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PERSPECTIVE

## Effective use of video clips at trial

By Olivier A. Taillieu

I am a personal injury trial lawyer. A few weeks ago, I found myself justifying the societal value of my work to a tort-reform-inclined friend of mine. We debated for a while, but I could tell I was winning neither heart nor mind. So I reached for my phone and showed him some dash cam footage of a truck driver falling asleep at the wheel and running into the back of my client's pick-up truck at about 60 miles per hour. The impact killed my client and launched the pick-up truck into oncoming traffic and severely injured three other people. I don't know how much I changed his worldview, but I can tell you that it ended the conversation.

Now, on reflection, that was probably a cheap trick. After all, anyone seeing that video would agree that the truck driver bears meaningful responsibility for that crash. But I suppose that's precisely the point. Videos tend to make one's point rather vividly and as a trial attorney, my job is to present evidence to a group of 12 people in the most effective way possible to get a desired result. I can do that with words, pictures, or better yet, videos.

With the advent of the Internet and smartphones, the availability of video content has propagated exponentially over the last 30 years. Articles get read, but videos go "viral." Viral videos have sparked civil unrest (Rodney King), movements (George Floyd), unprecedented



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fundraising (ALS Ice Bucket Challenge), and even parental agony (Baby Shark). I would even argue that at this moment in history, jurors expect to see videos at trial.

The irony in my choice of topic is not lost on me, however. Here I am writing an article, in a newspaper, about the use of videos at trial. Nonetheless, as an advocate, I cannot stress enough how important audiovisual media is to any trial presentation.

There are many ways to use videos at trial. The most obvious type of video footage is the kind I described above in the argument with my friend. Therefore, as early as possible in the case, make sure

you exhaust every possible avenue to get this footage. Remember that surveillance footage often gets erased within 30 days after the event. It is incumbent upon you to make an early site visit and talk with anyone who may have had a surveillance camera pointed at the crash (or documenting whatever event transpired).

Sometimes, however, the footage is not clear, or it does not provide a full picture of what happened. In those cases, I may have an accident reconstruction expert analyze the video and the available data and produce a demonstrative exhibit which mimics the real-life event but from different angles. This approach

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can also incorporate real life pictures or screen grabs of the actual video to demonstrate key moments in the crash sequence.

This can produce some very dramatic exhibits and tends to crystallize, in the jury's mind, what transpired on the day of the incident. If this is done early enough in the case, it can be used at various experts' depositions. This can help to lay a foundation for the animation and also be shown to other experts to support your argument relating to mechanism of injury, for example. This then opens the door to a specific motion in limine to allow you to show this animation to the jury on opening.

But there are more mundane ways to use video clips at trial. For example, I have used video recorded deposition testimony (usually of treating physicians) to streamline the presentation of evidence at trial. Emergency room doctors or trauma surgeons may not always be available for trial, therefore having their testimony recorded makes for a smoother process when one needs the underlying information to support one's retained expert's opinions. It saves time, streamlines the testimony through editing, and omits objections and other interruptions.

Video testimony can also be useful when key witnesses are out of state and not subject to subpoena power. The practice tip here is to get every deposition recorded. Remember to check with opposing counsel to make sure they have ordered video recording, and if they haven't, serve your own no-

tice of deposition with a request for video. This may require you to arrange for the recording but it's well worth the effort and cost. Make sure to state your intention to use the video at trial in the notice of deposition.

## **‘With the advent of the Internet and smartphones, the availability of video content has propagated exponentially over the last 30 years. Articles get read, but videos go “viral.”’**

Video testimony can also help you demonstrate the nature and extent of damages. One name for these types of videos is a “day in the life” video. However, these must be used judiciously for a couple of reasons. First, the video footage must demonstrate a relevant point in the case. For example, I have had a video technician attend regular rehabilitation sessions of a client to catalogue their recovery – with the intent on capturing milestones. One can talk about the rehabilitation process involved in regaining one's ability to walk, but nothing communicates that process better than a video montage of your client hoisting themselves on parallel bars and struggling to get their feet under them.

I have also used day in the life videos to demonstrate how needy and vulnerable a TBI client is – to

justify the need for extensive, and expensive, future need for care. Picture a person who must be carried out of bed by two people, placed on a gurney, wheeled to a shower and washed by two nurses every few days just to keep clean.

Imagine seeing a video of that same patient receiving assisted physical therapy to minimize muscle atrophy in their arms or legs. I promise you that whatever comes to mind right now, the video is more poignant.

But be careful not to include narration or to over sensationalize what is being depicted. Also make sure to protect the privacy of the other individuals depicted in the video. If nursing staff is in the video, make sure you get written consent from them or blur their faces. Also, it's important to focus on non-hearsay, non-objectionable content that will survive a 352 argument.

Pre-incident family videos can also paint a powerful picture of what your client was able to do before the incident. Family events, vacations, sports activity, or the like. This is a fun and simple way to

show your client's level of activity before their injury without long, tedious testimony. The flip side to that, however, is that the defense can also have its own video repertoire, which may be detrimental to your case – sub rosa video.

Video clips are so effective, that even non-impeaching sub rosa evidence can depress the value of a non-economic award. The defense knows this; so make sure you let your client know that they are likely to be followed and videoed. Most sub rosa filming takes place either (1) immediately after the DME or (2) once the defense has responded to your last set of supplemental discovery. The reason for the former is to draw a comparison between what your client told the DME physician and how they interacted with the real world immediately thereafter and the reason for the latter is to avoid having to disclose it before trial.

My strategy with video clips at trial is to use them early and often. Try to get the other side or the judge to agree to let you use them on opening and then make an effort to use them at somewhat frequent intervals during the trial. It breaks the monotony of testimony and usually piques the jury's interest. It's also helpful to either have a video technician help you at trial or be very familiar with the court technology so you don't skip a beat before presenting them.

With the right videos and the right strategy, you can make your case a lot more real for the jury and ultimately get the kind of results you want for your client.