



The deluge of digital evidence

Video and audio evidence and what to consider in a rapidly changing landscape

By MICHAEL D. SCHWARTZ

When I was a child, my father forced me to read certain books. “The Catcher in the Rye,” “The Lord of the Rings,” and “Fahrenheit 451” come to mind (who knew then that I’d grow up to become a lawyer and be forced to read much less interesting works!). He also had me read George Orwell’s “1984.”

Orwell’s book describes cameras built into most electronic devices and citizens imbedded with electronics under the skin. Each encounter and conversation is recorded visually and audibly and sent around the world in seconds, to be catalogued and reviewed for content and subversiveness. In 2019, would anyone argue that Orwell’s nightmarish vision has not, at least somewhat, come true?

Yes, we have “Big Brother,” but we also have what I call “Little Brother.” Every citizen carries cellphones that

record high-resolution video and sound, and many attach cameras to their cars, motorcycles, bicycle helmets, and home doorbells. Most of my clients are police officers whose daily “equipment” now routinely includes body-worn cameras, dash cam video, helicopter video, and audio recordings of their contacts and arrests.

My cases often involve evidence recorded by these ubiquitous video and audio recording devices.

The deluge of digital evidence can include keys to solving your evidentiary puzzle

While I had a background in broadcast television before going to law school and consequently an intuition and foundation of how video and audio evidence fits into the overall litigation of a case, I am not a forensic expert. Consequently, I have routinely sought out the services of forensic audio, video, and digital files

expert David Notowitz and his company, the National Center for Audio and Video Forensics (“NCAVF”). Combining my trial and general litigation experience with Mr. Notowitz’s knowledge and experience in the field, we have developed a list of key considerations to take into account when evaluating digital media evidence for a case. Below are several of those considerations, gleaned from my personal experience as a trial attorney as well from an excellent workshop Mr. Notowitz teaches to attorneys.

Important considerations with video, audio, and cellphone evidence

1. Don’t accept your evidence at face value

Without this first rule, any suggestions to follow are worthless. A basic understanding of the video or audio evidence is not enough. For attorneys and clients alike, there is no substitute,



Get Clarity

Whether it's positive and good news for your client...
or it hurts your client and the case...



be they expert or not, for the attorney or client involved in the case to know the video or audio like the proverbial back of their hand. Although a forensic expert is better equipped when evaluating the medium and its potentials, limitations and details, it is ultimately the attorney who will defend against the footage or, as I've had the good fortune, actually utilize that footage to strengthen a client's case. The attorney knows the legal and factual issues, and the client experienced what happened. Both need to be able to use the video to bolster the positive legal and factual issues and to debunk or deflate potentially

damaging claims by the other side, whether in a criminal trial, administrative hearing, or civil litigation.

There really can be no part of the material that is unknown, unfamiliar, or not factored into the theory of the case in some way.

As Mr. Notowitz teaches in his workshop to attorneys, "Get Clarity. Whether it's positive and good news for your client, or it hurts your client and the case, at least know the truth, so you can plan strategies and tactics for responding in court."

In many of my cases where there was significant video or audio evidence

(*People v. Cicinelli & Ramos*, *People v. Ivory Webb*, *People v. Downey*, *Phelps & Foster*, and most recently, *U.S. v. Chad Jensen*, to name a few), there were small facts or details from the video material we brought out during the trial that significantly changed how the jury viewed the case. I've had similar experiences in arbitration hearings. Knowing the material allows the client to better explain his or her state of mind during the event, and it allows the advocate an opportunity to better defend or present the case while explaining and validating the state of mind of the client, or his or her actions.



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2. Cameras can be, and usually are, everywhere

There are possibly more videos of your incident than you realize. Did you know that many buses have a dozen surveillance cameras or more pointing in all different directions, and some cities install cameras on traffic lights, street sweepers, and bridge overpasses? Make sure to go back to the location on foot and look around for cameras. If a bus line drives past the location of your case's incident location, request video surveillance. The cameras might have captured something prior to or post incident that will be helpful.

3. Process the evidence and gather information quickly

When cases do present video and audio evidence, it is imperative that you gather, process, and begin to evaluate the electronic evidence as soon as possible. Although the investigation will be an ongoing process, that process needs to begin immediately because surveillance footage can be lost due to automatic overwriting and erasure.

4. Know the system from which the footage was gathered

The quality and usability of evidence is dependent on its source. Surveillance cameras, particularly older systems, are notorious for poor quality and the inability to enhance. The age, type, and quality of the system is instrumental in knowing what exactly you're dealing with, and how much ability you or your expert will have to enhance, evaluate, or work with the material. If at first viewing, your footage is too dark or too light, the video levels may be adjusted to improve clarity and the results of your evaluation. Video footage may also be subject to compression, loss of detail, and lowering frame rate if transferred improperly from system to system. For example, if your client emails video to you and then you email the video to your investigator, the video may have lost quality through each of those steps. The closer to the original footage and original equipment that your footage is, the better the ability to enhance it, work with it, and evaluate it.

Knowing the source and its strengths and limitations can be valuable information for a more informed press release or interview to help either dilute or debunk media claims based on partial or poor-quality footage.

5. Get an expert on board early

Getting a trained forensic expert on-board as early as possible is integral to the evaluation and eventual successful use of the material or, in the alternative, its neutralization as evidence against a client. I often see attorneys on the other side wait too long, deciding only a few weeks before trial to have their video evidence carefully evaluated, and by then, they are far behind the eight ball.

An expert will add an objective, trained set of eyes or ears to your team, and he or she also is keeping up with the newest technology and techniques for evaluation. Once the expert understands the key issues and facts of the case, those trained eyes and ears can pick out details and nuances often overlooked by a less trained, less impartial observer. They can



assist your other experts with information that help their assessments and may even spark ideas for getting other experts involved. If the expert has good knowledge of current technological innovations, they can suggest potential avenues for enhancement and discernment of the material and advise as to limitations.

6. Make sure playback quality in court is sufficient for your evidence

If details in your video or audio evidence are important, such as a muzzle flash or seeing Taser wires, make sure your jury can see those details by having appropriate equipment set up for your trial. This requires planning ahead. Don't show up on the first day in court and make the request.

Regarding audio, the speakers built into your computer are often not sufficient. Set up a professional speaker so the judge and jury can hear subtleties of your evidence.

7. Practice! Rehearse playing the evidence in court

Attorneys are often not technical. They are great with analyzing documents and recalling details of an interview. They are good at telling dramatic stories to a jury and painting a picture of the case. But I can't tell you how often I've seen attorneys on the other side fumbling with their digital evidence in court – pushing the wrong button and not knowing how to recover. Mistakes like that make you look unprepared, unprofessional, and maybe even untrustworthy. Practice with your evidence in order to work out the kinks before standing in front of the jury. Use the actual computer, evidence, and TV screen you are planning to use in court.

We live in a rapidly evolving world. Technology seems to advance exponentially not just daily, but by the hour. What was once the purview of James Bond or Star Trek has become

commonplace. In this ever-changing society, the role of digital evidence in the courts is becoming of greater importance; the attorney who ignores this change will soon find him or herself in a sea of hot water.

As attorneys, we therefore need to understand the details of this deluge of digital evidence and technology – both what it shows, and, in some cases, what it does not, and why.

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