A Testament to Inefficacy: Louisiana’s New Legislation Allowing for the Admissibility of Videotape Evidence in the Probate Process

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I. INTRODUCTION

Technology constantly encourages the legal system to adapt to ever-changing advancements. No area of the law is immune from this prodding, as these advancements have spurred incredible changes in both procedural and substantive law. In particular, legislators have been called upon to implement new developments in the area of civil procedure. From newly suggested electronic discovery procedures to the possibility of executing a will through e-mail, change is on the horizon. While the arguments in favor of technological advancement are sound, the resulting changes to the practice of law require practitioners to question whether legislators are looking with an appropriately discerning eye to the effect that these developments will and already are exhibiting.1

Newly enacted Louisiana Code of Civil Procedure article 2904 provides for the admissibility at trial of a videotape of a testament’s execution.2 Videotape evidence may be entered in a contradictory trial to probate a testament or in an action to annul a probated testament.3 The videotape is to serve as proof of a number of factors associated with a will’s execution.4

This comment addresses several issues raised by the enactment of article 2904. Specifically, it argues that article 2904 requires substantial revision before it can effectively serve the evidentiary purposes intended by the legislature.5 To develop this argument,

1. See sources cited infra note 33 and accompanying text.
3. Id.
4. Id.
5. The bill’s sponsor explained that article 2904 “add[s] the ability to videotape [the will] . . . . [T]he judge can use the videotape to determine not only the soundness of mind but the voluntariness of it and everything else that perhaps may be beneficial to settle any dispute that may be among family members.” Admissibility of a Videotape of the Execution of a Testament: Hearing on H.B. 260 Before the S. Comm. on Judiciary, Section A, 2005 Legis.,
Part II explains the grounds for videotape admissibility in the probate process. Part III focuses specifically on the Louisiana approach by giving an in-depth analysis of article 2904's shortcomings, providing corresponding suggestions for legislative revision, and suggesting the proper interpretation courts should give to the article. Part IV concludes by offering practical advice to practitioners who rely on the article's provisions.

II. VIDEOTAPE EVIDENCE

A. Grounds for Videotape Admissibility in the Probate Process

Commentators initially conceived of the role videotape should play in the probate process during the early 1980s. Prior to that time, videotapes were extensively utilized in other areas of the law, particularly criminal law. For example, practitioners made use of tapes to capture defendants' statements, to aid in the conducting of line-ups, and to film crime scenes. In the civil setting, video depositions were frequently introduced. Despite this widespread application, the use of videotape evidence in the probate arena did not receive similar approval. This absence of jurisprudence derives from the newness of the idea, as well as from the ever-present controversy surrounding the use of videotape evidence in this context. In effect, those individuals who are willing to sit in front of the video camera and who have found a lawyer willing to stand behind it simply have not yet died. Undoubtedly, though, as individuals who have grown up with video technology begin the process of preparing a will, there will be more instances in which videotape evidence plays a part in the probate process.


7. Id. at 43.
8. Id. at 43-44.
9. Id. at 44-46.
10. Id. at 47.
11. Id. at 48.
When videotape evidence has been introduced in the probate process, courts generally require some, but not all, of the following elements to be proven: a voluntarily made tape, proper functioning of the equipment, competency of the equipment operator, accuracy of the recording, proper preservation of the recording, absence of videotape alteration, and accurate identification of the participants of the execution of the will.\(^\text{12}\)

As to the purpose served by videotape admissibility, courts often look to the tape as evidence of "objective" factors, such as proper execution and authenticity of the testament, as well as more "subjective" factors, including the existence of testamentary capacity and the absence of undue influence.\(^\text{13}\) Regarding the objective factors, a videotape can document the presence of the witnesses required for proper execution.\(^\text{14}\) The video can also serve as proof that the testator signed the document himself in the presence of the witnesses\(^\text{15}\) and can insure against subsequent alterations of the document's contents by individually recording each page of the testament.\(^\text{16}\) This forestalling of physical alteration also exists in cases where the testator reads the entire will aloud.\(^\text{17}\)

The controversial nature of videotape admissibility arises with respect to the subjective factors. As will be explained in greater detail below, videotape evidence has been touted for its ability to reveal both the existence of testamentary capacity and the absence of undue influence in will executions. Commentators argue that a videotape of the will execution ceremony would allow the testator to appear "personally" before the court and state his or her intentions directly.\(^\text{18}\) This approach, however, is too simplistic in that it fails to consider the possibility that the testator's words may not be an


\(^{14}\) Beyer & Buckley, supra note 6, at 57.

\(^{15}\) Id.

\(^{16}\) Id. at 58.


accurate reflection of his intentions, no matter how “directly” he states them.

B. The Approaches of Other States to Videotape Admissibility in the Probate Process

Several states have adopted different approaches to videotape admissibility. Some states have ethical guides on the use of videotaped wills. Others have considered legislation on the matter and rejected it. Still others have adopted specific laws with standards for admissibility of videotaped wills.

The Supreme Court of Ohio put forth its attitude toward the use of videotape evidence in the probate process through an advisory opinion issued in 1988. Opting to treat the matter as one involving the duty of care owed by lawyers to clients, the Board of Commissioners on Grievances and Discipline confirmed that videotaping the reading and execution of a will does not violate the Ohio Code of Professional Responsibility.\[^{19}\] The board directed all interested lawyers to a reference manual for continuing legal education published by the Ohio Legal Center Institute.\[^{20}\] The manual guides lawyers in their decision to videotape a will execution ceremony by outlining the advantages and disadvantages of videotaping a will and providing guidelines as to what should be included in the videotape itself.\[^{21}\]

Other states, such as Texas and New Jersey, approach the matter more as an evidentiary issue than an ethical one. In 1985, the Texas Legislature drafted a bill seeking to amend the Texas Probate Code to allow for the admissibility of videotape as evidence of the testator’s identity, competency, and “any other matter relating to the will and its validity.”\[^{22}\] Similarly, the New Jersey House of Representatives drafted a bill in 1986 that would have allowed videotape to serve not only as evidence of proper execution and

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20. Id.
21. Id.
22. S.B. 732, 69th Leg. (Tex. 1985); H.B. 247, 69th Leg. (Tex. 1985). See also Beyer & Buckley, supra note 6, at 70.
testamentary capacity, but also as a will itself as long as a written version was also created. Nevertheless, however, was ever enacted by the respective state legislatures.

The New York State Senate also proposed a bill in 1987 that would have added section 1407-a to the Surrogate's Court Procedure Act. This new section provided for the admissibility of videotape to prove the validity of a will. Despite the legislature's refusal to enact this video-will statute, the Supreme Court of New York in 1994 jurisprudentially determined that the videotape of a will execution ceremony is admissible in circumstances where the videotape is offered not as a will to be probated, but rather as evidence of the decedent's testamentary capacity.

