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Can I Videotape Opposing Counsel During a Deposition?

By Katherine Gallo



For years, parties have videotaped both the deponent as well as the lawyer asking the questions during a deposition. The purpose is to provide a split screen video to the jury at trial, which would simultaneously show the questioner and the deponent in real time. But is it permissible? As demonstrated below, the answer is “No” unless the parties stipulate or the court orders it upon the showing of good cause.

There is No Statutory Authority for Videotaping Opposing Counsel

Code of Civil Procedure Section 2025.330 titled *Deponents to be Under Oath or Affirmation; taking of Testimony and Objections Stenographically; Recording of Testimony; Examination and Cross-Examination: Written Questions* states in pertinent part:

(c) The party noticing the deposition may also record the testimony by audio or video technology if the notice of deposition stated an intention also to record the testimony by either of those methods, or if all the parties agree that the testimony may also be recorded by either of those methods. Any other party, at that party's expense, may make an audio or video record of the deposition, provided that the other party promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, serves a written notice of this intention to make an audio or video record of the deposition testimony on the party or attorney who

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noticed the deposition, on all other parties or attorneys on whom the deposition notice was served under Section 2025.240, and on any deponent whose attendance is being compelled by a deposition subpoena under Chapter 6 (commencing with Section 2020.010). If this notice is given three calendar days before the deposition date, it shall be made by personal service under Section 1011. [emphasis added]

As has been shown above, the statute only explicitly allows a party to record the “testimony by audio or video technology.” Since counsel is not giving testimony, then counsel cannot be videotaped.

Green v. GTE California, Inc. Provides Helpful Dicta

In researching this issue, I did a Lexis search and found only one case that addresses the issue even though it wasn’t the holding of the case. The case is *Green v. GTE California, Inc.* (1994) 29 CA4th 407 at 408, which found that *plaintiff’s counsel’s attempted novel use of the video camera ran afoul of the notice requirements of Code of Civil Procedure section 2025 subdivision(l)(1). He did not give the three-day notice required by the statute. Putting aside the notice requirement, it is questionable whether the statute applies to videotaping opposing counsel instead of the witness. [emphasis added]*

Both California Civil Discovery (CEB 2015) at §5.78 and Weil and Brown, Civil Procedure Before Trial (TRG 2015) at ¶8:662.5 only cite *Green v. GTE* for the proposition with Weil and Brown stating:

Whether the above statute allows video recording opposing counsel instead of the witness is “questionable.” [Green v. GTE California, Inc. (1994) 29 CA4th 407, 410—sanctions upheld against counsel who, without providing requisite notice, brought along video camera to record opposing counsel’s

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'intimidating' facial expressions and gestures; court stated: ' If this case is an example, the term 'civil procedure' is an oxymoron]

PRACTICE POINTER: *If controlling opposing counsel during the deposition is a potential problem, ask the court for an order expressly authorizing such video recording before the deposition commences.*

Need to Show that Counsel has been Abusive

In bringing a motion to videotape opposing counsel you need to show the exceptional circumstances that would justify the videotaping. Such circumstances might include a track record of witness coaching, signaling, menacing or intimidating glares, aggressive body movements (i.e., pointing fingers, reaching across the table towards the deponent, etc.) or other inappropriate conduct.

Alternative Remedies

If there is a history of abuse, the court may instead order the deposition to be held at the courthouse with the Judge being available to rule on the objections for immediate rulings. However, it is more likely the court would appoint a Discovery Referee at the cost of the parties to supervise the deposition and rule on the objections. See California Civil Discovery (CEB 2015) §5.78 citing C.C.P. §639(a)(5). The discovery referee would then report to the court his/her findings and recommendations which can include the allocation of referee fees and sanctions.

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