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Effective use of videotaped depositions in a medical-malpractice case

A step-by-step guide to the use of videotape from discovery through trial

Your pulse is racing and you are barely able to keep a calm demeanor because you cannot believe your luck. The standard-of-care defense expert in your medical-malpractice trial has just completely contradicted her deposition testimony and now all you have to do is impeach her and expose her as a hired gun willing to say anything the defense lawyer tells her.

You inform the court and opposing counsel of the page and line number of deposition testimony and… *read* the testimony from a transcript?! Are you *kidding* me?! This is 2015; you can and you should have video to show those jurors. This article will provide some practical advice about how to make effective use of videotaped depositions in a medical-malpractice case, from discovery through trial. As you will see, videotaping of your depositions is a realistic goal, even if you are litigating on a constrained budget.

Discovery

The use of a videotaped deposition at trial starts with a notice of deposition that must include notice that the videotape of the deposition will be used at trial. Once appropriate notice is given, then it's time to get to the nuts and bolts of how to accomplish videotaping the deposition. There is a do-it-yourself option as well as a hired-vendor option. At its most basic level, the main difference will ultimately be an equation of your time versus your money spent. There is no wrong answer, whatever works best for your practice can still result in having videotaped deposition testimony to play at trial.

The first option for taping is to pay for a professional company to do the taping for you. This service is available through most court-reporting agencies. The advantages to having someone else tape the deposition include allowing you to focus on the task of taking an effective deposition and obtaining a professional quality videotape. You can also order it to

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be synced with the transcript, making the editing process for trial substantially easier.

The second option is taping the deposition yourself. I will defer to advice from Linda Fermoyle Rice, whom I witnessed effectively videotaping her own depositions several years ago and who has been doing it for well more than 10 years. First, you obviously need the equipment, which includes an HD video camera with microphone and headphone jacks and a mixer, two microphones and headphones to test the sound, power cords, extra batteries, a tripod and tape to secure the wires.

I would suggest going to a major electronics store, telling them what you intend to do, and getting advice as to what to buy. The price for all of this equipment in 2015 should be about the same as the cost of a videotape professional taping one or two depositions. Second, you need the script that must be read at the outset of the deposition; for this, see Code of Civil Procedure section 2025.340, subdivision (h). While at the deposition you will need to pay attention to things like lighting, sound quality and the backdrop behind the witness to ensure that you obtain usable video.

One final topic in discovery is the decision of which depositions to videotape. For the reasons that will be laid out, my suggestion is that you videotape only the defendants and any other non-physician percipient witness depositions. This leaves out the treating physician depositions. Pursuant to Code of Civil Procedure section 2025.620, subdivision (d), a videotape of a treating physician is admissible at trial, regardless of the availability of the witness. This is commonly used in personal- injury cases by the plaintiff's attorney as an efficient way to present damages testimony. However, in medical-malpractice cases, you should be very cautious with this approach because it can easily backfire. The reason for this is twofold.

First, most physicians are wary of criticizing a colleague or contributing to a medical-malpractice case against a health-care provider. Second, almost invariably the treating physician will obtain representation for the deposition from her malpractice insurer, and who do you think gets hired to do this job? It's another medical-malpractice defense firm whose lawyer will contact the defense lawyer to figure out where the dangerous areas are for the defendant and will coach the treating physician to help out the defendant as much as possible. In many cases the same insurance company insures both the defendant and the treating physician. What do you think the chances are that the treating physician gets coached to blow holes in your case?

I will provide a little illustration of how this happens. In both of my last two medical-malpractice cases that went to trial there were crucial treating physicians who had been interviewed prior to their deposition and provided information that was either helpful or at least neutral on the issue of causation. However, once served with a subpoena they got representation, hired by their insurance company. By the time of their depositions, having been coached by defense attorneys, both physicians had completely changed their story and gave testimony on the issue of causation that was essentially opposite to what they had previously stated. Unfortunately in both of these cases, the witnesses had moved out of state by the time of trial and we were left having this terrible testimony played at trial and unable to cross examine the witness live in front of the jury. Perhaps most importantly, both of these cases would have been ripe for settlement had the treaters just remained honest, and both of these cases ended up going to trial in large part based on the changed story of the treaters.

