

FACTS, LAWS *and* VIDEOTAPE

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The use of video to advocate is increasing not only in forums of alternative dispute resolution, but also in trials. With this new and effective method of advocacy, it is important to realize the legal implications of video in alternative dispute resolution, discovery, pretrial motion practice, as well as at trial. This article provides an overview of the different types of video uses and the potential legal implications of each.

VIDEOTAPED DEPOSITIONS

The Code of Civil Procedure allows a party to videotape any deposition. While no prior court order is required, the deposition notice must indicate that the deposition may be videotaped.¹ If the deposition is of an expert witness and is intended to be used at trial, then the notice must include a provision so indicating.² Also, if the videotaped deposition is intended to be used in lieu of the testimony of a treating or consulting physician or an expert witness then the Code of Civil Procedure dictates certain additional requirements by the party noticing the deposition and the videographer.³ The costs of videotaping the deposition fall on the party noticing the deposition, however, are recoverable costs pursuant to Code of Civil Procedure section 1033.5(a)(3).⁴

Some practical considerations are necessary when determining whether to videotape a deposition. First, assess whether the witness is likely to be available during trial. If not, videotaped testimony is likely to be more effective than reading a transcript. However, if you intend to enter videotaped deposition testimony into evidence during trial, it is necessary to notify the court and all parties in writing of that intent, including the parts intended to be offered, within a sufficient time for objections to be made and ruled on by the judge, and for any subsequent editing of the tape.⁵

Second, consider the tactics employed by opposing counsel during prior depositions. If the opposing counsel has a tendency to make unnecessary objections or coach the witness, videotaping the deposition may quell this behavior. While the camera may not be focused on counsel⁶, simply having the camera on the deponent may prevent unnecessary verbal outbursts from counsel.

Third, consider the potential demeanor of the witness. A deposition transcript cannot convey the body language and credibility of a witness, simply the text of their testimony. A video, however, illuminates subtle inconsistencies or idiosyncrasies such as pauses, blinks, glares, stares, hesitations, stutters and mannerisms of an untruthful witness. Conversely, a sincere witness who has no difficulty remembering facts becomes more credible.

Finally, consider whether it would be beneficial to have the deponent draw a diagram of how the accident occurred, demonstrate their use of an allegedly defective product, or reenact an event. If the deponent refuses a request for a demonstration, the party may seek an order compelling compliance with a request for sanctions.⁷

In addition to their use at trial, videotaped depositions can be put to use during alternative dispute resolution proceedings. One example is a Deposition Documentary. A Deposition Documentary is a short but powerful movie that can refine volumes of testimony into a concise presentation that gets to the point, as told by the witnesses who might potentially be testifying in trial. The credibility of a key witness or defendant can be effectively asserted or destroyed using his or her own testimony. Similarly, expert testimony can neutralize other experts. To compile a Deposition Documentary when using multiple deponents, clips are first organized by topic, and juxtaposed to either forensic evidence or other deponents, which reveal the relative strengths and weaknesses of each witness. Filming begins when the first important witness is deposed and editing should start as soon as that videotape is available. The production time and costs can vary depending on the number of deponents that need to be filmed, reviewed, and edited.

1 Code Civ. Proc. § 2025.220(a)(5).

2 Code Civ. Proc. § 2025.220(a)(6).

3 Code Civ. Proc. § 2025.

4 However, in federal court, the circuits are split on whether the cost is recoverable pursuant to 28 USC § 1920(2). (Compare *Morrison v. Reichhold Chemicals, Inc.* (11th Cir. 1996) 97 F.3d 460, 464-65 [cost recoverable] with *Migis v. Pearle Vision, Inc.* (5th Cir. 1998) 135 F.3d 1041, 1049 [not recoverable cost].)

5 Code Civ. Proc. § 2025.340(m).

6 *Green v. GTE Cal., Inc.* (1994) 29 Cal.App.4th 407.

7 *Emerson Elec. Co. v. Super. Ct. (Grayson)* (1997) 16 Cal.4th 1101, 1111-12.

