

# New York Law Journal

## THE USE OF VIDEO DEPOSITIONS AT TRIAL

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**By Ben Rubinowitz and Evan Torgan**

The astute trial lawyer must always be aware of the jurors' ability to process information and effectively learn from that information. Perhaps this is why trial lawyers have long familiarized themselves with the psychological concepts of primacy and recency - - that which a juror hears first and last will be far more memorable than that which has been lost in the middle. Of equal importance is the psychological concept that information that we both see and hear is processed and retained better than that which we hear alone. Studies have repeatedly shown that people recall 65% of the information that they have seen and heard after 3 days, when compared to 10% of information that they have only heard.<sup>1</sup>

It is against this backdrop that lawyers must carefully consider the use of the video deposition as a tool at trial. Both the Federal Rules of Civil Procedure (F.R.C.P. 30 (b)(3)) and the C.P.L.R. (§3113(b)) permit depositions to be videotaped without a showing of "special circumstances" provided appropriate notice is given and procedural rules are followed. The question at the outset, however, is not whether you can take a video deposition, but whether the video deposition is appropriate for the specific case. The issue is whether the

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<sup>1</sup>See Andrea Mosmann, "Communicating with the 21<sup>st</sup> Century Juror," 10 Voir Dire no. 3 (2003).

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video will provide insight and information that is not available from a written transcript alone. In basic terms, the question is always whether the video will help or hurt your cause.

There are certain obvious reasons to videotape a deposition. Age, illness and infirmity of the witness must always be considered. Additionally, if the witness is outside of the subpoena power of the court or likely will be difficult to track down in the future, the video deposition is the best way to preserve his testimony. Careful consideration should be given to these factors prior to noticing a witness for deposition. The failure to videotape such a witness will likely result in a tactical disadvantage at trial. Needless to say, it is hard to think of anything more boring than reading a long and complicated deposition- - a not so uncommon event - - that will likely succeed in creating nap-time for the jurors. That same deposition when presented as a video to the jurors will unquestionably hold their attention for a greater period of time and serve to enhance the presentation of proof.

The video deposition also has certain "behavioral" advantages. Consider the situation in which you know, prior to taking the deposition, that your adversary will likely be overly aggressive, annoying or obstreperous in defending the deposition. Knowing that these tactics will be preserved on tape will cause the defending attorney to modify or curtail such behavior. While it goes without saying that jurors will respect an attorney for being courteous and polite, the converse is also true. Rude and nasty conduct will unquestionably work to the attorney's disadvantage. The reality is that most people are far more conscious about their appearance and behavior when they know they are being videotaped.

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Not only does the video force the rude or nasty adversary to be polite, but it also works to modify the “general” instructions used to prep the witness. Often, without a video, the attorney defending the deposition will tell the deponent to take as much time as is necessary before answering the question. Without a video, there is no record to reflect how long it took the witness to answer the question. All that is memorialized is the cold written question and answer with no record of time. With the video, however, the witness who thinks long and hard before each answer might come off as one who is less than candid. Clearly, the non-verbal response by a witness who pauses for too long a period of time between the question and answer runs the risk of being viewed as dishonest.

## OLD v. NEW

For years, trial lawyers have studied how to properly impeach a witness through the use of prior inconsistent statements. Lawyers yearn for that “gotcha” moment when conducting a cross. But the old fashioned ways of impeaching a witness with only a transcript in hand are fading fast. The times are indeed changing. Jurors expect more than reading from transcripts. Jurors are used to five-second sound bites from talking heads on television and videos viewed on the computer. Indeed, younger jurors have never known what it is like not to be connected with a phone or tablet. But before a trial lawyer jumps to the video playback, consideration must be given to the manner in which the question was asked and answered.

Consider the following scenario: a police officer investigates a motor vehicle accident and writes up a police report. The municipality for whom the police officer works is a defendant in the case. At his

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deposition the officer is asked multiple questions about his independent recollection surrounding the circumstances of the accident to which he replies “I don’t remember”, “I don’t know” and “I have no idea.” At trial, however, this same police officer testifies that he now remembers the accident, the specific location of the vehicles and the traffic signs that were in place at the time of the accident. Clearly, this is a situation which is ripe for impeachment. Assume that there was a video deposition of the officer and that it was available for use at trial. While the trial attorney might view this as a “gotcha” moment to show the “Dr. Jekyll - - Mr. Hyde” switcheroo, there are times when the attorney should resist the temptation to “go to the videotape” immediately. The reason for this is two-fold: First, the witness should be properly set up in preparation for using the video. Second, the information that is not on the video can be just as powerful, if not more so, than the video itself. As with all impeachment, the witness must be locked into his previous answer:

Q: Officer, you just testified that you had a specific recollection of the accident, true?

Q: You just testified you specifically recall the location of the vehicles, right?

Q: And you just testified that you specifically remember the signs that were in place at the time of the accident, correct?

Q: No doubt about that, right?