In 1988, Indiana became the first state to enact legislation allowing for the admissibility of videotape evidence in the probate process. The new section of the Indiana Probate Code provided: "Subject to the applicable Indiana rules of trial procedure, a videotape may be admissible as evidence of the proper execution of a will." Following an amendment in 1989 expanding the use of videotape evidence, the current language of the provision reads:

(c) Subject to the applicable Indiana Rules of Trial Procedure, a videotape may be admissible as evidence of the following:

(1) The proper execution of a will.
(2) The intentions of a testator.
(3) The mental state or capacity of a testator.
(4) The authenticity of a will.
(5) Matters that are determined by a court to be relevant to the probate of a will.

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24. Beyer & Buckley, supra note 6, at 72 n.134.
25. S.B. 5098, 210th Leg., 1987–88 Reg. Sess. (N.Y. 1987); Beyer & Buckley, supra note 6, at 73. See also id. at 70.
27. IND. CODE ANN. § 29-1-5-3(d) (Burns Supp. 1988). See also Beyer & Buckley, supra note 6, at 69.
28. Id. at 70.
29. IND. CODE ANN. § 29-1-5-3.2 (West 2006).
In other words, videotape is admissible as proof that all of the statutory requirements for a testamentary instrument have been met. One commentator explained that the Indiana Legislature was willing to adopt this provision based on the predisposition of Indiana courts to rely on videotape as evidence in other areas of the law, including both the criminal and civil arenas.

III. THE LOUISIANA APPROACH: CODE OF CIVIL PROCEDURE
ARTICLE 2904

Louisiana is the latest state to address the use of videotape evidence in the probate process. Following the lead of Indiana, Louisiana has chosen to enact a statute explicitly setting forth both the requirements for videotape admissibility and the evidentiary function the videotape is to serve.

A. The Text of Article 2904 and the History Behind Its Adoption

Newly enacted Louisiana Code of Civil Procedure article 2904 states:

Article 2904. Admissibility of videotape of execution of testament

A. In a contradictory trial to probate a testament under Article 2901 or an action to annul a probated testament under Article 2931, and provided the testator is sworn by a person authorized to take oaths and the oath is recorded on the videotape, the videotape of the execution and reading of the testament by the testator may be admissible as evidence of any of the following:

(1) The proper execution of the testament.
(2) The intentions of the testator.
(3) The mental state or capacity of the testator.

30. Buckley, supra note 17, at 92.
31. Id. at 85. Examples of this reliance include using videotape as evidence of “defendants’ statements and confessions; . . . line-ups; and . . . law enforcement sting operations,” as well as “for recording depositions and trial proceedings.” Id.
The purpose of article 2904 is to allow videotape to serve as evidence of both the objective and subjective factors involved in proving the validity of a testament. The article’s similarity to the Indiana statute is striking. Aside from the use of the word “testament” rather than “will,” the substantive provisions of each statute are identical, insofar as the evidentiary role that videotape is to play. This similarity suggests heavy reliance on the Indiana version, as no substantive difference exists other than the addition

33. The legislative history of the article reveals that the legislature failed to thoroughly consider the bill. When the bill was first presented to the House Committee on Civil Law and Procedure on May 18, 2005, the sponsoring representative gave a brief explanation of its effect. He stated that the bill “would aid judges and lawyers in settling cases in which a will is disputed” based on the fact that “the will might not make clear the recipients of assets outlined in the will.” Admissibility of a Videotape of the Execution of a Testament: Hearing on H.B. 260 Before the H. Comm. on Civil Law and Procedure, 2005 Reg. Sess. (La.) (statement of Rep. Willie Hunter, Jr.). He added that “a testator’s mental health and the authenticity of a signature might also be in question.” Id. He explained that “a videotape could resolve uncertainties when determining the testator’s intent regarding the will.” Id. Based on this brief recitation of the terms of the article, the Committee reported the bill favorably. Id. There were no questions asked by the representatives present at the committee meeting. Id. When the bill reached the House on May 23, it passed by a unanimous vote after only a single question. See La. H.R. Session Day 17 (May 23, 2005) (Internet Live Video), available at http://house.louisiana.gov/rmarchive/Ram/RamMay05/05RS-Day17.ram. See also source cited infra note 117 and accompanying text (discussing the single question asked when the bill was read). On presentation to the Senate Committee on Judiciary, Section A, a similarly brief statement was given by the sponsoring representative. Statement of Rep. Hunter, supra note 5. The bill was reported favorably, presented to the Senate, and unanimously approved. See History of 2005 La. Acts No. 79, § 1, http://www.legis.state.la.us/ (last
of procedural requirements absent from the Indiana provision and the inclusion of the definition of "videotape," which is also missing from the Indiana version.

Historically, courts have justified videotape admissibility through Louisiana Code of Evidence article 402, which states: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation." Relevant evidence is any evidence having a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Therefore, it follows that evidence that has been documented through photographs, film, or videotape can be useful for determining what took place during the event that is the subject matter of the litigation.

Moreover, the admissibility of videotape is within the sound discretion of the trial judge. The trial judge must consider "whether the videotape accurately depicts what it purports to represent, whether it tends to establish a fact of the proponent's case, and whether it will aid the jury's understanding . . . [without] prejudic[ing] or mislead[ing] the jury, confus[ing] the issues, or caus[ing] undue delay." Following such an approach, Louisiana


34. Article 2904 requires the testator to be sworn by a person authorized to take oaths. LA. CODE CIV. PROC. ANN. art. 2904 (2006) (amended 2005). See sources cited infra notes 112–20 and accompanying text for a discussion about these procedural requirements.

criminal courts have admitted videotapes showing murder scenes, as well as footage of armed robberies. Courts justify videotape admissibility in the criminal context based on its ability to “corroborate other testimony in a case, such as location of the body; manner of death; specific intent to kill; number, location, and severity of wounds; and cause of death.” With respect to civil actions, Louisiana courts have allowed videotape evidence in products liability suits. Courts have also admitted videotaped depositions of witnesses. Notably, this admissibility has extended into the probate process, documenting such events as interviews of witnesses to aid in the determination of a testator’s capacity. Therefore, the Louisiana Legislature’s enactment of Code of Civil Procedure article 2904, allowing for the admissibility of videotape evidence in the probate setting, conforms with the general liberty taken by Louisiana courts regarding the admissibility of videotape evidence in other areas of the law.

B. Step-by-Step Analysis of Article 2904 and Suggestions for Improvement

Article 2904 contains five subsections, each representing an element for which videotape evidence may be admissible. These elements can be sorted into two categories: objective and subjective.

