



Videotape depositions: Take one!

*One picture is worth a thousand words:
A new view on depositions.*

BY JEFFREY HURON

California law allows litigants to use the deposition of their opponent for any purpose during trial. If you videotape your opponent's deposition, this means you can select and play clips from his deposition for the jury to watch during your: (1) opening statement; (2) turn to introduce evidence without any opportunity for your opponent to respond in his own words until later in the trial; and (3) closing argument. Imagine: jurors get to hear and see your opponent at his worst, as if they were watching an entertaining *YouTube* clip (which most of them do frequently).

Without videotape of your opponent's deposition, you have nothing but a cold, lifeless transcript to read the jurors to sleep. The videotape not only gives jurors something to hear, but also something to see. For example, where a phrase like, "I don't recall," looks boring and standard on a page, video-recorded testimony of the same phrase could be very damaging to your opponent. A video could show your opponent immediately and without hesitation responding aggressively to an important question with, "I don't recall," as if on cue. Or, the video could record him deliberating at length and looking at his attorney, all the while fidgeting in his seat, before apologetically responding, "I don't recall." Without videotape, all of this non-verbal language is lost forever because the transcript is nothing but boring words on a page –

one more among many pages and documents shown to jurors during trials.

In his book, *Blink*, Malcolm Gladwell supports a claim by the psychologist Paul Ekman that a person's face while speaking can reveal whether he is lying. Gladwell uses several examples to demonstrate, that despite our best efforts to suppress involuntary facial responses, our facial expressions often give us away. One example occurred during a press conference given by Harold Philby, who had not yet been revealed as a Soviet spy. Twice after being asked serious questions about whether he had committed treason, he smirked like "the cat who ate the canary." Another example occurred on videotape during the O.J. Simpson trial, when Kato Kaelin showed anger and disgust toward Marcia Clark's question by baring his teeth, lowering his brow and wrinkling his face as if he were a "snarling dog."

According to Gladwell, we are face readers from the day we are born. As babies, we learn to read our parents' faces for acceptance, unhappiness and fear. By adulthood, we instinctively read faces for clues. A videotaped deposition allows the jury to read your opponent's face – during a deposition that he never thought the jury would see. When choosing video to play at trial, you must concentrate on your opponent's face for "tell-tale" signs. If you catch your opponent smirking, glaring, worried, etc., it would be a mistake not to share it with the jury.

There are other reasons to videotape depositions as well. You can show them to the mediator or settlement judge during the mediation or settlement conference to strengthen your settlement position. The presence of a video camera at important depositions also tends to make the proceedings more formal and thereby reduces the amount of frivolous objections, coaching and other interference by opposing counsel. At the same time, the video camera can be very intimidating and thus interfere with your opponent's preparation by rattling his or her nerves. Finally, when you start videotaping depositions, you send a clear message to your opponent that you are serious about going to trial.

Despite these clear advantages, very few depositions are videotaped even though the cost (approximately \$1,000) is relatively cheap within the context of high-expense litigation. If you have a dispute important enough to litigate, why skimp on a technical tool that could have a big impact on your success.



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