. Misc. LEXIS at 3967.
15. 307 F.R.D. 314 (S.D.N.Y. 2015).
16. 3 N.Y.3d 64, 781 N.Y.S.2d 488 (2004).
17. 307 F.R.D. at 324, quoting *James v. Virgin Islands*, 60 V.I. 311 (Sup. Ct. V.I. 2013).
18. 526 F.Supp. 1221 (1981, N.D.N.Y.).
19. 526 F.Supp. at 1224.
20. 353 F App'x 482 (2d Cir. 2009).
21. See "Construction and Application of Silent Witness Theory," 116 A.L.R.5th 373; 27 Fed. R. Evid. Serv.; "Admissibility of Visual Recording of Event or Matter Giving Rise to Litigation or Prosecution," 41 A.L.R. 4th 812 (1985 & Supp. 2000); *Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970).

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