42. Pooler, 696 So. 2d at 50.
44. LA. CODE CIV. PROC. ANN. art. 1440 (2006); Succession of Dowling, 633 So. 2d 846, 849 n.1 (La. App. 4th Cir. 1994).
45. On the other hand, this willingness of courts to admit videotape evidence as needed seems to eradicate the need for article 2904. See sources cited infra notes 122–40 and accompanying text (discussing that videotape evidence is already admissible under one or more of the exceptions to the hearsay rules).
I. Objective Factors: Proper Execution and Authenticity of the Testament

Through article 2904, videotape evidence may be admissible as proof of the proper execution of the testament under subsection one and the authenticity of the testament under subsection four.47

i. Proper Execution

Regarding proper execution, videotape evidence may be a valuable tool to ensure that codal requirements of form have been met. According to Louisiana Civil Code article 1577, a notarial testament must be prepared in writing, dated, and executed in the presence of a notary and two competent witnesses.48 During the execution, the testator must declare or signify to these individuals that the instrument is his testament and must sign his name at the end of the document and on each of its pages.49 Likewise, the notary and witnesses must, in the presence of the testator and each other, sign a declaration certifying the events of the execution.50

Because a videotape of the execution would capture whether the testator, notary, and witnesses actually carried out these requirements in each others' presence, the videotape can serve as evidence of a testament's proper execution.51 Therefore, videotape could solve problems such as the one that occurred in Succession of Smith.52

47. Id.
49. Id. These requirements apply when the testator is literate and able to sign his name. For the proper procedures to be carried out when the testator is literate and sighted, but physically unable to sign, see LA. CIV. CODE ANN. art. 1578 (2006); when the testator is unable to read, see LA. CIV. CODE ANN. art. 1579 (2006); and when the testator is deaf or deaf and blind, see LA. CIV. CODE ANN. art. 1580.1 (2006).
51. Beyer & Buckley, supra note 6, at 57 (describing how the videotape could document the presence and proximity of the witnesses and testator).
52. 806 So. 2d 909 (La. App. 5th Cir.), writ denied, 815 So. 2d 105 (La. 2002).
In *Smith*, the testament at issue was executed in the testatrix’s hospital room.\textsuperscript{53} The court found that the testatrix successfully signed her name in the presence of the notary and witnesses, who were nurses at the hospital, but there was a question as to whether the witnesses’ signing of the declaration was properly performed.\textsuperscript{54} One of the nurse-witnesses left the room following the testatrix’s signing without first signing the declaration.\textsuperscript{55} He stated that he thought his duty as a witness was over since the signing by the testatrix had taken place and “the group began talking.”\textsuperscript{56} He later signed the declaration at the nurses’ station rather than in the testatrix’s room,\textsuperscript{57} but he “stated that he could see into the room from the nurses’ station and [the testatrix] could see him if she was looking.”\textsuperscript{58} Despite this apparent physical proximity, the *Smith* court found that these circumstances did not meet the “presence” requirement of Civil Code article 1577 and declared the testament null.\textsuperscript{59}

Had a videotape of this execution been taken, the footage would have revealed whether the testatrix, the notary, and the other witness were in the “presence” of the witness who signed at the nurses’ station. Absent such a representation of the spatial relationship, the court was forced to find the testament null. Furthermore, had a videotape been utilized, perhaps the witness would not have left the room at all—the fact that the recorder was still running would have been an indication that the execution had not yet concluded.

But even with the objective issue of proper execution, use of a videotape is still not without problems. For example, in the Washington case *In the Matter of Estate of Kessler*, the court was faced with conflicting evidence from witness testimony and videotape as to whether a testament was properly executed. Challengers to the will alleged that the document was not properly executed because the videotape of the will signing did not show the witnesses signing their names in the testatrix’s presence or at her

\textsuperscript{53} *Id.* at 910.
\textsuperscript{54} *Id.* at 912.
\textsuperscript{55} *Id.* at 910.
\textsuperscript{56} *Id.*
\textsuperscript{57} *Id.* at 910–11.
\textsuperscript{58} *Id.* at 911.
\textsuperscript{59} *Id.* at 912.
direction as required by statute. Rather than rely on the videotape, the court opted to rely on witness testimony and found that the witnesses had in fact signed their names in the presence of the testatrix and at her direction or request. The Kessler court’s acceptance of witness testimony, despite its contradiction with available videotape footage of the execution, reflects that witness testimony is often treated by the courts as a form of evidence superior to videotape.

The videotape involved in the Kessler proceeding apparently failed to capture the entirety of the execution ceremony, as the signing of the witnesses’ declaration was omitted. Under article 2904, the procedural requirements would presumably prevent admissibility of a videotape that did not capture the completed execution. Still, the language of the statute does not expressly exclude a videotape showing only a portion of the ceremony. For this reason, the legislature should amend the terms of article 2904 to reflect that only a videotape showing a completed execution will be admissible. Until that point, Louisiana courts should only rely on such complete footage.

ii. Authenticity of the Testament

Although article 2904 adds to the fact-finding process with respect to proper execution, any evidentiary support the article lends to the issue of a testament’s authenticity is trivial at best. As described above, a notarial testament is executed before a notary and two witnesses. Since a notarial testament is an authentic act, it is, by nature, a self-proving document. Absent a challenge to the

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61. Id.
62. Id. at 597–98.
63. Article 2904 only states that “the videotape of the execution and reading of the testament by the testator may be admissible . . . .” LA. CODE CIV. PROC. ANN. art. 2904 (2006) (amended 2005).
64. LA. CIV. CODE ANN. art. 1833 (2006).
65. This precept stems from Louisiana Civil Code article 1835: “An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title.” LA. CIV. CODE ANN. art. 1835 (2006). Further justification stems from Louisiana Code of
testament, this law-imposed status thus eliminates the need for a videotape to prove a testament’s authenticity.

2. Subjective Factors: Testamentary Intentions, Capacity, and Undue Influence

Videotape evidence may also be admissible as proof of the testator’s intentions under subsection two, the testator’s capacity under subsection three, and any other matters determined by a court to be relevant to the testament’s probate under subsection five.

i. Testamentary Intentions and Capacity

Regarding testamentary intentions and capacity, videotape arguably aids the trier of fact since the footage displays the testator’s “dialogue, soliloquy, [and] conduct” during the execution. One commentator describes videotape evidence as “clearly superior to any secondary source of information regarding capacity inquiries.” This exalted status arises from the potential unreliability of

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66. Should the testament be challenged, the burden of proving a lack of authenticity is born by the proponent of the will. LA. CIV. CODE PROC. ANN. art. 2903 (2006). Because a testament’s self-proving nature is not absolutely conclusive and can be overcome, a videotape of the execution ceremony could be relevant as a means to rebut the presumption of authenticity established in Louisiana Civil Code article 1835. See sources cited supra note 65.

67. Article 2904 also adds nothing to the probate of olographic testaments because such documents are not executed in authentic form. See LA. CIV. CODE ANN. art. 1575 (2006). While the terms of the article do not expressly exclude olographic wills, as a practical matter, the article does not apply to olographic testaments. See id.


