

Video depositions offer advantage at trial.

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In May of this year, jurors in a federal courthouse in eastern Louisiana were asked to watch and listen as the image of a hospital risk manager appeared on the court's huge video screen.

It was a key moment in a trial that pitted one hospital against another for providing a glowing job recommendation for a doctor known to have drug abuse problems. The significance of the deposition was twofold - first, the witness testified she was certain the hospital knew the doctor was diverting Demerol for personal use; second the deposition was conducted before Hurricane Katrina caused potential witnesses to scatter across the country.

Although the deposition had been taken two years earlier, the immediacy of the videotaped testimony on the big screen was a turning point in the trial and helped win an \$8.2 million verdict in a complex insurance/med-mal case, according to the plaintiff's attorney, J. Ric Gass.

"If we'd have just read the deposition transcript without the video, we never would have won that case," he said.

Once a rarity, video depositions are catching on across the country as way to preserve the spontaneity and drama of crucial interviews that often happen years before a case goes to trial.

Camera, sound and editing equipment have steadily improved - at the same time they've grown cheaper. A new generation of tech-savvy lawyers now accounts for a major portion of the profession, and courts are encouraging the use of technology by wiring courtrooms for electronic visual presentations.

"I believe it's time for all good lawyers to master the art of the video deposition," said John H. Mathias, who heads the insurance and reinsurance practice group at Jenner & Block in Chicago. "If you don't, you're giving your opponent a huge advantage."

But the lawyers who practice this relatively new legal art say there's a lot more to producing an effective video deposition than turning on the camera and microphones. Equipment, camera angles, editing and deposition ground rules all play a key role in making a potentially dull deposition into a compelling piece of testimony.

Tips from the experts

Although proponents agree about the benefits of video depositions, they offer a variety of suggestions on how to conduct them most effectively.

For example, Austin, Texas, trial lawyer Craig D. Ball believes lawyers should be more creative in the way they set the scene for video depositions.

"I think the mistake many lawyers make with video is that they don't maximize the visual space," he said. "People think deposition means you sit in a conference room and that's it. But you could convene a deposition on the side of the road by an accident scene or on a factory floor."

Gass agrees, noting that even in a traditional setting, lawyers should do more than just aim a camera at the witness. He recommends camera pans to show perspective, including interaction between lawyers and deponents.

"If I had my druthers, I'd have at least a two-camera shoot," he said.

Paul Tauger, on the other hand, takes a more conservative view. When the San Francisco attorney is doing a deposition, he wants the camera set back and shooting statically over one of his shoulders.

"The trick is to make the witness forget the camera," he said. "You want them to act naturally."

Generally, he prefers a shot that's bounded on the bottom by hands on a tabletop and on the top by the top of the deponent's head.

"The TV screen should be a substitute for a person sitting in the witness box," said Tauger, who works in the San

Francisco office of Schnader Attorneys at Law.

The optimum camera angle may depend on whether the person being deposed is your witness or an opposing witness. Ball said that in deposing opposing witnesses he tries to get them to look at things as much as possible.

"Every lawyer who does video depositions can tell you about the times when he or she hands a document to a witness, he looks up at the camera and doesn't know what to say, then he looks over at his own counsel like, 'You didn't tell me about this.'"

Even if they don't express confusion or surprise, the mere act of looking down may not come across well to a jury, Gass said, because "it can look evasive on video."

As a defense against opposing counsel employing the same technique, Gass said he has a rule for his own witnesses: If opposing counsel wants them to look at something, they should request going off the record to examine it before responding.

Technical tips

Gass has found that the incremental difference for video depositions in the kind of complex multi-million-dollar cases that he handles is about \$6,000, which he considers a "drop in the bucket" for cases of that magnitude.

For smaller matters or when cost is an issue, lawyers might consider simply setting up their own video camera, said Fred Misko, Jr., a Dallas civil litigator. In Texas, lawyers can avoid the expense of having court reporters present at video depositions by having a notary public or other person qualified to administer oaths swear in the video as evidence.

But generally, lawyers prefer to work with professional videographers. Some law firms have them in-house, but most outsource the work.

Tauger said that he hired videographers through court-reporting services. Others hire videographers and court reporters separately. Although some lawyers don't use court reporters at the deposition itself, Gass doesn't recommend it because he said it's helpful to have them present to read back testimony quickly.

When choosing a videographer, one should look for experience at doing depositions. It's important, lawyers say, because a videographer must realize that he or she will have a limited creative role, if any, at a deposition and must abide by the directions of the lawyer.

"Lawyers should use companies that have a good understanding of civil procedure and rules," said Richard E. Katz, a lawyer who created his own trial consulting firm, Katz Consulting Group, in Charleston, W.Va. "You shouldn't go to a company that says, 'We do bar mitzvahs and weddings and, oh yes, we can do depositions, too.'"

Videographers also must caption the deposition with a script that provides identities of speakers, locations and subject matter, and serve as a time-keeper who informs interviewing lawyers of time situations by cue card.

Ball said lawyers shouldn't "cheap out" on equipment and should make sure that they're employing the best technology in cameras and recording equipment. The latest state of the art is 3-CCD cameras, which require no lighting, and Lavelier clip-on microphones for all participants.

Lawyers should also insist on back-up capabilities - backup video copies as well as backup cameras on site in case of mechanical failure.

The finished product

When it's time for trial, most lawyers prefer to create edited videos for the courtroom. A variety of inexpensive editing programs are available for use on computers, including Indata Corp.'s Trial Director and Verdict Systems' Sanction II.

"With video, you've got about a 20-minute attention span," Misko said. "I'm not sure how many lawyers really know that."

That means lawyers should limit questioning on the witness' qualifications to no more than two minutes.

"I want the guts of it in the first five minutes when the jury is freshest," said Ball.

Gass agreed that concision is important and has developed a technique for summarizing important points. He calls

it the "five questions" rule.

"Lawyers need to ask themselves when they're doing a video, 'What are the five questions I absolutely need to ask?'"

Those questions may have been answered by the witness in lengthy fashion during the deposition, but he's found it to be an effective tool to ask the questions again in a way that invites a succinct response.

Another trick that lawyers use with video depositions is to ignore the chronology of the deposition itself.

"It's not unusual for me to take stuff that came out late in the deposition and shift it to the front" of the video to be used at trial, said Ball. It often brings objections from opposing counsel, "but no judge has ever said no."