



Portions of this trial were previously recorded

Using video depositions at trial



Cooper

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The lawyer was cross-examining the defendant. “Just before your car struck my client, you were traveling 35 miles per hour.”

“No, I had slowed to 10 miles per hour.

“Playing video from the defendant’s deposition, page 32, lines 5-14.” The lawyer waited for the defense counsel to confirm there was no objection.

The lawyer then played the video. The same lawyer’s voice came over the speaker, “Just before your car struck my client, how fast were you traveling?”

“35 miles per hour.”

Foundation

That moment – the defendant appearing demonstrably different in trial – is the moment we strive for when considering whether to video a deposition. It can dramatically affect the trial’s outcome. There’s a great deal of groundwork needed to do it right, though.

Hi Fi

Deposition locations, court reporters, and videographers are fungible, right? Wrong. If you plan to use video, you need to consider the deposition setup itself. The doctor’s office with a constantly ringing phone? Not so much. Think about the use before you agree to the location. Deposition recordings are hard enough to follow without adding additional distractions.

If the recording is poor, alert the jury before you use it. Opening statement is one way. “The recording has a few distractions – the doctor’s office phone rang during the deposition. Please don’t be distracted. What the doctor said is important.”

In synch

Most court reporters now offer video synching. What is synching? In order to use the recording in a trial presentation program like Trial Director or Sanction, the video needs to be matched to the court reporter’s text. Otherwise, all you have is a video. This does not happen automatically. Synching is done with voice recognition software. The results are good but not perfect. You should upload and test the disk well before trial. Most synch problems are easy to solve (but not when discovered the night before trial.)

I do not like it, Sam-I-am

Many judges disfavor video. Why? Past bad experiences. Video once required that lawyers argue over objections and then have a video editor recut the excerpts. This meant a trial delay. The technology has improved. Editing takes a few seconds in the courtroom. But judicial memories remain. Many judges still put up roadblocks. The easiest one: Failure to provide notice.

Notice

One needs to identify the intended excerpts with sufficient time for objections to be made and ruled on. (Code Civ. Proc., § 2025.340, subd. m.) “Sufficient time” is not defined. Nor does this rule appear in most calendaring software. Best practice: calendar it one week before trial.

Prepare and file the notice as a separate pleading. Include the excerpts you intend to play. Omit the objections. Most lawyers do not know exactly what they want to play, so this may sound daunting. Do your best and be over-inclusive. Most judges use the excerpts as discussion points, not written in stone. Another concern: showing your cards. This is another reason to be over-inclusive.

Use for any purpose

“But can’t I use a party opponent’s deposition for any purpose? I should be able to play it without notice.” Yes – you can use it for any purpose. That means the clips don’t need to impeach. But the judge can require you to read the testimony (rather than show the video) unless you provide notice. Some judges are not familiar with this nuanced evidentiary rule. Judges with a criminal background or judges who were elevated without significant civil trial experience might not know it. Citing this rule in your notice can help. Our firm can provide an exemplar notice if you ask.

Why play a clip that does not impeach? Because most witnesses are better prepared for trial. That damning response – the eye roll, the snark – gets cleaned up. Consider playing the clip instead of asking the question.

Impeachment?

Technically, you need not provide notice for impeachment. In application, best to provide notice of intent to use video. The judge could decide under Code of Civil Procedure section 352



that video will take more time than reading. Under an abuse of discretion standard, reversal is unlikely.

Video impeachment is done the same way as with a regular transcript. Ask the *exact* question you asked at deposition. Type it out and read it. One word change can alter the impact. Don't ask the witness to explain. Play the clip, pause, and then move to the next question.

Can you hear me now?

Making jurors strain to hear tinny audio won't work. Nor will computer

speakers. Test the courtroom prior to trial. You can hook into some courts' audio systems. Even that may not be crisp enough. Powered studio monitors are ideal. One will fill a courtroom. An example: M-Audio's BX5 D2.

Outro

Back to our cross-examining lawyer. The jury gave the lawyer the requested verdict. When talking with the jury, jurors said the most impactful moment in trial was the video impeachment. It took a

great deal of work to get to there. But for our lawyer, it paid off.

Miles B. Cooper is a partner at Emison Hullverson LLP. He represents people with personal injury and wrongful death cases. In addition to litigating his own cases, he associates in as trial counsel and consults on trial matters. He has served as lead counsel, co-counsel, second seat, and schlepper over his career, and is a member of the American Board of Trial Advocates. Cooper's interests beyond litigation include trial presentation technologies and bicycling (although not at the same time.)