

# Technology & Management

## Video: The Changing Face of Depositions

As recent events have shown, technology has revolutionized the way modern wars are fought. Likewise, technology in the courtroom is transforming how trials are conducted.

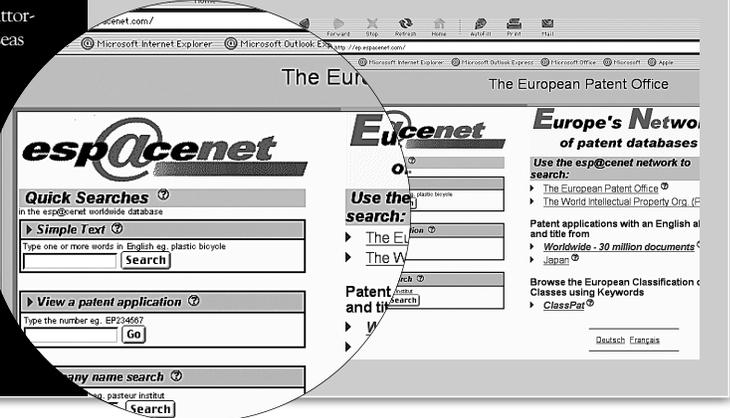
The presentation of videotaped deposition testimony, either as a direct examination for an unavailable witness or as part of a cross-examination, is one of the most important innovations offered by modern trial technology.

Indeed, the use of videotaped depositions to impeach a witness is often standard practice in high-stakes litigation, and features like high-resolution, high-impact

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## LAWYERS AND TECHNOLOGY

BY SUANN INGLE AND MARK BINI

projection screens for jurors and judges and the ability to edit video taped deposition designations on the fly — that is in real time at trial — may provide the seamless presentation that clients are hoping their trial attorneys can provide.

The decision to pursue an advanced trial presentation package is, of course, dependent on a client's ability and willingness to pay for it, but where the stakes are high, it is a disservice to a client to present to a jury without advantageous multimedia communications tools.

### Relevant Factors

Attorneys should consider the following factors regarding the videotaping of a deposition:

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- Will the witness' demeanor detract from his or her possible value to the case? A witness may be so volatile that even video taping them may reduce credibility. For example, in a contract case between a car dealer and manufacturer, one of the dealers was so unstable in his responsive style that merely watching his manner may have led the jury to find him and his company negligent.

- Is the actual video production cost prohibitive to the case? This is rarely true given court reporter costs in the first place. Court reporting agencies often offer video as one of their add-on services.

- Is it highly unlikely that the case will go to trial? Never say never, and attorneys who do may be doing their clients a disservice. Indeed, any competent litigator knows the importance of preparing the best case possible, even if the case will settle long before trial. In fact, being trial-ready helps in the settlement negotiations.

- Does the possibility of seeing the deponent outweigh the value of his or her testimony? Actually seeing a witness, even on video, may soften the sting of bad testimony. Thus, even if an attorney has elicited extremely damaging testimony from a witness for the other side, the attorney may not want to let the jury see the witness on

video due to the sympathies that any "connection" with the witness may arouse.

For example, many of former President Clinton's most ardent detractors were disappointed to find that the people who had seen parts of his now-famous Monica Lewinsky deposition actually began to soften their judgment of him, boosting his public appeal. Although Mr. Clinton is certainly more telegenic than the average witness, do not underestimate the powerful effect, both positive and negative, that watching video of a witness can have on a jury.

Once the decision to videotape has been made, there are numerous options that will affect the way in which it is used if and when a case goes to trial. The following factors do not replace the need for a qualified, professional legal videographer, but instead represent some of the steps that make the final product as useful as possible to attorneys preparing for trial. These are simple points, but if not considered can mean the difference between a good trial presentation and a great one.

### Two-Camera View

Regardless of whether the end product will include a view of the examining attorney, some parties insist on the two-camera view

during the deposition purely for "behavior modification" of one side's attorney.

In fact, some judge's have found the two-camera view distracting or useless, and therefore have not allowed it, but the attorney being videotaped certainly cannot count on that.