69. Beyer & Buckley, supra note 6, at 57. Presumably, this reference to videotape evidence assumes that the testator be allowed to speak freely about his intentions. The current terms of article 2904 do not apply to this situation since the videotape may only show the reading of the testament and the actual signing of the document. See LA. CODE CIV. PROC. ANN. art. 2904 (2006) (amended 2005).

70. Beyer & Buckley, supra note 6, at 56.
testimony of relatives or friends on both sides of a will contest. The parties often possess conflicting interests that may taint their recollections.

At odds with this contention is the impression that the videotape can “give a false appearance of ill health, frailty, nervousness and confusion.” Combining these problems with the notion that “most people are . . . uncomfortable in front of a video camera,” particularly “an elderly and infirm [individual who, when] the will signing takes place[,] [is] in an unfamiliar location in front of strangers,” results in what could appear to be a physical manifestation of a lack of testamentary capacity. Therefore, the existence of subsections two and three of article 2904 may actually encourage challengers to initiate will contests that they believe to be buttressed by video evidence.

At least one court in Louisiana has addressed the issue of videotape evidence and testamentary capacity. In 1994, over ten years prior to the enactment of article 2904, the court in Corley v. Munro admitted a videotape of a will execution ceremony in a will contest. The videotape was admitted to prove the testatrix’s capacity. The court ultimately held that the testatrix possessed capacity despite evidence in the videotape that led one doctor to conclude that the testatrix “did not know what she was doing from one minute to the next.” The court chose instead to rely on both lay testimony at trial and the medical opinion of a psychiatrist who examined the testatrix the day she executed the testament, which revealed that she was competent and did in fact “[k]now what she

71. Id. at 55.
72. Id.
75. Id.
76. 631 So. 2d 708, 714 (La. App. 3d Cir. 1994).
77. Id.
78. Id. at 713.
was doing."\textsuperscript{79} Accordingly, \textit{Corley} stands for the principle that Louisiana courts tend not to rely on videotape evidence to disprove testamentary capacity when other evidence reveals its existence. There is no reason why the enactment of article 2904 should change this predilection.\textsuperscript{80}

In addition, these two subsections raise issues about which the legislature has failed to properly instruct practitioners. For instance, is the lawyer required to ask questions of the testator to determine the intentions or the mental state or capacity of the testator?\textsuperscript{81} If so, must the lawyer compile a script to make certain all issues are covered during the videotaping?\textsuperscript{82} One proponent of videotaping seems to suggest that this is precisely what a lawyer should do.\textsuperscript{83} He explains that the lawyer must instruct the testator to speak freely regarding his or her intentions.\textsuperscript{84} To do so, the testator should explain what he or she is doing on the videotape and that he or she understands what is taking place.\textsuperscript{85} This procedure has the effect of giving the lawyer a script that he may then turn over to the testator to read to the camera. For example, one commentator states: "the videocamera should then focus on a dialogue between the testator and the attorney. This should include the testator identifying himself and explaining the function of a will; i.e., a document which will dispose of his property upon death."\textsuperscript{86} Moreover, "[t]he testator should identify the actual will document as being his final wishes regarding the disposition of property at death."\textsuperscript{87} In this way, the

\begin{itemize}
  \item \textsuperscript{79} \textit{Id.} at 709, 713.
  \item \textsuperscript{80} \textit{See} sources cited \textit{infra} notes 122–40 and accompanying text (discussing how videotape evidence was already admissible in the probate process under Louisiana law prior to the enactment of article 2904, leading to the conclusion that the article does not change the law, but merely codifies videotape admissibility in the probate process).
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} Gerry W. Beyer, \textit{Videotaping the Will Execution Ceremony—Preventing Frustration of the Testator’s Final Wishes}, 15 ST. MARY’S L.J. 1, 12 (1983).
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} \textit{Id.} at 29.
  \item \textsuperscript{86} \textit{Id.}
  \item \textsuperscript{87} \textit{Id.}
\end{itemize}
lawyer is effectively telling the testator what to say and how to say it. Simply because the testator says he intends to bequeath certain property to particular legatees following instruction by his attorney to do so in no way reflects the testator’s capacity and intentions, other than his capacity to follow directions well.

Furthermore, it is questionable if videotape of an interview session is even admissible under article 2904. The current language of the article stipulates that only “videotape of the execution [i.e. the actual signing] and reading of the testament” may be admissible. Reasoning *a contrario*, it appears that a question and answer session is not covered by article 2904. To this end, the legislature should revisit subsections two and four, particularly as to the admissibility of an interview session under article 2904. Presumably, videotape of a question and answer session would be admissible under current Louisiana evidentiary rules. Still, for the sake of simplicity, article 2904 should expressly state that the session is admissible. The testator’s mere signing and reading of the testament *aloud* fails to capture an adequate visual display of testamentary intentions and

88. *See* sources cited *infra* notes 122–40 and accompanying text (discussing other theories by which videotape evidence is already admissible under Louisiana law).

89. As support for this proposition, the bill considered by the New Jersey Legislature would have allowed for the admissibility of an interview session: “The attorney shall question the testator during the filming of the videotape to demonstrate the testator’s sound mind and satisfactory memory and understanding of the event.” *Assemb. B. 3030*, 202d Leg., 1st yr. Sess. (N.J. 1986). Also, a reference manual for continuing legal education published by the Ohio Legal Center advises lawyers to “[q]uestion [the] testator as to [the] possibility of undue influence,” and to have the testator “explain[] his disposition plan with reasons.” *REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION* No. 154 (Ohio Legal Center Inst. Publication 1985).

90. For purposes of this comment, the language of article 2904 allowing for the admissibility of a “videotape of . . . [the] reading of the testament” has been interpreted to indicate a reading of the testament *aloud*. *See* *LA. CODE CIV. PROC. ANN.* art. 2904 (2006) (amended 2005). Support for this interpretation lies in the fact that it defies comprehension to assume that a videotape of a testator silently reading a copy of the testament would be probative of any of the factors listed in article 2904, particularly those of testamentary intentions and capacity. *See* sources cited *infra* notes 113–14 and accompanying text (discussing the only situation prior to the enactment of article 2904 when a reading of the testament must be carried out during the execution ceremony).
capacity. To capture these subjective factors so that the videotape can effectively serve the evidentiary purpose contemplated in the article, a lawyer must be allowed to draw out these factors from the testator’s mind by asking questions of the testator. Such action by the legislature would greatly enhance the effectiveness of subsections two and four.

ii. Other Matters Determined by a Court to be Relevant to the Testament’s Probate

Regarding the final subsection of article 2904, one matter that a court could find relevant to the probate of the testament is the existence of undue influence. A number of commentators insist that “videotape could dispel accusations of undue influence employed during the will execution.” At first glance, the ability to introduce videotape evidence of the will execution ceremony seems to be an effective means of disproving undue influence. If videotape evidence was a foolproof solution, the logical result would be the cessation altogether of will contests brought on grounds of undue influence.