The lesson learned is that you can almost never trust a non-retained, treating physician to be brutally honest in their depositions on a medical-malpractice case. Unfortunately, you are much more likely to get testimony that tanks your case than supports it. My suggestion is to forego the videotape, simply use the deposition as preparation for trial, and serve the witness with a trial subpoena at the deposition. You can decide later whether to call the treater at trial, and if the defense calls them you will be prepared to cross them because you got their whole story at deposition. This is significantly better than finding yourself forced to sit through a videotape of a witness killing your case with you unable to throw a single counter punch.

Expert discovery

Videotaping the expert depositions is virtually a necessity. Time and time again you will find an expert less prepared at deposition than at trial and this often leads to priceless snippets of videotape for trial. It can also help to catch the gamesmanship from experienced experts that they often abuse you with at deposition, but leave at the door in favor of a friendly demeanor at trial.

It's pretty compelling to show the jury that friendly old Dr. Jekyll who showed up to trial is actually Mr. Hyde when he's not putting on a show for them. Lastly, should you hammer the expert so hard during deposition that the defense chooses not to call that expert, you can play that videotape at trial under Code of Civil Procedure section 2025.620, subdivision (d) and not be deprived of all your good work.

Another brief pointer here on the subject of do-it-yourself videotaping: California law actually requires that a professional videographer (not affiliated with the parties or lawyers) be used for either a treating physician deposition or expert witness deposition *unless* all parties choose to waive this requirement on the record at the deposition. I would suggest getting this agreement in writing prior to the deposition and attaching the agreement to the transcript; then you do not have to worry about someone changing his mind at the deposition, leaving you without a means to videotape the proceeding. If you do this, you can actually videotape any deposition for use at trial.

Trial preparation

Trial preparation is essentially a three-part process: 1) deciding what portions of the videotape obtained to use; 2) providing all parties with statutory

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notice of what videotape you will use; and 3) preparing the videotape for trial.

Regarding what videotape to use, there are some times when you may want to put on a witness by simply playing their videotape. Common examples would be a treating physician on damages or a percipient witness to some foundational facts that are important enough to be necessary for the trial but not so critical that you want the testimony live. In my experience it is usually significantly faster to play a videotape than call a witness live, so it can help move a complex medical-malpractice trial along by utilizing videotape testimony in lieu of live testimony.

You should get an agreement from the defense attorney in place that they will forego calling the witness live as well, and if they will not agree, then simply call the witness live. Streamlining a case is not worth giving up the advantage of calling a witness live in your part of the case that would otherwise be called in the defense case.

Then there is the issue of use of videotape for witnesses who are going to be called live. For these, you likely will not know exactly what sections to play until you are in trial and actually performing the cross-examination of the witness. For these, you will need to go through the deposition transcript and pick out the critical sections that you think are likely to come up or be useful. If something unanticipated arises during trial, you can always fall back to reading from the transcript, but obviously having spent the money or time on videotaping you would like to utilize the video. You may also want to cull out key concessions by the defense experts and witnesses that can be played in your case in chief, thereby establishing those issues long before the witness actually takes the stand and has an opportunity to respond.

Once you have the sections of videotape compiled, you must provide notice to the parties and file a designation with the Court of what sections of videotape you intend to offer into evidence at trial. (See Code of Civil Procedure, section 2025.340, subd. (m).) This would also seem to be a requirement under Los Angeles Superior Court Local Rules, Nos. 3.25(f) and 3.150. The way that I have handled this is to provide notice by identification of deponent and specific page and line number of the testimony to be played.

