

Breaking new ground with the settlement documentary

Videos are not just for trial. Powerful storytelling can lead to a faster, better settlement

By Rob & Keiko Feldman

The video begins. A young woman in a wheelchair struggles to climb a ramp just to get to her front door. Another film shows the grueling 10-minute ordeal for an older man fighting just to get into the shower. Still another video shows how a former athlete is left gasping for breath simply moving from a chair to the breakfast table.

These are the scenes that might come to mind when you think of using a video presentation to demonstrate damages. And for good reason. The day-in-the-life video is now a widely used and highly effective tool to communicate damages for catastrophic injury cases. No amount of argument or testimony can put the jury in the shoes of your plaintiff like a *cinema verite* style production that lets the jury truly experience what life is like for an injured plaintiff.

But the power of video presentations for litigation goes far beyond the day-in-the-life video. Plaintiffs' attorneys are breaking new ground using settlement documentaries to present their injury cases. Settlement documentaries are television-newsmagazine style presentations that are produced specifically for mediation. Like their paper cousin, the mediation brief, they aren't bound by trial rules of evidence and are protected by mediation privilege, making them an excellent way to present your case based on your plaintiff 's narrative.

Settlement documentaries are the ultimate multimedia tool. They can include interviews, home video, photos, audio recordings, deposition excerpts and documents all tied together with storytelling, narration and music. Most settlement documentaries run between 15 and 30 minutes. And if they're produced well, they unfold like a story you would see on *20/20* or *60 Minutes*.

Storytelling

There's a reason those television newsmagazines are so successful: because they tell a story. TV newsmagazine style has survived more than four decades because it presents a great deal of information in the way that's easiest for us to absorb – an engaging story.

Powerful storytelling can benefit any type of case. Daniel Balaban, partner in the Los Angeles firm Balaban Spielberger, produces settlement documentaries for a majority of his cases, especially if the injury isn't visible on first glance.

"They cut right to the bone and are able to get the raw emotions from the victim and those around them which brings the tragic impact of the seemingly normal appearing plaintiff to life," Balaban said.

Attorney Bill Smith of San Francisco's Abramson Smith and Waldsmith often handles traumatic brain injury cases. He refers to some of these cases as 'invisible injuries' – closed-head injuries that can't be seen with the naked eye and sometimes don't even show up well on medical imaging film. That's where a documentary can help convey damages.

"There are two types of brain injury cases where settlement documentaries are helpful," Smith said. "The first is the severe traumatic brain injury case (TBI) where there are skull fractures, brain bleeds and/or brain swelling that can be seen on x-ray, CT, MRI or other studies. These can be shown and commented on by experts in the case to insure that the other side understands the nature and extent of the injury. The second is a mild TBI or a more serious injury that cannot be seen (e.g., carbon monoxide exposure). Here the only way that the injury can be 'shown' is to interview close friends and family members who can explain how the victim's behavior has dramatically changed. For example, he or she cannot remember things, is short tempered or cannot perform a host of executive functions."

Presenting theory of liability

In addition to portraying damages, settlement documentaries can also be used to present your theory of liability. Tim Tietjen, partner at San Francisco's Rouda Feder Tietjen and McGuinn, regularly includes liability in his settlement documentaries. They include photos, key documents, expert interviews and videotaped deposition excerpts. And he says the process of creating the documentary starts during discovery.

"Nothing is more powerful in a settlement documentary than hearing and seeing the defendant admit the facts that prove your case," Tietjen said. "Do not squander the opportunity to hammer this point home, as denial and distortion is the first line of defense. When taking a defendant's deposition, get the key facts nailed down and see the 'video' in your mind of how it will play out in your documentary. If the question/answer is not as you would like, 'take two or three' and pin

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the witness down until you get the 'director's' approval. Leaving no room for doubt about the facts that establish a defendant's liability sets the stage for damages and settlement. And that is the goal of a settlement documentary."

Simplifying the complex narrative

Attorney Mark Robinson, partner at Orange County's Robinson Calcagnie Robinson Shapiro & Davis and the newly elected national president of ABOTA, uses settlement documentaries for injury cases as well. But he also sees their value in more complicated matters. He commissioned a documentary for his Toyota unintended acceleration cases to demonstrate not only his clients' loss, but his theory of liability as well. The video was made to be shown to Toyota executives.

"The power of these documentaries is the ability to turn the facts of your case into a compelling story," Robinson said. "That becomes even more important when you're talking about complex business litigation where the narrative isn't as easy to recognize. Working with professional documentary producers helps me step back and really craft the big picture story I'm trying to communicate."

Settlement documentaries can also be used in cases where there is no physical injury at all: An intellectual property dispute over the creation of a reality TV show, cases of workplace sexual and racial harassment, legal malpractice and breach of contract.

Bruce Brusavich, partner with Agnew Brusavich in Torrance, represented a source interviewed by a national television network news program about terrorists operating in the U.S. The network promised the source confidentiality including disguising his face and voice. But when his interview aired, he was still easily recognizable.

"His life was turned upside down," Brusavich said. "He received death threats, had to move out of his home with his family and lived like a fugitive. The documentary was the best way to show the network what their negligence had done."

Negotiating bad-faith cases

A settlement documentary can be a powerful tool to negotiate insurance bad faith cases. Ricardo Echeverria, partner with Shernoff Bidart Echeverria and Bentley in Claremont, remarks, "Unlike catastrophic personal-injury cases, where the defendant usually did not mean to harm the plaintiff, in an insurance bad-faith case the claim is that the carrier intentionally cheated the customer out of benefits owed under the policy. A settlement documentary can help show the insurance company executives, and their lawyers, how the story might play out to a jury. It can be a very powerful tool to get an objective re-assessment of the conduct and a more realistic approach to resolution."

Can be costly

Producing a settlement documentary involves substantial investment in a case. Documentary projects can cost $20,000 and up. Most projects involve a team of professionals including videographers, producers, writers and editors. But attorneys who use settlement documentaries regularly insist they get a big return on that investment.

"I've had cases where the facts don't fit in the usual hole and something else is needed, said Browne Greene, partner at Greene Broillet & Wheeler. "I've found that using a settlement documentary that leans on the strength of emotions and pulls at the heartstrings evokes the 'fear factor' in my opponent so that they will do the right thing when it comes time for settlement."

Veteran attorneys like Greene who regularly use settlement documentaries insist there is a direct return: a larger, quicker settlement offer. Some plaintiffs' attorneys say they help opposing counsel "sell" a settlement offer to insurance decision makers. They also send the message to opposing counsel that the case is well-prepared, well-funded and ready to go all the way to trial. Then there's the indirect return from the documentary – honing the attorney's focus on the story and making the attorney that much better prepared if the case goes to trial.

Rob and Keiko Feldman are co-owners of Juris Productions. *Both were award-winning television news producers in Los Angeles before bringing their decade of experience to assist attorneys in the presentation of their cases. They hold degrees in communication and broadcast journalism, have produced documentaries for more than 100 law firms, and are frequent speakers at trial lawyer association meetings. www.jurisproductions.com.*


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