91. It appears that the representative sponsoring article 2904 did not take into account the fact that the article, as written, allows for the admissibility of a videotape showing only the signing of the testament and a reading aloud of its terms. See La. H.R. Session Day 17, supra note 33. In his presentation of the bill to the House, this representative stated that practitioners should “take a videotape [of the execution ceremony] and video also what their [the testator’s] intentions were in the will.” Id. By nature, it is impossible to videotape an individual’s intentions. The closest a practitioner can come is to ask questions of the testator in an attempt to bring out such intentions.


93. Beyer & Buckley, supra note 6, at 60. See also Buckley, supra note 17, at 88–89.

94. See generally Beyer & Buckley, supra note 6 (arguing that videotape evidence of the will execution process could be used to discourage or ultimately win will contests); Lisa L. McGarry, Note, Videotaped Wills: An Evidentiary Tool or a Written Will Substitute?, 77 IOWA L. REV. 1187, 1197 (1992) (stating that videotape evidence “[m]ay deter many will contests by disgruntled relatives” through its ability to display the testator’s final wishes to the trier of fact).
In reality though, videotape evidence simply does not provide concrete proof of the lack of undue influence, given its highly subjective and fact-based nature.\(^9\) Aspects of undue influence are usually veiled in secrecy,\(^9\) and for this reason, undue influence is generally proven by circumstantial evidence, such as witness accounts of the testator’s behavior toward family members.\(^9\) More often, “there is seldom ever any direct proof of undue influence since it usually occurs when no one else is present and it is accomplished in a subtle way.”\(^9\)

In response, one commentator suggests that the testator could “[i]n his own words . . . explain on the videotape that the disposition being made is a result of his [or her] free will and that the decision as to property disposition was not influenced by overreaching on the part of anyone.”\(^9\) This approach fails to consider that the testator could just as easily have been unduly influenced to say these things, particularly if he lacks the capacity to think for himself. While videotape showing “the testator’s recitation, . . . demeanor on camera, and attitude toward the written will may provide excellent and timely evidence that the testator voluntarily signed the instrument,”\(^10\) if undue influence is present, the testator may very well behave as if the signing of the instrument is voluntary. As a result, the testator will not appear hesitant or uncertain, behavioral traits that proponents of videotape admissibility often cite as evidence of undue influence.\(^10\)

As justification for the principle that videotape adds little to the determination of undue influence, many jurisdictions admit videotape as evidence during the probate process but rely upon other

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96. LA. CIV. CODE ANN. art. 1479 cmt. (b) (2006).
97. Id.
98. In re Estate of Smith, 827 So. 2d 673, 676 (Miss. 2002).
99. Beyer, supra note 83, at 7. Admissibility of such a discourse would require the same action by the legislature as mentioned supra note 89 and accompanying text.
100. Beyer & Buckley, supra note 6, at 60.
101. According to one commentator, videotape evidence would preserve “nonverbal evidence such as demeanor, voice tone and inflection, facial expressions, and gestures,” evidence that is “crucial in determining . . . freedom from undue influence.” Id. at 50.
evidence in ascertaining whether undue influence exists. For example, in the Nebraska case *In re Estate of Peterson*, the court held that the testatrix’s execution of a codicil increasing the share of property bequeathed to her son who helped manage the family farm was not the result of any undue influence exerted by the son.\(^{102}\) While a videotape of the execution ceremony was admitted,\(^{103}\) the court did not rely on the videotape for its determination. Instead, the court based its holding on witness testimony and on the terms of the testament itself. The court’s reliance on witness testimony was not limited to witnesses involved in the execution ceremony but included witnesses who had heard the testatrix relate her intentions regarding her desired beneficiaries.\(^{104}\) Furthermore, in reasoning that none of the evidence presented suggested the presence of undue influence,\(^{105}\) the court asserted that “[t]he terms of the codicil reflected [the testatrix’s] recognition of the special business relationship she had with [her son].”\(^{106}\) Other than noting what was captured on the videotape, the court did not make use of the videotape’s contents in deciding that no undue influence existed.\(^{107}\)

Even courts that find undue influence often do not base their holdings on available videotape evidence. For example, in *Ex parte Baker*, the Alabama Supreme Court mentioned that a videotape of the execution ceremony was made but opted instead to rely on other evidence to demonstrate undue influence.\(^{108}\) In finding undue influence, the court relied upon witness testimony revealing the confidential relationship shared by the testatrix and her daughter-in-law; the daughter-in-law’s control over the testatrix’s household, medical, and financial affairs; and the daughter-in-law’s active participation in procuring the execution of the will.\(^{109}\) Therefore, the evidence found by the court to be telling of undue influence was

\(^{102}\) 439 N.W.2d 516, 520 (Neb. 1989).
\(^{103}\) Id. at 521.
\(^{104}\) Id.
\(^{105}\) Id. at 520.
\(^{106}\) Id.
\(^{107}\) Id. at 519.
\(^{108}\) 709 So. 2d 7, 9 (Ala. 1997).
\(^{109}\) Id.
not contained in the videotape, nor could it be, for all the events occurred prior to the will execution.\textsuperscript{110}

*Peterson* and *Baker* stand for the principle that videotape frequently fails to serve as valuable evidence in actions challenging a testament's validity on the basis of undue influence. In particular, *Baker* reveals that oftentimes the best evidence of undue influence is not found at the execution but rather in events leading up to the execution. As a result, courts repeatedly choose not to rely on the contents of videotape and focus instead on the contents of the testament itself and on witness testimony. Knowing this, Louisiana courts should not allow the enactment of article 2904 to alter their determinations of undue influence.\textsuperscript{111} Courts should not create a negative inference of undue influence simply because a lawyer opted not to record a will's execution.

**C. Additional Technical Deficiencies of Article 2904**

In addition to the evidentiary problems associated with each subsection of article 2904, several procedural deficiencies also exist. First, the language of the article states that a reading of the testament is to be carried out "by the testator.\textsuperscript{112} Without allowing for an exception to this rule, the article fails to take into account the situation of the illiterate or blind testator. Under Louisiana Civil Code article 1579, if the testator is unable to read, the testament must be read aloud in his presence, usually by the notary.\textsuperscript{113} In fact, it is ordinarily only in this type of situation when a "reading" of the testament is done at all,\textsuperscript{114} making the requirement of a reading aloud under article 2904 somewhat peculiar. Nevertheless, it is unclear if a videotape of an execution involving an illiterate or blind testator would be admissible under article 2904. Even if it is admissible, such a videotape would add nothing to a determination

\textsuperscript{110} Id.

