

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

07-CV-F

CHAMBERS OF
VAUGHN R WALKER
UNITED STATES DISTRICT JUDGE

December 14, 2007

Honorable Lee H. Rosenthal
United States District Court
11535 Bob Casey United States Courthouse[^]
515 Rusk Street
Houston, TX 77002-2600

Honorable Mark R. Kravitz
United States District Court
307 Richard C. Lee
United States Courthouse
141 Church Street
New Haven, CT 06510

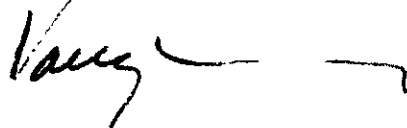
Dear Lee and Mark:

Here's an item that somehow came to my attention.

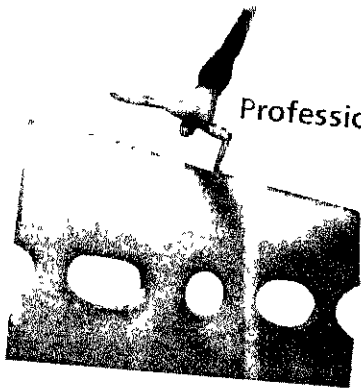
I think it raises an issue to which one or more of the
rules committees might well give some attention.

Trusting that you'll have a wonderful holiday season
and productive and happy 2008, I am

Sincerely yours,



cc: Judge Baylson and Peter McCabe



Digital Attachments Are Here ... or Are They?

by Kathy Carlson



For a number of years now, law librarians have been concerned about access to and preservation of government legal information provided in digital form. Many articles and programs have addressed these issues. In a recent article, University of California-Berkeley law professor Robert Bering compared the problem to a snowball poised to roll down a slope and get larger as it descends.¹

This year, the U.S. Supreme Court added another layer of snow to the snowball. In *Scott v. Harris*, -- U.S. --, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), Justice Scalia attached a video to the opinion. In footnote 5, he states

We are happy to allow the videotape to speak for itself. See Record 36, Exh. A, available at http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb and in Clerk of Court's case file.²

While the video is the best evidence under Federal Rule of Evidence 1002 and would seem natural to attach to the opinion, there are some serious implications that could arise from this seemingly innocuous attachment.

As electronic resources became more prevalent and available, it was inevitable that courts would begin citing them. Unfortunately, just like many other government entities, courts have not been taking precautions to ensure that the materials they cite remain available to the public. In recent years, materials cited solely by URL in judicial opinions have disappeared. Some have voiced concern that the precedential value of opinions may be diminished as practitioners are unable to view supporting authority. Now the problem may expand as parts of the opinions themselves may disappear.

The video attachment from *Scott v. Harris* is currently available via the Supreme Court's Web site. Ideally, the Court will ensure that access to this material will be available on this site in perpetuity, but there is no legal

requirement that it do so. Additionally, the videotape has been stored as a Real Video file. Real Video is proprietary software that has undergone a number of upgrades and undoubtedly will continue to do so. Although a version that will run the Supreme Court's video is currently available as a free download, there is no guarantee that this will always be the case. There is also no guarantee that at some point in time an upgrade will cease to recognize items stored in an earlier version. Will stored information be converted before that happens?

According to the footnote in *Scott*, there will also be a copy stored in the clerk of court's case file. There is no reference as to the format in which it will be stored. Again, the prospect of incompatible hardware and software may result in an inability to access this data in the future. Furthermore, court files (and material within them) cannot be taken outside of the court building, and it is highly unlikely that public viewing equipment will be available in the Court. Since most current video is created as data files, will the clerk have a means of copying and, if so, what will the costs be?

This is the first of what could be a large number of videotapes and digital recordings attached to opinions. If the U.S. Supreme Court can do it, other courts will soon be following suit. There are numerous times when a video or digital recording "can speak for itself." If one does any viewing of CourtTV, one will realize the amount of video that is being made from patrol car dashboard cameras, from surveillance cameras in retail establishments and banks, and by people who just seem to be in the right place at the right time to catch things on disk. Any of these recordings may now potentially become part of judicial opinions. There needs to be some thought as to how these materials will be preserved and permanent access will be provided, especially now as the practice of attaching them to opinions is in its infancy. ♦♦

¹ Robert C. Bering, *Losing the Law: A Call to Arms*, 10 GREEN BAG 2d 279 (Spring 2007).

² *Scott v. Harris*, U.S. 127 S. Ct. 1769, 1775, n.5 (2007).

Kathy Carlson is State Law Librarian at the Wyoming State Law Library. Her e-mail address is kcarlson@courts.state.wy.us