## Quality Sound

The video sound quality is of great importance to the seamless and dramatic presentation a good trial attorney seeks.

Critical testimony should not be presented with such bad sound that the jury must strain to understand what is being said, let alone comprehend its significance.

Unfortunately, by the time of trial, there is very little that can be done to enhance sound. Therefore, it is a good idea to make sure that during the deposition the witness is speaking directly into the lavalier microphone, and that it has not slipped behind a tie or wedged into a dress collar. In most instances, an examining attorney must depend on the videographer monitoring the sound through headphones.

Used less frequently, unidirectional microphones — like those used by radio newscasters in old movies — record a higher quality, but come with their own characteristics and nuances. They may feel intrusive or intimidating to a deponent who does not like sitting in front of a mic stand and speaking directly into a microphone.

These microphones may make some deponents feel as if they are being interrogated at a congressional hearing. Of course, depending on whom the deponent may testify for at trial, an attorney may or may not wish to create such an atmosphere.

Most audio-visual equipment has a meter indicating the volume of incoming audio levels. The meter typically consists of a needle that will bounce as high as the volume of the sound being recorded. The meter will also show the optimal volume input range for recording, which is somewhere below the highest point of the needle.

If sound is recorded at very high volume levels, it will distort, and when played back it will be garbled and of low quality. Thus, the attorney should check with the videographer, and look at the audio input meter to determine if the sound being recorded is coming in at a good recording level.

A sound check should be conducted to make sure the equipment is working well. The videographer should tape a short question and answer between the attorney and deponent, and then play it back to make sure there are no audio and visual problems.

Even though the initial sound levels may have been good, the videographer should continue to monitor the audio input during the entire recording. The best way for a videographer to do this is to keep an eye on the audio input meters, and to wear headphones to listen to the sound being

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recorded. This insures that the videographer can correct any problems that occur during the course of the deposition.

## Video Clips

The use of deposition testimony in preparing witness examinations is made much more interesting and effective through the use of video clips.

The creation of video clips is much like the traditional preparation for trial associated with the designation of deposition text to be read into the record. Attorneys must pore over the depositions, and identify those portions that they wish to be played via videotape for the jury.

Although an attorney may wish to make initial identification of useful video deposition clips by simply reading through the deposition transcripts, as this is usually a much quicker process than actually watching all the taped depositions, the attorney should watch every clip he or she plans to use before ever presenting it to a jury. Indeed, attorneys should review video clips if only to guard against the occasional, but potentially significant, transcript error.

The magic of the video clip is that it provides a human content lacking from the straight reading of a deposition transcript,

and while a deposition may read well, the video clip may not play well. Winnowing such clips from the attorney's arsenal, and noting the particular effectiveness of a clip that may read dryly, are the sorts of keen observations that will insure that the well-prepared attorney makes a winning presentation.

After the clips have been identified, a trial technology expert can record them as individual video clips. An infinite number of clips can then be easily accessed by scanning a corresponding bar code with what looks very similar to the "price guns" used in supermarkets and department stores. Pre-fabricated, bar coded video clips can help make trial presentations appear seamless by making such clips easily accessible.

Attorneys frequently make the mistake of making their video clips too long. Just like clips used in radio and TV news programs, video clips used at trial should be short, punchy, and dramatic. Television and radio reporters understand that their audiences have short attention spans, and so they purposely use short, dramatic quotes and sound bites to add drama to their reports. As a result, video clips rarely last longer than 15 seconds. At trial, when used dramatically, video clips can add another dimension to the presentation, and powerfully interest and affect a jury. A short, decisive video clip of a witness making a statement contrary to what he or she just testified to on the stand can devastate the credibility of the witness.

Video clips that are too long and lack bite, however, will only dull the jury and deaden the impact of more effective impeaching evidence that may be imbedded in the long clip.

## Conclusion

Videotape and computer technology have changed the face of the modern courtroom.

Although the skills required today of a superior trial lawyer bear much similarity to those required in the days of Clarence Darrow and Bill Fallon, the tools of the trade have changed.

Rather than resisting them, trial lawyers must embrace these new tools. Those who do not quickly risk rendering themselves extinct.