\textsuperscript{111} See sources cited *infra* notes 163–65 and accompanying text for further suggestions regarding proper interpretation of article 2904.

\textsuperscript{112} **LA. CODE CIV. PROC. ANN.** art. 2904 (2006) (amended 2005).

\textsuperscript{113} **LA. CIV. CODE ANN.** art. 1579 (2006).

\textsuperscript{114} See **LA. CIV. CODE ANN.** art. 1577 cmt. (f) (2006) (explaining that the testator is not required to actually read the testament at the time of its execution).
of the subjective factors, such as testamentary intent and capacity, since the only action carried out by the testator captured on the videotape would be his physical act of signing. Therefore, these circumstances also support the admissibility of a question and answer session during the execution.\textsuperscript{115}

A second deficiency concerns the requirement that the testator must be “sworn by a person authorized to take oaths.”\textsuperscript{116} The language of the article fails to clarify basic requirements about this oath. For instance, what is the content of the oath taken? Since testators do not normally take oaths, a practitioner may be uncertain as to how to proceed under this article in order to ensure that the videotape will be admissible.

This lack of clarity was evidenced even by legislators as the bill was presented to the House of Representatives.\textsuperscript{117} One legislator posed the question: “Is it going to take a separate swearing by a court reporter or will the normal attestation clause be enough under this bill?” The representative sponsoring the bill that eventually became article 2904 responded: “The normal one should be enough, but the video will occur at the same time that you’re doing the will.” The questioner continued: “But I usually don’t make them say it out loud; do you think we’re now going to have to say it out loud?” The sponsoring representative replied: “I have them say it out loud.” The questioner continued: “What do you think under the bill is going to be required?” The sponsoring representative replied: “They will have to manifest that this is their will and testament.”

This “normal attestation clause” apparently referred to by the representatives is described in Louisiana Civil Code article 1577: “the testator shall declare or signify [to the notary and two competent witnesses] that the instrument is his testament.”\textsuperscript{118}

\textsuperscript{115} See sources cited supra note 89 and accompanying text.
\textsuperscript{117} The following exchange was transcribed from archived footage of the House proceedings on the day the bill creating article 2904 was voted on by the House of Representatives. See Video of House Proceedings, Final Passage of HB 260, http://house.louisiana.gov/rmarchive/Ram/RamMay05/05RS-Day17.ram.
\textsuperscript{118} The only other attestation clause the representatives could be referring to is the one contained at the end of the testament signed by the witnesses rather than the testator and certifying that the execution was properly performed. See LA. CIV. CODE ANN. art. 1577(2) (2006). In fact, another source of confusion
According to comment (c) of this article, "[t]he testator's indication that the instrument contains his last wishes may be given verbally or in any other manner that indicates his assent to its provisions." As the comment suggests, this communication by the testator is merely an "indication" rather than an "attestation clause" or an oath.

To qualify as an oath under Louisiana law, presumably its content should conform to that required by Louisiana Code of Evidence article 603, which states: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." Also, it would seem that the oath should be administered by a person authorized to administer oaths, as per Louisiana Code of Civil Procedure article 1434 applicable to oaths involved in the taking of depositions and worded similarly to article 2904. Without answers to these questions, there exists a serious risk that a videotape made in a good faith attempt to conform to article 2904 might not be admissible.

Article 2904 was drafted and subsequently enacted without input from the Louisiana State Law Institute. As evidenced by its many inadequacies, it is hoped that the legislature will refer the matter to the State Law Institute to help clarify the article with comments. Regardless, unless and until the legislature properly accounts for these unresolved issues, article 2904 will fail to have its intended evidentiary effect.

regarding the representatives' exchange is that the term "attestation clause" normally refers only to this declaration made by the witnesses rather than any declaration by the testator. Max Nathan, Jr. & Carole Cukell Neff, 2 LOUISIANA ESTATE PLANNING, WILL DRAFTING AND ESTATE ADMINISTRATION WITH FORMS 6 (Matthew Bender & Co., 2d ed. 2004) (1959).

119. LA. CIV. CODE ANN. art. 1577 cmt. (c) (2006) (emphasis added). Therefore, prior to article 2904, there was no requirement that the testator make this assertion "out loud."

120. LA. CODE EVID. ANN. art. 603 (2006).
D. The Potential for Increased Litigation

Article 2904 may have the regrettable effect of increasing actions to annul testaments seemingly buttressed by videotape evidence. In fact, clients often agree to the excess costs associated with videotaping the will execution ceremony "in the hope that it will assure victory over challengers" to the testament. Challengers, however, may then attack the same video alleging that the testator's actions show, for instance, that the testator lacked capacity or was unduly influenced. Now that Louisiana has enacted legislation devoted specifically to the admissibility of videotape evidence, its use by attorneys and clients in the probate process is likely to increase.

1. Article 2904 is Somewhat Superfluous

It is important to note initially that article 2904's authorization of videotape admissibility is at best somewhat superfluous when considered in light of the fact that videotape can already be introduced under a myriad of theories.122 First, most states' rules of evidence allow videotape to be admitted. Although the only state to enact legislation on the subject prior to Louisiana was Indiana, many other states have case law allowing videotape to be admitted in the probate process.123 Even Louisiana, under its Code of Evidence, allowed a videotape of a will execution to be admitted prior to the enactment of article 2904.124 To be admissible, videotape must survive a potentially fatal objection to its admissibility, namely, the possibility that it may be considered hearsay. Louisiana Code of Evidence article 802 states that "[h]earsay is not admissible except as otherwise provided by this Code or other legislation."125 Hearsay is defined in the

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121. Abrahams & Zabel, supra note 74.
122. The argument can be made that article 2904 is not superfluous at all. Rather, for the sake of simplicity, its terms are actually beneficial because it allows for the admission of videotape without contest. However, as evidenced by the contents of this comment, article 2904 as currently written actually creates more problems than it solves.
123. See sources cited supra notes 102, 108 and accompanying text.
124. See, e.g., Corley v. Munro, 631 So. 2d 708 (La. App. 3d Cir. 1994).
preceding article as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."\textsuperscript{126} Hearsay evidence is excluded because "the value of the statement rests on the credibility of the out-of-court asserter who is not subject to cross-examination and other safeguards of reliability."\textsuperscript{127}

In the case of probate litigation, if videotape evidence is admitted, statements made by the testator during the testament’s execution could be considered hearsay if the videotape is admitted to demonstrate the truth of these statements. For example, the testator's declaration that the document being executed is his "last will and testament" could technically be considered hearsay if the videotape's admission is for the purpose of proving testamentary intent. In this case, the testator is clearly unavailable for cross-examination purposes.

However, if the videotape is admitted as proof of something other than the truth of the testator’s statements—for example, testamentary capacity—it would fall outside of the scope of the hearsay rule.\textsuperscript{128} This is because "evidence of the mental state or intent of the testator may be reflected by the testator’s statements" made on videotape, but such evidence is "not conditioned on the statements' truthfulness."\textsuperscript{129} Therefore, such statements would not be considered hearsay.

