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Let's roll the videotape!

Basic tips for taking video depositions and using them at trial

This article will answer the “why” and “how” on the issues of taking videotaped depositions and using them at trial. At the time I was first asked to write this piece, I was gearing up for a trial in a case where I had taken approximately 100 depositions, all of which were videotaped. Some might ask, “Why bother?” The following will address the reasons why videotaped depositions can (and should) play a key role in most cases, as well as the practical and procedural side of actually using these videos effectively at trial.

The power of video

Since about 1998, I have videotaped virtually every deposition I have taken. By no means am I suggesting that everyone should necessarily videotape all of their depositions (although I can imagine more than a few videographers who wouldn't mind such a plug). However, in every case, there will be critical depositions where simply having a written transcript will not do justice to the content of the testimony, and in fact, may weaken your case altogether. To demonstrate, consider these two hypothetical examples:

• Example 1: Video deposition of Reckless Ralph.

Imagine that you are deposing the defendant driver in a serious auto accident matter. You suspect that the defendant was drinking alcohol shortly before the accident, but you have no objective proof at this time. In the middle of the depo, you ask him:

Q: At any time on the night of the accident, but prior to the accident, had you consumed any alcohol?

In response, the witness stares silently at you for a few seconds, absorbing your question. He then turns to his counsel with a nervous smile and a half shoulder shrug, wondering if his attorney will be objecting to the question.

Upon realizing that he will have to answer the question, he turns back to you. He looks up for a moment as if he is looking for guidance, but then looks back down. He then starts to turn pale and sweaty. Thirty seconds pass in silence – still no answer. He opens his mouth as if to answer, but quickly reconsiders, looking down again. Another 30 seconds pass, and the silence is now making everyone uncomfortable. You can hear his attorney nervously shifting in his seat. Finally, he lifts his head slightly, but without looking at you, says in almost a whisper, “No.”

• Example 2: Written transcript of Reckless Ralph.

Here's how that same moment would appear on the written transcript:

Q: At any time on the night of the accident, but prior to the accident, had you consumed any alcohol?

A: No.

As you can see, then, the video will give you numerous layers of information that would be completely missed on the written transcript. These include things such as silence where a simple, quick answer would be expected, nervous mannerisms, lack of eye contact, lack of conviction, etc. Moreover, seeing *how* the witness reacts to a question and hearing the intonations of their voice in their answer are critical types of information

that allow a jury to more fully assess a witness's credibility. Yet, if all you have is the written transcript, that powerful multitude of information is distilled down into just one bland dimension, virtually eliminating everything compelling about that moment in the deposition. Instead of creating a breakthrough sound byte to play at mediation or trial, you are left with almost nothing of any use.

In light of the above, it is essential that for any key deposition, you capture it on videotape. More often than not, it will enhance the value of your case. In addition, videotaping depositions tends to have a restraining effect on boisterous opposing counsel, as well as unruly witnesses. If you want to have more control over the proceedings, videotaping is a great tool.

Videotaping on a budget

I suspect that many attorneys still do not videotape their depositions because they have trouble justifying the cost. To me, given how a 10-second video clip can make or break a whole case, it's hard to imagine not videotaping a deposition. With that said, here are some tips on how to cost-effectively videotape your depositions:

Take your own videos. For non-expert depositions, there is nothing preventing you from having someone at your office handle the camera, or you can even just cheaply hire a college or law student to do so. They may not get paid much, but it gives them exposure to what attorneys do, which is a great value to them. So long as you follow the procedure

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dural requirements of Code of Civil Procedure section 2025.340, there is no need to hire a professional videographer for a lay witness.

Work out a deal with a videographer.

Many videographers, if they know you will be using them on a regular basis, will negotiate better rates than advertised. Since it's a competitive field, get quotes from a few, let them all know you're shopping around, and then ask them to give you their best offer. You may also be able to collectively negotiate in conjunction with other law firms and negotiate a group deal with a videographer in exchange for using them exclusively. Short of that, just using the CAALA listserve to compare rates can save you quite a bit.

