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The Forensic Engineer in Videotaped Depositions

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Abstract

Video has become pervasive in our culture, and the courtroom is no exception. In recent years, the trend toward video recording of expert depositions has been growing. Forensic Engineers are often videotaped at deposition because their testimony is expected to be a pivotal factor at trial. Jurors are accustomed to receiving information from a video screen, and are often more attentive than when a transcript is being read. Videotape conveys information one cannot get from a written transcript, such as appearance, body language, tone, and confidence. Video depositions also provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition.

History

Before the 1980 amendments to Federal Rule 30, video depositions were not allowed. From 1980 to 1993, a party had to obtain the consent of the other parties or get a court order to take a video deposition. Before 1993, there was no right to a video deposition in Federal Court. With the 1993 amendments and the proliferation of video into many parts of everyday life, video testimony in the courtroom has become common. A series of decisions has held that the 1993 amendments created a right to a video deposition. The rules vary somewhat from State to State, but most jurisdictions follow the Federal rules.

Current trends

Judges and attorneys prefer video depositions for a number of reasons. Most importantly, to capture the demeanor of the witness, which would be lost with only a transcript. Courts have opined that video is an important tool for jurors. Videotape depositions are considered a superior means of presenting the deposition testimony of a witness, because they allow the jury to better assess the credibility of the witness.

If the witness won't be present at trial, the jury will appreciate being able to watch the deposition on a TV monitor, as opposed to having it read to them by lawyers. Even when they know the witness *will* be present, a videotaped deposition can be more impressive as a vehicle for impeachment than the alternative. Some judges will even allow portions of videotaped depositions to be played during opening and closing statements.

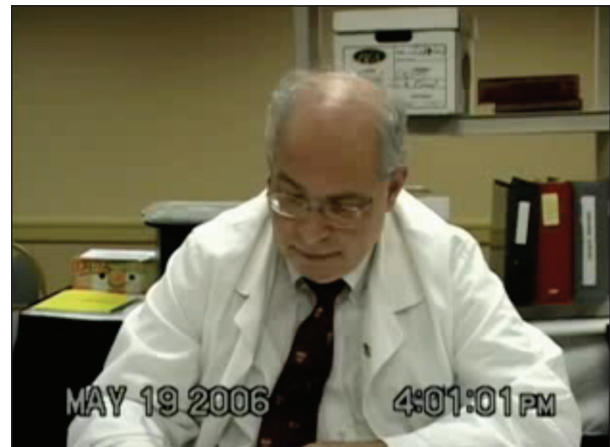
In both state and federal actions, parties must provide notice of the video recording method if it is to be used. A party need not state that stenographic recording will be used; that is the default method. However, if non-stenographic recording will be used, “the notice shall designate the manner of recording and preserving the deposition.”

Another advantage of videotape is that it will have the effect of putting the attorneys on their best behavior, even if they might be irrational and abusive when the camera’s not there. Attorneys will still make objections when appropriate, but they’re likely to be made in a much more even tone of voice, without all the melodrama.

How it is done

The mechanics of videotaping depositions can create concerns for attorneys. Issues may include the selection of the room; the backdrop, camera selection, camera location, angle, lighting, and other subtleties. There needs to be agreement on which activities will be on the video record.

The current usual practice is to have a color video camera focused on the witness, with microphones for the witness and the attorney conducting the deposition. If the parties disagree on the mechanics or conditions of the videotaping, any objections must be raised at the time of the deposition or else they are waived.



The lighting and background can be un-flattering to a witness on video

Tips and Cautions

Both transcribed and video depositions will cover the same questions and answers, but video deposition testimony also involves courtroom presentation skills. The witness is “on TV”, and the medium conveys messages beyond the audio track.

As the main character in a TV drama, the witness must look credible at all times. This includes not only while speaking, but between questions, between answers, and during any delays. For an instructive example of non-verbal communication, see the 1960 televised debate between John Kennedy and Richard Nixon.¹



Giving a video deposition requires a witness to maintain a continuous level of self-awareness above and beyond that which is required for a transcribed deposition.

