

## **Rock Stars, Lies and Videotape: Using Videoed Deposition Testimony at Trial**

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The introduction of videoed deposition testimony at trial is increasingly common. Once it has been determined that deposition testimony is admissible, special permission is typically unnecessary to introduce video depositions. Indeed, many courts prefer video deposition testimony over traditional stenographic transcripts because video testimony enables the fact finder to view the witness' demeanor and thus to better assess the deponent's credibility.<sup>1</sup> Yet there are pitfalls as well. Improper editing of video clips, for example, can provide skewed and inaccurate versions of events by placing statements or expressions out of context and overemphasizing otherwise innocuous expressions or comments.

### *General Rules for Introducing Video Deposition Testimony*

Federal Rule of Civil Procedure 32 governs the use of depositions in court proceedings. Specifically, Rule 32(a)(2) provides that “[a]ny party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.” In addition, under the Rules the deposition of an adverse party may be used “for any purpose,” including instances where the party has testified and is available to give further testimony.<sup>2</sup>

When introducing video clips, an attorney faces the same challenges as the admission of any other evidence. For example, there must be a legitimate purpose for showing the video testimony.<sup>3</sup> Video testimony can be excluded if it would be merely cumulative of live testimony

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<sup>1</sup> Michael J. Henke & Craig D. Margolis, *The Taking & Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 13-14 (Winter 1998).

<sup>2</sup> Fed. R. Civ. P. 32(a)(3); *Rojhani v. Meagher*, 22 P.3d 554, 560 (Colo. Ct. App. 2000) (applying the Colorado counterpart to the Federal Rules of Civil Procedure).

<sup>3</sup> *Stauffer v. Karabin*, 492 P.2d 862, 866 (Colo. App. 1971); *Scruggs v. Otteman*, 640 P.2d 259, 261 (Colo. App. 1981).

that has been introduced.<sup>4</sup> And a court may require the introduction of any other part of the video deposition that ought in fairness to be considered with the part introduced.<sup>5</sup>

### *Using Video Deposition Testimony During Opening Statement*

Video deposition testimony can be used successfully in opening statement. Let us illustrate the benefit of using video deposition testimony with an anecdote.

A major issue in a jury trial handled by the authors' firm was whether a contract existed between the plaintiffs and the deponent. The plaintiffs, who owned a low-voltage wiring company and recording studio, sued an insurance company for bad-faith failure to pay a claim. The plaintiffs alleged that the insurer's failure to pay caused them to lose various contracts with third parties, including one with a well-known alternative rock band. Our firm represented the defendant insurance company, and we deposed the band's lead singer in the attempt to prove that there was no contract. The plaintiffs had stated under oath that they entered into an agreement with the deponent. In the deposition videotape, when asked whether he had entered into the alleged contract with the plaintiffs, the long haired rock-star deponent shook his head negatively, looked directly at one of the plaintiffs, and said emphatically that there was "no way in \*\$?#" he would ever have had a contract with them.

We used this dramatic video clip successfully as part of our opening argument at trial. Using the video format highlighted the importance of the testimony, and a large screen allowed the jury to scrutinize closely the deponent's non-verbal communication. Although we had collected impeachment evidence from a number of other sources, the video clip poignantly and powerfully conveyed to the jury our desired point. In the end, the jury returned a total defense verdict.

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<sup>4</sup> *Johnson v. Bd. of County Comm'rs*, 676 P.2d 1263 (Colo. Ct. App. 1984).

<sup>5</sup> F.R.C.P. 32(a)(6).

Using video evidence in opening statements is typically allowed so long as the evidence is otherwise admissible.<sup>6</sup> Because rulings concerning the use of evidence during opening statement are ultimately committed to the trial court's discretion, however, determinations can vary greatly depending on the individual judge. For example, in *Hynix Semiconductor Inc. v. Rambus Inc.*, the court prohibited both parties from using video clips in opening because “[r]epeatedly showing the same few deposition segments seems to exalt the relevance of those videotaped shreds of evidence over live testimony.”<sup>7</sup> By contrast, in *MBI Acquisition Partners, L.P. v. Chronicle Publishing Coompany*, the court allowed the use of video excerpts in opening and ordered the party seeking to show the video clips to “advise plaintiff’s counsel promptly of the particular excerpts they intend to show.”<sup>8</sup>

To avoid being blindsided by unexpected video clips during opening statements, attorneys should take advantage of trial-management orders and local rules to ascertain in advance what video clips, if any, opposing counsel intends to use. You should also consider writing a letter to opposing counsel specifically asking about the intended introduction of video deposition testimony. Conversely, attorneys seeking to use video clips in opening are cautioned that referring to inadmissible evidence in the opening statement may be the basis for a mistrial or the imposition of sanctions.<sup>9</sup>

### *Introducing Video Deposition Testimony During Later Stages of Trial*

Certain pitfalls must also be avoided when using video testimony during later stages of

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<sup>6</sup> See, e.g., *Spence v. Southern Pine Elec. Co-op.*, 643 So.2d 970, 972 (Ala. 1994) (stating that the trial court did not abuse its discretion by allowing excerpts of deposition testimony of two witnesses as demonstrative evidence during opening statements).

<sup>7</sup> Nos. CV-00-20905 RMW, C-05-00334 RMW, & C-06-00244 RMW, 2008 WL 190990, at \*1 (D. Cal. Jan. 21, 2008) (slip copy).

<sup>8</sup> No. 01-C-0177-C, 2002 WL 32349903, at \*1 (D. Wis. Oct. 2, 2002).

<sup>9</sup> *Koehn v. R.D. Werner Co., Inc.*, 809 P.2d 1045, 1050 (Colo. Ct. App. 1990).

trial.<sup>10</sup> For example, portions of videotape testimony shown during closing argument should not be so lengthy as to constitute a second trial, emphasizing only one litigant's side of the case.<sup>11</sup> Similarly, parties should not edit video deposition testimony in a manner that misstates the testimony or takes statements out of context, thereby confusing or misleading the jury.<sup>12</sup>

To address such problems, hearings can be conducted out of the jury's presence to view the proposed portions of the videotaped testimony on the record to ensure that the video clips accurately reflect the evidence.<sup>13</sup> A good strategy for ensuring that opposing counsel's video editing is proper is to request a hearing in connection with a pre-trial conference.

### *Conclusion*

This article ends with a word of restraint. While using clips of video depositions can provide a powerful tool for highlighting crucial comments and captivating the jury's attention, the tool should be used sparingly to maintain its value. In the authors' experience, juries have seemed riveted by video clips that directly impeached an opposing party or that contained dramatic non-verbal communication. However, where video clips have only marginally deviated from an opposing party's testimony, or where the contradiction between live and video testimony was subtle, using video deposition testimony has proved less beneficial. The considerable time and money spent preparing and presenting these clips could have been better used for more traditional presentations of evidence. Using video clips can grab the jury's attention, but if overused, the jury may become desensitized to the video clips and, even worse, may view the clips as sensationalism or histrionics rather than as credible evidence.

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<sup>10</sup> See *Morgan v. Scott*, 2006 WL 2457378 (Ky. Ct. App. 2006).

<sup>11</sup> See *id.* (citing *Owensboro Mercy Health Sys. v. Payne*, 24 S.W.3d 675 (Ky. Ct. App. 2000)).

<sup>12</sup> *Id.*

<sup>13</sup> *Condella v. Cumberland Farms, Inc.*, 689 A.2d 872, 875 (N.J. Super. Ct. 1996).