A DAY IN THE LIFE VIDEO

Another useful video tool is recording a day in the life of your client. Day-In-the-Life Documentaries enable a client's injury or injuries to speak for themselves. These videos are often the best way to present compelling evidence to a mediator, arbitrator, defendant, insurance company and/or a jury about the extent of your client's injuries, and how his or her future has been impacted. The extent of most injuries and any attendant pain and suffering, can be accurately demonstrated by capturing daily activities that show how your client's life has been altered in carrying out even the simplest of tasks. The admissibility of these documentaries at trial is based upon the authenticity of the tape as well as weighing whether the tape has probative value or presents cumulative evidence.⁸

A videotape is considered a "writing" pursuant to Evidence Code section 250. To be admitted into evidence, the authenticity of a writing must first be established.⁹ To authenticate a videotape, it may be necessary to have the videographer designated as a witness to testify that the video fairly and accurately depicts the subject matter, and testify as to his or her qualifications, the chain of custody of the film, and how the film was developed and edited.¹⁰ It is wise to keep all unedited video footage. If the authenticity of the video is challenged, the court can then review the entire raw footage to determine the genuineness and accuracy of the video.

Two objections are frequently made to "Day In The Life" videos: (1) the probative value of the video is substantially outweighed by the danger of unfair prejudice¹¹; and (2) the evidence is cumulative. With regard to the "unfair prejudice" objection, judges are careful to ensure that the video was not staged but fairly depicts the injury and its effect on plaintiff's life. Attempts to "stage" the video by overly dramatizing an injury and its impact are vulnerable to this objection. Specifically, close-up shots of agonized grimaces, tears or screams may affect the admissibility of the video.¹²

In *Jones v. Los Angeles* (1993) 20 Cal.App.4th 436 the court was faced with such an objection. Plaintiff was involved in an automobile accident that left her a paraplegic. The "day in the life" video showed her daily activities. The images included being "moved from her bed by two attendants, being bathed, being placed in her wheelchair and shows her attempting to move around in the chair."¹³ The video was narrated by plaintiff's nurse. The court overruled defendant's objection that the tape was more prejudicial than probative on the grounds that "the videotape was relevant on the issue of the extent of Ms. Jones's medical needs and the extent of her pain and suffering."¹⁴ The court determined "the videotape was also probative to aid the jurors in determining the quantum of compensation required based on the extent of her needs.

"These videos are often the best way to present compelling evidence to a mediator, arbitrator, defendant, insurance company and/or a jury about the extent of your client's injuries, and how his or her future has been impacted."

Moreover, because there was an opportunity to cross-examine both Ms. Jones and Ms. Roughan at trial, the risk of any prejudice was greatly reduced."¹⁵ The probative value of the videotape was found to outweigh any prejudicial effect and the trial court's admission of the video was upheld. One point of practice from this case is that both individuals who appeared in the video (narrator and Plaintiff) were able to be cross-examined at trial, which factored into the decision to allow the video.

The second common objection to a "Day In The Life" video is that it presents cumulative evidence. Cumulative evidence is improper for two principal reasons: (1) it needlessly delays the trial; and (2) it threatens to create undue prejudice.¹⁶ Defendant in the *Jones* case objected on this basis, however the court found that the video "best describes the problems Ms. Jones encounters on a daily basis in a way mere oral testimony may not convey to the jurors."¹⁷ The court overruled defendant's cumulative objection and allowed the video. A cumulative objection is, however, likely to be upheld when the video depicts repetitive activities.

An attempt to either keep out or admit a day-in-the-life video may be most effective through a motion in *limine*. A motion in *limine* to admit the video is useful in determining in advance whether the video will be admitted as shown. Otherwise, a successful objection to the video or portions of it during trial may thwart an otherwise sound trial strategy. Likewise, a defendant may want to preclude introduction of the video or portions of the video through a motion in *limine*. While not mandatory, a successful motion in *limine* regarding a videotape will affect the trial strategy of both parties, or, at a minimum, raise the judge's awareness of a potential evidentiary issue during trial.

Finally, an attorney should ensure that the proponent of the video has complied with discovery requests. Often, interrogatories ask if any videotape has been made.¹⁸ These discovery requests usually deserve comprehensive and supplemental responses and should not be ignored. Following these guidelines, a "Day In The Life" video can have a substantial impact on your case.

⁸ *People v. Mayfield* (1997) 14 Cal.4th 668; *Jones v. Los Angeles* (1993) 20 Cal.App.4th 436, 445-46.

⁹ Evid. Code §§ 1400, 1401.

¹⁰ *People v. Estrada* (1979) 93 Cal.App.3d 76.

¹¹ Evid. Code § 352.

¹² *Thomas v. C.G. Tate Construction Co., Inc.* (D.S.C. 1979) 465 F.Supp. 566, 568.

¹³ *Jones v. Los Angeles* (1993) 20 Cal.App.4th 436, 439.