Should videotape be deemed hearsay, it still can be admissible under one of several exceptions to the hearsay rule,\textsuperscript{130} including present sense impression;\textsuperscript{131} then existing mental, emotional, or physical condition;\textsuperscript{132} and recorded recollection.\textsuperscript{133} To illustrate, in

128. Id.
130. See Beyer & Buckley, supra note 6, at 64–65; Beyer, supra note 83, at 14–16.
131. This exception to the hearsay rule allows for admissibility of "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." LA. CODE EVID. ANN. art. 803(1) (2006).
132. This exception to the hearsay rule allows for admissibility of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or
the example given above where the testator declares that the document being executed is his “last will and testament,” this statement of testamentary intent, although hearsay, would be admissible as a present sense impression.\textsuperscript{134} The rationale behind this exception to the hearsay rule lies in the contention that “the substantial contemporaneousness of the event and the statement negates the likelihood of deliberate or conscious misrepresentation.”\textsuperscript{135} Likewise, statements reflecting proper execution, testamentary capacity, testamentary intent, and lack of undue influence likely fall under the then existing mental, emotional, or physical condition exception to the hearsay rule.\textsuperscript{136} In the context of a testament’s execution, even statements of memory or belief are admissible to prove “the fact remembered or believed.”\textsuperscript{137}

If the testator’s statements do not fit under one of these exceptions, the unavailability\textsuperscript{138} or “catch-all”\textsuperscript{139} exceptions may apply. The catch-all exceptions found in Louisiana Code of Evidence article 804(B)(6) allow admissibility of evidence as long as the statement is trustworthy, is offered as evidence of a material fact, and “the proponent of the evidence has adduced or made a physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant’s then existing condition or his future action.” \textsuperscript{LA. CODE EVID. ANN. art. 803(3) (2006).

133. This exception to the hearsay rule allows for admissibility of “[a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.” \textsuperscript{LA. CODE EVID. ANN. art. 803(5) (2006).


135. \textit{Id}.

136. \textit{Id}. at 15.

137. \textsuperscript{LA. CODE EVID. ANN. art. 803(3) (2006).

138. A declarant is unavailable as a witness when he or she “cannot . . . appear in court and testify to the substance of his statement made outside of court.” \textsuperscript{LA. CODE EVID. ANN. art. 804(A) (2006). This includes situations in which the declarant is “unable to be present or to testify at the hearing because of death.” \textit{Id}.

139. \textsuperscript{LA. CODE EVID. ANN. art. 804(B)(6) (2006). See also Beyer, supra note 83, at 15.
reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates."\textsuperscript{140}

Because videotape evidence generally falls under these exceptions to the hearsay rule, there already exists extensive grounds on which such evidence could be admitted. Since videotape evidence was already admissible under Louisiana law prior to the enactment of article 2904, this article does not change the law, it just expressly allows for videotape admissibility in the probate process.

\textit{2. Risk of Increased Litigation}

Article 2904 may also have the effect of exacerbating the instances of litigation brought by beneficiaries under the will since it may provide a malpractice cause of action against lawyers for failing to make a videotape. Counter to this principle, one commentator explains that the "failure of an attorney to prepare a videotape of the will execution ceremony under circumstances where the reasonably prudent attorney would do so does not lead to malpractice liability . . . because the lack of privity between the attorney and the intended will beneficiaries bars the action."\textsuperscript{141} For instance, in an unreported Ohio case, \textit{In re Estate of Nibert},\textsuperscript{142} the court indicated that the will beneficiaries' lawyer was not responsible for delays and additional costs resulting from prolonged litigation for failing to videotape the will execution ceremony.\textsuperscript{143} The court noted that this premise assumes, but does not suggest, that a videotape would actually have helped to corroborate issues such as testamentary capacity and the presence of undue influence, thus cutting short the protracted litigation.\textsuperscript{144}

Contrary to \textit{Nibert}, however, this privity defense is only maintained by a few states.\textsuperscript{145} As a result, beneficiaries to the will may assert their malpractice claims against lawyers who fail to

\begin{thebibliography}{9}
\item[	extsuperscript{140}]LA. CODE EVID. ANN. art. 804(B)(6) (2006).
\item[	extsuperscript{141}]Beyer & Buckley, \textit{supra} note 6, at 48.
\item[	extsuperscript{142}]No. 88-02-004, 1988 WL 102420 (Ohio App. 12 Dist. Sept. 30, 1988).
\item[	extsuperscript{143}]\textit{Id.} at *5.
\item[	extsuperscript{144}]\textit{Id.}
\item[	extsuperscript{145}]Reynolds, \textit{supra} note 73, at 745.
\end{thebibliography}
videotape the execution ceremony. Such is the case in Louisiana. Malpractice liability with respect to beneficiaries of a will in Louisiana is based on the idea that the “intended legatee under a will is considered a direct, explicit third-party beneficiary of the contract for legal services between the attorney and the testator so that, in the event the will is invalid, the legatee can have a cause of action against the attorney.” More specifically, under Louisiana law, this contract between the lawyer and the testator to create a will for the benefit of the legatees is considered a stipulation pour autrui, or a stipulation for a third party, under Louisiana Civil Code article 1978. By law, third party beneficiaries to a stipulation pour autrui may sue for its breach.

The Louisiana Supreme Court first set forth its opinion regarding the lack of a privity defense in Succession of Killingsworth v. Schlater. The issue before the court was whether a notary is liable to legatees under a will declared invalid as a result of his failure to use proper care in its formation. The court subsequently found that he was. The court reasoned that the lack of attorney-client privity between the attorney and beneficiaries was not determinative in finding the existence of a stipulation pour autrui.

146. For example, the defense is not recognized in New Hampshire. See Simpson v. Calivas, 650 A.2d 318 (N.H. 1994). In Simpson, the court upheld a malpractice action against the draftsman of a will who failed to provide a bequest for the plaintiff-heir. Id. at 323. While Simpson does not involve malpractice liability with respect to failure to videotape per se, it still stands for the premise that beneficiaries to a will may bring claims against the lawyer responsible for the will based on the theory that an intended beneficiary may enforce the terms of a contract as a third-party beneficiary. Id.


149. The “stipulation that a lawyer is to confect a will to institute third part[y] legatees is a stipulation pour autrui . . . for damages breach of which the third party may sue.” Id. at 542 (emphasis added) (quoting Woodfork v. Sanders, 248 So. 2d 419 (La. App. 4th Cir.), writ denied, 252 So. 2d 455 (La. 1971)).

150. See generally id.

151. Id.

152. Id. at 543.
autrui, ultimately holding that "an attorney’s clear error in confecting a will, which the exercise of a reasonable competence would have avoided, constitutes a breach of the contractual stipulation for the benefit of the intended legatee."

