

Lights, Camera, Action: Getting the Most Out of Videos at Trial

by Ian McWilliams

Since the early 1990s the use of multimedia presentations at trial, particularly video productions, has grown exponentially. Successful litigators have discovered that using visuals with their persuasive words gives them a distinct advantage in presenting their case to a jury. In this article we describe some of the different types of video productions being used in courtrooms, share tips on ways to prepare your witness and deposition space for maximum effect, and cite examples of successful use of video at trial. We also reveal some trial presentation techniques that can be used by even the most technologically challenged.

Videotaped Depositions

Simply hearing a witness's words recited in open court does not allow a jury to effectively interpret whether an answer is belligerent, hesitant or genuine. The printed word alone cannot show if a witness is confused, hostile or earnest in a deposition response. So, perhaps not surprisingly, the most common type of video presentation viewed in court is the videotaped deposition, which certainly can communicate much more than a transcript alone. It adds the additional communication of vocal tone, inflection and witness demeanor. Hearing *and* seeing testimony from a witness can add credibility to an expert's report if that expert appears credible. It can also go a long way towards impeaching a witness's credibility if that witness appears uncomfortable or contemptuous. As a picture is worth a thousand words, a moving picture can bring words to life.

There are many reasons to capture testimony for viewing. Economic reasons include the opportunity to save money by preserving the testimony of a paid expert to be played any time during trial rather than having them wait in the gallery or hallway until they are called. Medical experts oftentimes will not agree to appear in person for less than a full day's fee because of the disruption it may cause to their schedules. Video depositions are a useful tool when dealing with out-of-state or otherwise unavailable witnesses. And by having videotaped testimony available during trial, potentially costly delays can be eliminated and valuable court time can be used to full effect. Videotaped testimony can be a very useful tool even when a witness will appear live before the jury. Video clips from depositions can be used to impeach live testimony when answers differ from what was said under oath during discovery. It is very startling to a jury to see a witness contradict themselves, and much more effective than simply asking them to read aloud their prior testimony. And with modern presentation tools the editing and playing of video clips can be almost instantaneous. With a few clicks of a mouse, transcripts can be searched, testimony highlighted, and video clips created and played to dramatic effect.

How Does It Look?

But just showing a moving picture is not enough. How that picture and the elements it contains look can influence an audience to take action, in either a positive or negative way. A poorly produced video can distract the audience from the message and defeat the purpose for showing it. When planning for an audiovisual deposition, much care should be given to the surroundings and to the look and actions of the witness. You need to conduct your examination in an environment free from distractions in a space with enough room to accommodate not only a witness, court reporter and counsel, but also a videographer and all the necessary equipment. The space should have adequate,

even lighting so no additional lighting instruments are needed, as they tend to be bulky and give off a tremendous amount of heat. If a room with outside windows is used, then shades over the windows might be necessary to prevent too much sunlight from adding unwanted shadows or hot spots to the picture. A quiet location is desirable as microphones will be used to capture the audio and may also capture distracting noises from outside the room. Setting the witness against a blank wall or neutral backdrop will eliminate distractions from the picture. While you may be tempted to use a bookshelf full of law books or artwork as a background, avoid this as the shelves or other objects may look as if they are growing out of the witness' ears and distract the jury from the testimony. Eliminate clutter from the table such as water pitchers and glasses or piles of paper as these can also draw attention away from the testimony.

As for your witness, have them dress in a comfortable and professional manner. Ask them to dress as though they will actually be in the courtroom. Avoid loud ties, checks or bold stripes as these fabrics can become distorted on screen. Also, make sure they do not wear noisy jewelry as the microphones will pick up the sound and could actually drown out the words being spoken by the witness. Solid black and white fabrics can play havoc with exposure and contrast in the picture. Pastel shades, particularly light blue, work well and provide for a pleasing color balance. Make sure all cell phones and PDA devices are turned off, not just set to vibrate, as these devices have a tendency to interfere with the audio signal being recorded. As a rule of thumb, if you wouldn't have the device turned on in a courtroom, don't leave it on in the deposition location.

As to how a witness should conduct themselves during examination, make sure they act naturally. Exaggerated motions, leaning back or rocking in their chair, or stiff rigid posture can convey to a jury a sense that the person speaking cannot be trusted or has something to hide. A relaxed posture, with feet on the ground and the torso leaning slightly forward, can display earnestness and a sense that the witness is listening intently to the questions and is serious about giving a straightforward, honest answer. Instruct your witness not to look directly at the camera, but rather at the questioner. Or, if they are being asked to testify about a document, have them look at the paper in front of them. Remind your witness that they must always allow the question to be asked, and allow time for an objection to be lodged before they answer. Just as a court reporter cannot record two voices at once, a video editor cannot cut out an objection when the answer to the question is being stated at the same time.