Non-verbal behaviors are extremely important in communicating credibility, and due to the nature of the camera, these behaviors are magnified. Therefore, distracting behaviors³ must be eliminated or minimized. Straightening a tie, twirling a beard, adjusting glasses or shifting around in a chair are signs of nervousness. Nervousness can be interpreted as defensiveness or as having something to hide, so a calm and credible presence is crucial in a video deposition.



Even people who we know to be credible may appear nervous² in a deposition.

In some states, video depositions can be used in lieu of live testimony even if the witness is present in the courtroom. Thorough preparation is especially important for video depositions because unprepared deponents not only make errors, they appear nervous. As noted earlier, the camera exaggerates this appearance.

Given these aspects of video depositions, the following are just a few hints for effective testimony:

- Be aware of non-verbal communication. Effective non-verbal communication includes leaning forward, listening attentively, and using only minimal hand gestures. Avoid the use of a swivel chair or you will be tempted to swivel in it! Eye contact should be directed toward the questioner, not at the camera directly.
- Conservative clothing is a must for a video deposition. Dress as you would for court.
- Be aware that time has greater significance in a video deposition. The customary instruction to the witness is to pause and take time before answering. On a videotape, the pauses seem longer, and pauses can suggest to jurors that you don't know the answer to the question. Accordingly, in a video deposition, you should answer as quickly as you can after listening carefully to the question. You should not to play with or linger over documents after you have reviewed them, but rather should look up and listen for the attorney's question.
- Sit comfortably, but reasonably straight, both feet on the floor, hands on the table in front of you.
- Sit still. Even occasional movement might be interpreted as squirming.
- Sit straight. Often, the more tired you become, the poorer your physical posture becomes and poor physical posture usually creates a poor impression. Having your feet flat on the floor helps to maintain good posture. (Make sure that you have a comfortable chair that is not unduly relaxing.)

- Speak in your normal voice, but try to invoke reasonable gestures or inflections.
- Reading documents. Of course, you must take the time to read any document that is handed to you if you are going to be asked questions about it. However, try not to be unreasonably bent over the document. Instead, hold the document somewhat up. When you are not reading the document, switch your eyes back to the examiner. If the document has any length, ask if you can go off the record and read the document without the camera and lights on. Even if the request is denied, it may be of effect.

Avoid arguments ⁴ on camera. While the deposition involves adversarial parties, your demeanor must remain professional at all times, even when challenged.

Future trends

In addition to documenting a deposition visually for use at trial, video is also being used to facilitate “video-conference” depositions. Video-conferencing has become popular for meetings in industry, and can also be used to allow parties in two or more locations to participate in a deposition. A video-conference deposition can be undertaken with or without recording on videotape.

The latest twist on video-conferencing is “online” depositions using live-note technology. Participants may be in multiple locations, each connected via the internet with live audio, video and a real-time transcript. Participants in remote locations can even be linked by private text messaging.

Conclusions

There is no doubt that we live in a video world. Video cameras are embedded everywhere from the battlefield to the football field. The legal field is no exception. Quite simply, legal videographers assist attorneys in presenting a more compelling case, whether by videotaping depositions, producing settlement documentaries, or assisting in the courtroom. The video record can communicate much more than the transcript alone. Most importantly, use of video at trial decreases the chance that most jurors, who are accustomed to receiving information in visual form, will become bored and lose interest in the case.

References

VIDEO LINKS IN THIS PAPER CAN BE FOUND AT:

1. Kennedy-Nixon debate: https://www.youtube.com/watch?v=zHG4535W_o
2. Nervous: <https://www.youtube.com/watch?v=eKcPx2jD5to>
3. Distracting behaviors: <https://www.youtube.com/watch?v=-TzdPv9J0E>
4. Arguments: <https://www.youtube.com/watch?v=td-KKmcYtrM>