¹⁴ *Id.* at 445.

¹⁵ *Id.*

¹⁶ Evid. Code § 352.

¹⁷ *Jones v. Los Angeles* (1993) 20 Cal.App.4th 436, 446.

¹⁸ For example, see Form Interrogatory 12.4.

VIDEOS USED IN ALTERNATIVE DISPUTE RESOLUTION

We live and practice in an age when a majority of cases filed are resolved through alternative dispute resolution proceedings. In these forums, even the best litigator may never get a chance to deliver the arguments that develop full value from a case. Mediation especially is designed to attack only the issues, and the passion necessary to apply leverage, especially in a personal injury action, is absent. Often, even a brilliant mediation brief can be reduced to little more than trivia when opposing counsel and the mediator skim the brief. This presents a problem: What tools best tell the plaintiff's story and will help maximize plaintiff's recovery?

One increasingly common answer is video productions. Videos can complement a good attorney by presenting important facts identifying the people behind the pleadings. Combined with an effective advocate, video allows plaintiff's counsel to proceed to mediation confident that the defense and the mediator have a firm grasp on the personal and legal arguments supporting the case.

Productions differ in complexity and purpose and include Wrongful Death Settlement Brochures, Legal Settlement Documentaries, and the Hybrid Settlement Documentary. Each have been credited by various attorneys to add significant value to a case by employing 21st century communication techniques—value that may not have been present but for the videos.

Wrongful Death Settlement Brochures focus on the impact of a wrongful death on the plaintiffs' lives. Stories are told using video interviews accompanied with an introduction including photographs of the deceased. The usefulness here is to have each plaintiff effectively communicate the effect of the loss of the decedent.

A Legal Settlement Documentary is best described as an integration of an A&E Biography and Court TV which is produced exclusively for mediation or other pre-trial negotiation. Unlike videos focusing solely on damages, this is a full-length, broadcast-quality movie that also provides a framework within which legal arguments are developed. The goal is to have a well organized presentation assigning liability, illuminating damages, and advancing negotiations.

With respect to liability, animations can be used to re-create the scene of an incident to demonstrate the actual dynamics of the event. Segments from videotaped depositions can also be incorporated. Damages are usually depicted through interviews and demonstrations by the

plaintiff, along with statements by key witnesses, including treating or consulting physicians. Often, medical reports and documentation, economic analysis, photographs, and other graphic depictions are used to generate an authentic, in-depth understanding of the harm the plaintiff has suffered.

Due to the variety of content in the Settlement Documentary as well as the important role it serves in encouraging pretrial settlement, it is helpful to gauge the impact of the video on a neutral third party. The first or second draft of the video is often submitted to a focus group or panel of attorneys for valuable feedback. Production time can vary due to the complexity and developments in the case. One benefit to a Settlement Documentary is that the cost, which can be expensive, may be reduced through modified contingency fee agreements varying from four to nine percent of the recovery. These documentaries can also be produced for a flat fee or on a per-finished minute basis. The Settlement Documentary, however, is normally cost-prohibitive in all but catastrophic personal injury or wrongful death cases.

The final type of video is a Hybrid Settlement Documentary. This presentation is best suited to actions in which recovery is restricted by factors such as low policy limits or by statute (e.g. med-mal). A Hybrid is a mini-settlement documentary that organizes strategically selected, compelling facts with video clips into a presentation lasting five to fifteen minutes. A Hybrid normally takes one to two weeks to complete and is more moderately priced.

When considering using a video in mediation, keep in mind that communications and writings associated with mediation are privileged.¹⁹ Evidence Code section 1119 provides that no writing "that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery."²⁰ The mediation privilege incorporates the definition of "writing" found in the Evidence Code, which includes videotapes.²¹ If you intend to prepare a video strictly and specifically for use during the mediation, mark it "Prepared for Mediation", place it in a separate file to be identified, if necessary, on a privilege log.

In sum, videos are a useful tool that can add substantial value to a case no matter the forum. Of utmost importance is to ensure that once a quality production has been made, it can be used to complement you, the successful advocate, for the benefit of your client. This can be effectively accomplished by reviewing applicable statutory and case authority in advance of the date upon which the video is intended to be used. •

¹⁹ Code Civ. Proc. § 1775.10; Evid. Code §§ 703.5; 1115 et seq., 1152.

²⁰ Evid. Code § 1119(a), (b).

²¹ Evid. Code § 250.

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