Killingsworth could be interpreted to mean that there is no privity defense protecting Louisiana lawyers from malpractice claims by beneficiaries to a will. However, the status of the defense applied to a lawyer’s failure to videotape a will execution may not be so clear since the holding in Killingsworth involved an error by a lawyer which “the exercise of reasonable competence would have avoided.” Consequently, application of the Killingsworth approach assumes not only that a lawyer of reasonable competence would have opted to videotape the will execution ceremony, but also that the videotape would have helped the disappointed beneficiaries. To this end, article 2904 is of no help in determining whether a lawyer of “reasonable competence” would videotape the execution. Its language imposes no obligation to videotape a will execution, but provides only that videotape evidence “may” be admitted.

Since there is no requirement to videotape, how is a lawyer supposed to know when to videotape the execution ceremony? A proponent of videotaping suggests that the lawyer should predict, based on the individual client, if there will be a challenge to the will. For instance, “if [the] client is elderly or ill, [an] estate planner may anticipate a challenge to the will . . . based on lack of testamentary capacity or susceptibility to undue influence.” While the ability to predict a challenge to the will under these circumstances may be possible, how is a lawyer to predict in circumstances where the client is not elderly or ill? This suggestion effectively requires the lawyer to possess extra-sensory perception.

Another proponent offers the advice that videotaping should not be used in “relatively docile estate proceedings,” as “not all

153. Id.
154. Id. (quoting Woodfork v. Sanders, 248 So. 2d 419 (La. App. 4th Cir.), writ denied, 252 So. 2d 455 (La. 1971)).
155. Id.
157. Reynolds, supra note 73, at 745.
158. Id.
159. Buckley, supra note 17, at 90.
families erupt into vicious probate battles which span decades of spite and venom."\textsuperscript{160} Again, this method presupposes that a lawyer will be able to ascertain the nature of the proceedings prior to the testator's death. Since the lawyer's abilities are not always foolproof, it is likely that situations will arise where a lawyer does not videotape the execution, and beneficiaries may bring malpractice claims as a result.

There is also a risk if the lawyer decides to videotape. A leading Louisiana lawyer in the area of probate law cautions that "two interesting questions may be asked at trial with respect to a videotaped execution of a will: (1) Do you videotape all executions of wills by your clients? and (2) Why did you videotape this one?"\textsuperscript{161} Since videotape is not required under article 2904, unless a lawyer decides to videotape all executions, he or she risks that the decision to videotape in a particular instance will indirectly reflect the lawyer's own opinion or fear that there may be a will contest. In a close case, this subtle maneuver may influence the court to find against the will's validity.

This occurrence, combined with the uncertain status of the privity defense under Louisiana law, will likely lead to the undesired result of increased litigation in the probate arena. Although videotape evidence arguably is already admissible and thus the concern regarding attorney liability already exists, the codification of this principle through article 2904 concretely sets forth a new basis for malpractice suits against lawyers who fail to offer a videotape option to their clients.

Article 2904 fails to offer guidance to practitioners regarding potential liability for failing to videotape the execution ceremony. Its terms only suggest that a videotape of the execution and reading of the testament "may" be admissible.\textsuperscript{162} In fact, based on means by which videotape is already admissible, no one would question its admissibility absent article 2904. As a result, the legislature would do justice to practitioners to expressly set forth a lawyer's potential liability or denial thereof under article 2904 for failure to videotape a testament's execution.

\begin{itemize}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} Nathan & Neff, \textit{supra} note 118, at 138.
\item \textsuperscript{162} LA. CODE CIV. PROC. ANN. art. 2904 (2006) (amended 2005).
\end{itemize}
E. Suggestion for the Interpretation of Article 2904

In addition to the suggestions to the legislature set forth above regarding clarification of the article's provisions, courts must interpret article 2904 to best serve the interests of justice. In general, Louisiana courts should allow videotape evidence to stand as evidence of proper execution, but judges must be wary of the article's usefulness for purposes of the more subjective factors such as testamentary capacity and undue influence.

Courts should continue to rely on witness testimony as the best approach in determining the validity of a testament. According to one commentator, it is "far preferable for [a] lawyer to have . . . paralegal witnesses who can testify to their observing testators sign wills in many, many cases and whose appraisal of the testator's competence and understanding will be persuasive." As evidenced in the case In the Matter of Estate of Kessler, witness testimony, despite a contradiction with available videotape, is a superior form of evidence.

In short, article 2904 should not be interpreted as adding anything of substance to the existing means of videotape admissibility. Given its cursory legislative adoption, it is questionable if its enactment can be construed as a source of legislative support for the effectiveness of videotape in the probate process. Therefore, courts should not change their approach regarding videotape evidence, which, until this point, has been not to grant it much consideration at all.

IV. CONCLUSION

The legislators failed to debate thoroughly all possible issues when they unanimously voted to approve new Louisiana Code of Civil Procedure article 2904. The resulting article is in great need of assistance. Aside from its potential ability to aid in a court's determination of whether the testamentary execution was carried out according to proper codal requirements, the article does not add any

163. Reynolds, supra note 73, at 745.
165. See, e.g., Corley v. Munro, 631 So. 2d 708 (La. App. 3d Cir. 1994).
166. See sources cited supra note 33 and accompanying text.
additional support to a beneficiary’s action to probate a testament or a challenger’s action to annul a probated testament. As a result, Louisiana courts should not grant article 2904 undue importance. Likewise, practitioners must be wary of its potential effects. One commentator warns that the process of videotaping will “likely require longer office appointments and greater preparation [resulting in larger bills to clients] than presently needed to execute wills.” 167 Practitioners must also be aware of the risk that article 2904 could exacerbate malpractice actions for failure to videotape.168

The fact remains, the vast majority of other states that have considered similar legislation did so in the late 1980s.169 The only state to enact legislation was Indiana in 1988,170 while all other states that proposed legislation opted not to do so. Why, then, did Louisiana choose to take action in 2005, nearly twenty years later? Such action was not well considered,171 as evidenced by the deficiencies associated with the article; the legislature must make amends.

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167. Buckley & Buckley, supra note 18, at 4.
168. Id.
170. See sources cited supra notes 28–31 and accompanying text.
171. See sources cited supra note 33 and accompanying text.

* The author wishes to thank Ronald J. Scalise, Jr., Professor of Law, Paul M. Hebert Law Center, Louisiana State University, for his invaluable assistance and continuing support and guidance in drafting this comment. Also, many thanks to Max Nathan, Jr. of Sessions, Fishman, and Nathan, LLP, in New Orleans, Louisiana, and to Gerry W. Beyer, Governor Preston E. Smith Regents Professor of Law, Texas Tech University, for their helpful comments and suggestions.