Use conference rooms already equipped for videotaping. Some court reporting agencies (and some law firms, for that matter) have conference rooms set up for videotaping, where you literally just have to pop in a tape or CD and hit a button to begin. You may be able to work out a deal to use their conference room, saving yourself the costs of purchasing video equipment.

Lastly, remember that video deposition costs are specifically recoverable if you prevail in the case. (See Code Civ. Proc., § 1033.5, subd. (a)(3).) Therefore, not only do videotaped depositions enhance the value of your cases, but it's a bet that you can hedge when you seek to recover costs.

I've got all this video. Now what?

It's one thing to videotape your depositions, but it's another to actually use them in trial. This section will address the practical and procedural considerations for using videos at trial.

• I synch, therefore I am.

Unless you use a professional videographer who does this as part of your package, you will need to have your videos converted to the proper MPEG format and have the videos synched with the written transcripts. What this means is that in order to play the video excerpts for the jury, rather than just the entire deposition, you must have the

ability to carve out portions according to the page and line number in the written transcript. The two most common ways of doing this are 1) Having your videos synched into a self-executable format or 2) synching the videos for use with trial presentation software.

If you expect to be in trial on a regular basis, then it makes sense to invest a few hundred dollars in some good trial presentation software such as Sanction or Visionary. With either, however, you will need synched versions of your videos. With these tools, you will be able to accomplish the widest variety of functions at trial. These include having clips set up in advance which can be used for cross examination (or in the case of a party, having clips ready for use at any time of the trial, which are permitted to be used for "any purpose" under Code Civ. Proc., § 2025.620(b)). In fact, in cases where you have a defendant that comes across in deposition as untruthful or unreliable, you may want to have a "best of" set of clips ready to go right at the start of trial. The defendant then becomes pinned down by their own words before they ever take the stand and the jury's perception of the defendant's credibility will be tainted for the remainder of the trial.

As for using the trial presentation software, there are many vendors who will run it for you at trial for a fee, which can make your trial preparation much easier, but at the same time run up your trial costs. For smaller cases, attorneys can certainly operate the software by themselves or with the help of someone from their office. There is a learning curve, but the most popular programs are relatively user-friendly. I have been able to learn how to use the software without spending a lot of time reading through manuals. If I can teach myself how to use it in trial, anyone can.

If you don't want to invest in trial presentation software or a trial presentation consultant, most videographers have the ability, for an extra charge, to provide you the video in a self-executable format that allows you to call up portions by page and line number with-

out the need for separate software. The downside is that these self-executable formats may not allow you to create and save clips ahead of time, create a string of clips from different portions of the deposition that can be played seamlessly, or allow you to use visual effects such as splitting a screen to show the witness on one side and an exhibit on the other (which can greatly enhance the jury's ability to follow what is being said). Thus, the more complex the case (and your needs), the more likely the trial presentation software will be the better choice. But for simple cases with just a few witnesses and relatively straightforward testimony, using the self-executable format is more than adequate.

• The designation dilemma

In order to play videotaped excerpts at trial (at least for non-impeachment purposes), parties are required, under Code of Civil Procedure section 2025.340, to designate in writing before trial those portions they intend to use. Specifically, section 2025.340, subdivision (m), states, in pertinent part:

A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered. That notice shall be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording. Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing

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The problems with section 2025.340, subdivision (m), are twofold. First, it gives a vague timeline for when you need to provide your video designations to the other side (“within sufficient time for objections to be made and ruled on by the judge”). What is sufficient? A day? A week? The second problem, and an even more important reason to bring this up at the Final Status Conference, stems from the requirement that objections to your designations be made in writing. There is no guidance at all as to when such objections must be made or when they must be ruled upon. What inevitably happens, then, without any further guidance from the court, is that the other side will not provide you with written objections until the day before – or on the actual day – you expect to play your excerpts. The judge then has little or no time to consider the objections, and in the event the judge sustains any objections or requires you to play other portions, you are left with editing your clips on the spot while an impatient jury watches. (A further problem results from Code Civ. Proc., § 2025.620, subd. (e), which allows the opposing side to recite or play any other portions of a deposition relevant to your excerpts. Some judges may require you to edit your clips on the spot upon such a request.)