While the trial attorney could go right to the video and impeach at this time, doing so takes away from an equally destructive part of the cross.

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- Q: You were questioned under oath at a deposition two years after the accident, true?
- Q: Today, more than six years have gone by since the accident?
- Q: Prior to coming to court, however, you met with your attorneys, right?
- Q: I'm not asking you what was said, but we can agree your attorneys were not present at the accident?
- Q: In fact, the attorneys who represented you at the deposition were different attorneys than the ones who represented you now, true?
- Q: You met with your present attorneys more than once, true?
- A: Five times.
- Q: You and your attorneys went to the scene of the accident, true?
- Q: Things were shown to you?
- Q: Things were pointed out to you, right?
- Q: And after meeting with your attorneys five times, you now recall the accident location?
- Q: And after meeting with your attorneys five times, you now recall the street signs?

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Q: And after meeting with your attorneys five times, you now recall the location of the vehicles?

At this point the attorney can move in for the kill before ever showing the video.

Q: But that wasn't always your testimony, right?

Q: In fact, two years after the accident you didn't remember the accident location, true?

A: That's not true.

Q: (Counsel page 51 lines 6-10)

Isn't it a fact you were asked the following question and gave the following answer:

Q: Where was the accident location?

A: I don't remember.

Q: Isn't it a fact that two years after the accident you didn't know what street signs were there?

A: That's not true.

Q: (Counsel p. 52 lines 3- 10)

Isn't it a fact you were asked the following question and gave the following answer?

Q: What street signs were in place at time of the accident?

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A: I don't know.

Next, the trial attorney can get additional mileage by forcing a denial of relevant facts. Clearly, the witness will not want to admit that individuals not present at the accident scene suggested answers designed to enhance the defense position.

Q: Did anyone who wasn't present at the accident suggest an answer to you?

A: No.

Once the witness has denied making such statements, he can be impeached with the video deposition.

Q: Isn't it a fact that you have "no idea" how this accident occurred?

A: No.

Q: Let's take a look at the video of your deposition together - - But before I do, I have a question:  
Are you denying that this was your answer? (Video played).

Clearly, no matter how effective the attorney is at cross examination, it is hard to match the strength of the witness impeaching himself. By taking the time to set up the witness, the trial lawyer has achieved another goal. The witness will be reluctant, from that point forward, to disagree with the cross examiner for fear of, at best, coming off as foolish and, at worst, a liar.

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Another important advantage of impeachment through a videotaped deposition is it diminishes a witness' excuse that in-court testimony which is inconsistent from her deposition is either the result of misunderstanding the deposition question or that the deposition is being read out of context.

Imagine a medical malpractice case against an anesthesiologist. The claim in the case is that an intraoperative overdose of saline fluid during back surgery caused the plaintiff to suffer ischemic injuries to her eyes, rendering her totally blind. At deposition, the defendant doctor testified that she had no idea of the amount of "third spacing" which was likely to occur during the procedure, a factor which is critical in calculating the proper amount of intravenous fluid to provide to the patient.

At trial, the doctor testifies that she did, in fact, have an estimate in her mind of how much third spacing she anticipated during the surgery. Once again, before attempting to impeach the witness, a skilled cross-examiner must ensure that the witness is committed to the testimony and the jury understands its importance:

- Q. Doctor, it was necessary for you, prior to beginning that surgery, to have a reasonable estimate of the amount of third spacing to anticipate?
  
- Q. In fact, you need to have that information in order to properly determine that amount of saline fluid to provide the patient as maintenance during surgery?
  
- Q. It would be totally inappropriate to go into surgery without that information, true?



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- Q. Something you, yourself, would never do?
- Q. If you saw one of your residents doing that, you'd tell him that that's inappropriate, right?
- Q. You'd teach the resident, "That's not the way to practice anesthesiology", wouldn't you?
- Q. And, of course, if you did provide fluid to a patient without having an estimate of anticipated third spacing, that would be a departure from good and accepted practice, right?

Thinking you have the witness properly boxed in, you go to the deposition and read the relevant question and answer:

- Q. What would you anticipate for a case like this?
- A. I have no idea. You'd have to ask the surgeon.

When confronted with this testimony, the doctor responds, "I misunderstood the question. I thought we were talking about blood loss." Here is where the videotape of the deposition becomes crucial. By showing the entire sequence of questions that preceded the question and answer that she did not know how much third spacing to anticipate, the tape will reveal the ridiculous nature of the witness' denial. Show each proceeding question and answer, many of which specifically used the term "third spacing", and ask if the witness understood each of those questions to pertain to third spacing. Having the witness concede that she knew all of the proceeding questions discussed third spacing, and having the jury witness the tenor of the conversation, will seal the witness' fate and render her denial less than credible.

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While a savvy advocate can use his inflection in reading a transcript to underscore the important points to a jury, the stark vision of a witness giving testimony, and then offering a different version of the facts at trial, will make an indelible impression on the jury. That opportunity can only arise when you've gone to the efforts to videotape a deposition.

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