

Be Careful Authenticating Digital Photographs and Video Recordings

By Arbitrator Diego J. Peña



Employment litigators and labor arbitration advocates need to carefully consider the authenticity of all digital recordings and photographs offered into evidence. Using inexpensive modern technology, parties can easily alter and manipulate digital images and video recordings.

The most recent example comes from the prestigious Massachusetts Institute of Technology. Tim Binnall reports in a recent article that artificial intelligence experts at MIT used advanced video editing software to create a fake speech delivered by President Richard Nixon mournfully telling the American public that Apollo XI astronauts Neil Armstrong and Buzz Aldrin perished while attempting to land on the moon. The video, which can be found at <https://youtu.be/LWLadJFI8Pk> is remarkable. The President's lips and voice and synchronized perfectly. I personally found the video chilling. President Nixon never delivered this speech, but, if someone did not know they could easily believe this fake speech was actually delivered.

This proves how easy it is becoming to alter digital video recordings and photographs. For those of us who use surveillance videos in labor and employment cases or arbitrations, we must be extremely careful in properly authenticating video and photographic evidence.

Most state and federal courts have long held that video recordings and digital images qualify as photographs. Labor Arbitrators, following the common law rules of evidence—and common sense—have ruled the same way. But legal scholars began to question this assumption as enhancement technology improved: “The advent of digital photography and the ease with which digital photographs can be manipulated with easy-to-use software has created a level of unease in the practicing bar.” Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 19 (2009).

Digital photographs and video recordings have become commonplace in labor arbitrations. Screen recordings of call center employees are used to establish what they were doing on their computers during working hours; digital body cam recordings of police officers are used to establish what happened during a particular encounter. Union and employer advocates need to make sure that digital evidence is authentic and has not been tampered with prior to hearings.

The best way to insure authenticity is to review and preserve the original recording and make detailed notes about the recording device that made the recording (e.g., camera, computer, software), the custodians of the recording, establishing a chain of custody and distribution, confirming who or what devices have copied the recording and the precise of length of time the recording runs.

If quality enhancements have been made to the recording, the proponent of the recording needs to be prepared to present the original recording along with the enhancement for authenticity. Opponents need to be prepared to establish if the enhancements have prejudicially altered the recording.

Advocates offering digital photographs or video recordings always need to be prepared to defend the authenticity of the recording; alternatively, advocates opposing the photographs and recordings need to question the authenticity and veracity of such recordings, understanding that such recordings can easily be altered.

Michael Crichton predicted that enhancements in technology would render photographs or video recordings obsolete as evidence in legal proceedings. Digital photographs and video recordings are still good evidence, but advocates need to understand how to properly authenticate this evidence.