One remedy for this is working out a schedule with the judge and opposing counsel at the FSC. Promise to provide the other side with your written video designations by a certain date for all of them, or perhaps no later than a certain amount of time before you intend to play the clips for a particular witness (e.g., three days). In return, obtain a commitment from the other side as to when they will file objections or notify you of additional portions to be played under section 2025.620, subdivision (e). At the same time, obtain (hopefully) a commitment from the judge as to when he or she will rule on any objections (preferably at least a day before you intend to play the video). If the judge is noncommittal about establishing such a schedule, remind the judge of your desire to use the jurors’ time as efficiently as possible. In short, the more you can

bring these issues out in the open prior to the start of trial, the less likely you will be caught off guard while your jurors are watching and waiting.

• **How to get in synch**

Another technical issue that arises if you use trial presentation software is *how* to synch the video with the transcript. Virtually all videographers that I have used will offer video synching as a service. However, many of these vendors are just acting as middle men, sending your videos to sources that you could otherwise contact directly (and save money). Therefore, do your homework and investigate pricing, making sure you are not the victim of several layers of added profit margins.

The least expensive way to synch your video is to do it yourself. For example, with a short deposition, you can have someone at your office perform the synching manually. With programs such as Sanction, the synching process is as simple as playing the video and hitting the space bar each time a new line on the transcript approaches during the video. Now, if you have dozens or hundreds of hours of videos, this may not be the most attractive option for you. But for the cost-conscious attorney with a straightforward case, you can easily train a legal assistant or clerk to perform your synching for you.

If you do send your videos out to a vendor, you can usually choose between having them manually synch it for you (which literally entails a person watching the entire video for hours on end and hitting the space bar) or using their voice recognition software. The pros and cons are that the manual synching option is slightly more accurate, but also more expensive. If voice recognition software is used, you will save some money, but you may have to do more adjusting when setting up your clips, as the video may not align as precisely with each transcript line.

Whichever technique you use, it’s important to review all of your clips before you show them to the jury. If part of a question or an answer is cut off, it can be embarrassing or even harmful to your case.

• **Know your venue**

Whether you use a trial presentation consultant in the courtroom or handle the playing of video clips yourself (I have done both over the years), it is essential to work out with the judge (and more often, with the clerk) how you should set up your equipment in the courtroom. If your screen is so far away that the jury cannot see it, it will be of no use to you. Find out if the judge will allow you to dim the lights when showing any video (or test your equipment to see if that is even necessary). Make sure the volume is adequate for the jury to hear (but not too loud as to be distracting). In fact, you should make sure you test out all the equipment before the trial begins. Many judges will let you set up before jury selection to test out your equipment. Also, more and more courtrooms now have their own equipment that you can plug into, making your set up much easier. Lastly, you should also seek out other attorneys who have tried cases and shown video clips in that judge’s courtroom to find out valuable information that can only be gained through experience.

• **Have a backup plan**

Whether you use a trial presentation consultant or come armed with only your own laptop, a projector and a screen, make sure you have a backup of all your videos, etc. in case something goes wrong. For a small investment, you can purchase external hard drives capable of storing hundreds of gigabytes of videos. A cautious attorney would have everything he needs on a backup drive, and probably on a separate laptop computer, too, in the event there were any technical difficulties with your computer. After all, if your computer crashes while the jury is patiently waiting, you’re not going to have time to call tech support. You need a simple and quick alternative.

Specific requirements related to the use of video depositions

There are a number of procedural requirements and practical tips with which you must familiarize yourself,

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depending on how you intend to use your videos. Here are a few:

General rules

- Be familiar with all of the procedural requirements of Code of Civil Procedure section 2025.340, which outlines the conduct at the video deposition itself and sets forth the requirements for the person taking the video, the room used, etc. If the video deposition is not conducted properly, it can be precluded from use on a technicality.