What Is the Best Depo Video Format?

Once the deposition has been taken and you are packing up to leave, your videographer will ask you for your copy order. Just as the court reporter offers different formats for your convenience, so too does the videographer. When I started videotaping depositions there was only one format available, the VHS tape. With the growth in the use of personal computers in the modern law office, the choice of formats has expanded. Now a video can be delivered on digital media in the form of CD-ROMs, TV-DVDs, Digital Video Transcript (DVT) disks and even delivered streaming over a secure Internet connection.

If you plan to use the deposition video at trial, the most effective format is the Digital Video Transcript. With a DVT the reporter's official transcript is synchronized to the video file, linking the printed word with the spoken testimony. With the testimony synched you can easily search for segments to view without having to fast forward or rewind a tape while stopping to find your place in the paper record. Simply highlight the first line of testimony you

wish to view and double click on the highlight. The video will automatically be cued up to that portion of the proceedings and you can play the video from there. Most DVT disks will contain a software program which will allow the user to conduct keyword searches, index searches and basic video editing functions. You can highlight a section of testimony, and, using the easy to follow instructions, create a video clip that can be exported into trial presentation or multi-media presentation software, can be saved to a hard drive or portable media for later viewing, or can be encoded into a file small enough to be e-mailed to a client or colleague for viewing. Edited video clips can be combined into a presentation in any order and used at trial. Rather than show a jury eight or more hours of video testimony you can create a quick and effective presentation without all of the pauses, non-responsive answers and stated objections that can be prevalent during a long deposition. And all of these processes can be accomplished by even the most basic computer user. You don't have to be a professional video editor to make great presentations.

These are only a few of the many uses for video productions for presentation at trial. The only limits are your imagination and rules of procedure. Video productions need not be costly and can be effective tools in your arsenal.

Experience Counts

A professional videographer, particularly someone who has been certified as a Legal Video Specialist (CLVS) by the National Court Reporters Association (NCRA), can bring a wealth of experience and knowledge to your projects. As a videographer and trial presentation technician I have been personally involved in presenting evidence in close to two hundred jury trials and there is no doubt, some uses have been more effective than others.

Impeachment Now

During a personal injury civil trial one of the key witnesses for the plaintiff was the administrator of the facility where the injury occurred. The witness' deposition testimony had been videotaped in case the defense refused to produce this out-of-state witness at trial. As it turned out, the witness did appear and during direct testimony made statements inconsistent with previous testimony. Because we had made sure to synchronize the transcript and video, and because we were using modern trial presentation software, we were able to instantly retrieve the deposition testimony and create video clips of the previous answers to the same questions being posed live. The effect was stunning. As the witness was on the stand we projected, on a large screen right next to the stand, the prior testimony in the witness' own words. In doing so we were able to plant doubt in the minds of the jurors as to the truthfulness of the witness' testimony and drive home the point that counsel was trying to make: the facility had indeed tried to cover up their actions after the accident. The result was a verdict for plaintiff and substantial monetary award with punitive damages.

Show us please

Video cameras in the courtroom? They can be useful for much more than Court TV. During two different product liability trials we used small video cameras to give jurors an intricate view of the products in question. In one case for defense counsel, we rigged a small camera above a gas stove and projected onto a large screen an overhead view of the inner workings of the stove as an expert witness disassembled and explained the construction and operation of the device. Rather than try to crowd the jury around the stove as it was explained, we were able to provide a clear and up close view to every member of the panel and demonstrate that used properly, the product was designed with safety foremost in mind.

In a case for plaintiff counsel, we needed to show the jury the inside of a truck tire where a design defect had caused the inner tread to come apart and fail, which counsel contended had caused the accident which had harmed his client. One option was to cut out the portion of the tire in question and publish that sample to the jury. But that would have altered the evidence and would have taken a great deal of time to pass around the sample as the expert witness testified as to what was being shown. The solution was to mount a miniature flashlight to a small “lipstick” camera (a video device about the size and shape of a tube of lipstick) and, with the intact tire mounted on a display stand and with me seated on the floor in front of the jury box, counsel proceeded with the direct examination of the expert as I stuck the camera inside of the tire and displayed the image of the part in question onto video monitors mounted in the jury box. The witness was able to explain to the panel, all at the same time, what they were seeing and how this portion of the tire affected the overall safe operation of the product. Of course, using video technology in court is no guarantee of success, but it makes sense to use all available technology to your advantage. If you don’t, your opponent might use it and leave you behind the times.