For adverse witnesses of whom I expect to play videotape testimony for purposes of impeachment only, I simply identify that witness by name and state that any testimony from the deposition may be used for impeachment. The rationale is that providing specific page and line numbers for the adverse witness would obviously be giving up your attorney work product and providing the defense with a substantial advantage of having an outline of where you intend to go with that witness.

If you are in Los Angeles Superior Court and in front of a judge who wants to ensure that the actual videotape has been shown to opposing counsel first, you should learn this during the hearing on any objections that have been raised. In response, you could suggest to the Court that a brief recess can be taken prior to the cross examination of that witness for purposes of showing the videotape intended to be utilized, outside the presence of the jury and the witness. This should only take a few minutes, and although opposing counsel may now understand where you are going, as long as they are instructed not to talk to the witness, you will still have the element of surprise with the witness. Otherwise you may have to choose between giving up your work product and foregoing the videotape in favor of a deposition transcript.

The final step in trial preparation is actually preparing the videotape itself, which requires at a minimum cutting the video to include only the desired portions of the deposition and removing any objections (which will be ruled upon during the hearing on your designation of video). If you self-recorded the videotape, you will first need to sync the videotape to the transcript. I have seen a lot of recommendations for www.synchronvideo.com, which appears to be very reasonably priced, quick, and even includes free software to cut your own video yourself.

There is again a more expensive option if cutting up the numerous depositions you will likely have in a medical-malpractice trial seems too burdensome. If you use an outside vendor to do this editing, you will definitely want to watch the edited video closely to ensure that each clip is correct. If you are using the video for impeachment of a live witness, you will want the clips left separated, so that you can access each sound-byte individually, but if it is a video-only witness, you will want all of the clips combined into one video that you can play with one click from start to finish.

Trial

I strongly recommend that you utilize trial presentation software to present evidence. This requires a computer with software such as TrialDirector, a video screen, speakers and, ideally, an Elmo. You can put together all of this equipment yourself, but again I would expect it to require a considerable investment of personal time to ensure that it all works. Hiring a company is definitely going to be expensive, but often you can offset some of this cost by splitting it with the defendant.

The reason I suggest this expense: These trials tend to be document-intensive in terms of medical records, and I think juries want to actually see the key records that everyone is talking about. By utilizing this software, you can get through dozens of documents with each witness, rather than limiting yourself to only the operative report and vague statements about other documents. And regarding videotaped depositions, all of your clips can be loaded onto this software as exhibits, allowing you to simply call up the exhibit and hit play. I also recommend that you have the video close-captioned with the transcript. It is an incredibly effective presentation to allow the jurors to read the transcript as the video is playing.

Having a few videotape-only witnesses to play at trial also builds in some

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seemingly small, but important advantages. Since these witnesses can be played anytime, it can make scheduling of live witnesses a lot easier as you can use the videos to fill dead space. This can also be very helpful when an Evidence-Code-section-776 witness controlled by the defense suddenly has a conflict and cannot show up on the date and time promised, which seems to happen about every other trial. I also find the time that a video is being played to be one of the few moments during trial when you can actually sit back and observe the manner in which the jury is reacting to evidence, which is invaluable information.

Regarding use of video to impeach: have the clip number and substance of the testimony written into your outline for the witness. Some clips may be important enough to play, regardless of the substance of the live testimony from that witness. Other times, you just want the witness to repeat the important points they conceded during deposition and the video is simply backup to hold them to their prior positions. If you are using the video to impeach, I believe it is important to ask the set-up questions using the exact words the witness used during deposition and that the live testimony is fundamentally different from what was said during deposition. Few things are less effective than "impeaching" a witness with a statement that is not impeachment at all.

Conclusion

The use of videotaped depositions can be an incredibly effective tool at trial. In recent years, the development of technology is such that this can be done on a budget for very minimal additional expense.

If time is your concern, pay vendors to tape, prepare, and present the information at trial. Whichever method is right for you, it's an element that should be incorporated into your practice to make you a more effective trial advocate.

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