- Put in every deposition notice language regarding your intent to videotape. The specific notice requirements for lay witnesses are found in Code of Civil Procedure section 2025.220, subdivision (a)(5). There is nothing that requires you to *actually videotape* a deposition that is noticed for video, but you cannot videotape where the notice does not provide for it. Therefore, the solution is to add boilerplate language to all of your depo notices expressing your intent to videotape. Then at least the option of videotaping is preserved.

- When taking a video deposition, remember to act as if the jury is in the room with you. Speak clearly and act professionally. Also, if you're showing the witness an exhibit, start off by describing the document on the record to ensure there is no confusion about what they're describing ("I'm now showing you what has been marked as Exhibit 1, which is a five-page letter dated November 3, 2002, from Mr. Smith to Big Insurance, Inc.). If there is a particularly important part of the document, have the witness read it out loud into the record. It will make it easier for the jury to understand later on if that portion of the video is played.

- Take advantage of the added audio and visual dimensions. For example, if the witness keeps looking at his attorney after each question during an important line of questioning, I like to remind them on the record that their attorney can't answer for them. This will key the jury in on what's going on, so from that point forward, every time the witness stares at his attorney, the jury will

assume that the witness is hesitant to use his own words.

Party depositions

As stated above, party depositions can be used at any time for any purpose. (Code Civ. Proc., § 2025.620, subd. (b).) Because of this, you should have clips for pertinent issues lined up and ready to play before the trial begins. You can often use these clips throughout the trial to juxtapose favorable testimony with a defendant's unreliable testimony. For example, when you have your own client on the stand, you can play clips from the defendant and have them respond, explaining why the defendant's story does not make sense. The defendant is then forced to sit there in silence while you pick apart their testimony.

Expert depositions

There are different requirements for notice and for deposition logistics when an expert is being videotaped. Some key areas to consider:

- If you intend to play the expert's video deposition at trial, rather than call her live, your deposition notice must indicate such an intention to the other side. (Code Civ. Proc., § 2025.220, subd. (a)(6).)

- You cannot have someone that works for or is related to you or your client, or has a "financial interest" in the case, manning the video camera without a stipulation. (Code Civ. Proc., § 2025.340(c).)

- If you do intend to use your expert's video depo at trial, make sure you cover all the necessary elements of their testimony and use the "magic language" needed. This includes the reasonableness of medical expenses, the reasonable certainty of future care or damages, or in the case of medical malpractice, opinions to a "reasonable medical probability." If you do not have the requisite terminology stated in their opinions, opposing counsel may be able to exclude the testimony altogether, leaving you painted into a corner.

Third-party depositions

- Remember that, pursuant to Code of Civil Procedure section 2025.620, subdivision (c)(1), you can use at trial, in lieu of live testimony, the deposition of any witness who resides more than 150 miles away. There is no need to show that they are unavailable at trial or that you even attempted to subpoena them at trial. As a result, if you want to use someone's deposition at trial who is beyond the 150 mile radius, make sure to establish on the record, when you depose them, where they currently reside and whether they intend to remain there through the time of trial.

- Even if a third party deponent resides less than 150 miles away, if you don't think live testimony will be necessary or more useful, ask the other side on the record if they'll stipulate to using the video at trial. I like to ask the witness if they're available to testify during the trial period, then say, "Of course, I'm willing to stipulate on the record right now that we can use this video at trial and not have to burden you with taking time off from work. Will counsel for the defense stipulate?" If they say "yes," you've saved yourself the trouble of having to subpoena and schedule the witness. If they say "no," the witness now knows that you tried your best not to inconvenience them and will likely be more cooperative if and when you do subpoena them.

For all videotaped depositions

Remember to lodge your written deposition transcripts with the court before trial. California Rules of Court, Rule 2.1040 requires that "a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript must be marked for identification . . ." This is particularly important if objections are raised to your video clips. The judge will then have the written transcript available to rule quickly.

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Conclusion

We now live in an age where most people are used to getting their information from television or the Internet. People expect to *see* and *hear* what they need in order to make up their minds. Rather than struggle against your jurors'

expectations, provide them with the most effective means of assessing the facts. Let them see and hear all of the testimony by presenting them with videotaped depositions.

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