Tips from the Courtroom Roadies



In Massachusetts, we are fortunate to have a wide variety of architectural and technological styles at use in the court systems. From the new U. S. District Court building on Fan Pier in Boston to the other end of the spectrum, the Charles Bulfinch-designed Essex County Superior Courthouse, built in 1805 in the picturesque Town of Newburyport, the design and usage of technical presentations are subject to the various venue capabilities. These capabilities must be kept in mind when planning and implementing your trial technology. These tips should come in handy for any location where you may practice. They have been gathered through much trial and error throughout the past decade.

Oh, say can you see

There is a wide range of display equipment to choose from when designing a courtroom presentation. Some buildings are designed with technology in mind, such as the U. S. District Court in Boston, where courtrooms there are equipped with state of the art presentation tools. These include individual computer monitors in the jury box, the bench and on counsel tables; telestrator touch-screen monitors on the witness stand and counsel podium; and audio-visual playback devices built in to the room. Attorneys are invited to make the most of the equipment and use their technology to full advantage. In other venues, particularly at the State Superior Court level, display equipment must be brought in because nothing is available in the courtroom but electrical outlets (and many times, very few outlets at that.) When planning for display equipment, care must be given as to the layout of the courtroom. In order for all jurors to have an unobstructed view of the visual evidence, oftentimes counsel will find their options to be limited. We have had the greatest success using small video/computer projectors and large, portable movie screens. Not only can they be used in confined spaces, but by having one place for all the jurors to focus their attention, counsel can often control where the members of the panel look as well as the amount of time they spend studying the evidence.

We also recommend using of the “rule of threes”. For example, if the witness stand is to the right of the jury box and the counsel podium is to the left, then position the display screen in the center, directly across from the jury box. That way the attention of the panel can go from question, to display to answer without having to focus attention somewhere out of this visual arc. And if a deposition video is to be played, then jurors do not have to look at an

awkward angle or crane their necks to get a good look at the picture. The care and comfort of the jury should be foremost in the mind of the presentation technician and the layout of the room and equipment will go a long way towards maximizing your use of the technology.

Final Thoughts

A successful litigator must wear many hats and develop and master many diverse skills. Investigator, counselor, legal expert and, most of all, teacher. These are just some of the things you must become and talents you need to successfully advocate for your client. As with any discipline, tools are available to make the job easier. Video technology is one such tool, and by using the technology you can bring to life your thoughts and words and create a vivid image in the minds of your jurors. By capturing their attention and teaching them everything they need to make an informed, just decision, you will have done your job to the best of your ability and find success in your endeavors.

Fade to black...

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July 2009's Favorite Thing!

Every issue The Jury Expert features a favorite thing--something very special that we think you should know about to inform, educate, entertain, or otherwise enlighten you. And best of all, our Favorite Things are always free!



July's Favorite Thing is a terrific resource from the National Center for State Courts (NCSC). The Jur-E Bulletin comes out every Friday and reports on news, research, and events that have to do with the jury system. In any given week you may read about activities in a particular courtroom; research on jury selection/deliberation; or newspaper articles featuring stories about juries and courtroom like the one on "old shoes lead to a mistrial" featured in a recent Jur-E Bulletin.

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13,450+

13,450. That's the number of reads our May issue of *The Jury Expert* had as of Monday, July 20 (the day before we published this issue). Our online debut issue (in May 2008) had a few more than 500 reads. Over the past year we have grown a lot and we are grateful to the thousands of you who read our pages every issue. And even more grateful (dizzily so!) when you pass us on to your friends and colleagues.

We are also grateful to the academics and researchers who write for us and turn theory into practice and especially grateful to the members of the American Society of Trial Consultants (ASTC) without whom we would not exist. ASTC member trial consultants continue to inform, educate and surprise us with creative and practical articles focused on improving litigation advocacy. So thanks to all of you and to paraphrase a young Sally Fields--"you like us, really like us".

This issue is filled with lessons for uncertain times. We have articles on terror management theory and how to use it at trial, two articles on damages in times of recession (does it make a difference in awards and if so, how?), getting the most out of videos at trial, exploring the TODDI defense (this other dude did it!), how to prepare your witness for the environment change from office to actual courtroom, and negotiating in the new millennium. Plus our July favorite thing and a book review. It's hot outside! Stay inside, enjoy the air conditioning and read *The Jury Expert*!

--- *Rita R. Handrich, Ph.D.*



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