

Lights, Camera, Action!

The Power of Video Depositions in Business Litigation

By Gerard V. Mantese

In a business case, preparation is the most important factor in taking a great deposition. Preparation for a truly effective deposition includes analyzing legal memoranda, reviewing and organizing all relevant documents, giving yourself sufficient time to reflect on the issues and drafting a detailed outline, and planning how the deposition can be used to cross-examine your adversary at trial. When an effective deposition of a critical witness is on the horizon, capturing it on video can prove a lethal weapon at trial.

Including excerpts of a video deposition at trial can be pivotal and dramatic. Consider, for example, weaving deposition excerpts of opposing parties' admissions into opening statements; this will allow the jurors to see and hear your opponents' flaws and weaknesses for themselves and can profoundly affect the jurors' perceptions of your opponents from the beginning. When jurors see and hear the key witnesses' video admissions during opening statements, they form initial impressions of opposing parties that can be difficult to overcome.

To avoid objections, it is advisable to notify opposing counsel and the judge beforehand that you intend to use deposition clips in your opening. Sometimes opposing counsel may forget the exceptions to the hearsay rule and initially object because "my client will be in court and can be cross-examined live." This is not a valid objection, as a party-opponent's testimony is admissible as substantive evidence as party admissions.¹



During a shareholder oppression case my team and I tried a few years ago, I used deposition video clips liberally in my 40-minute opening statement. The issues at trial included whether defendants had disclosed related-party transactions (RPTs); how the price for the RPTs was determined; and how the plaintiffs could realize the value of their shares, given that the controlling-member defendants had locked out plaintiffs, preventing them from receiving any meaningful dividends. The videotaped testimony of the two key defendants on these issues was dramatic and framed the case in the minds of the jurors.

One such series of video admissions which helped to establish that defendants had concealed the RPTs from the plaintiffs is reproduced below with some redaction and clarifications. The defendant testified to the admissions with grizzly determination and defiance, his jaw locked and his eyes ablaze:

Q. Am I correct that over \$6 million in charges paid to a company owned by your family is not disclosed in the company financial statements?

A. Well, it's not disclosed that the entity that's doing the hauling was owned by our family.

Q. Did you ever bring to the attention of the board or to the shareholders the fact that you were going to form these other companies to transport product and charge my clients' company for that?

A. No, sir.

Just as our mock jurors were appalled when they saw and heard this testimony, so was the actual jury. In post-trial interviews, the jury was angry that the defendants had not only concealed these important issues, but were so self-righteous about it. The jurors told us that observing these vignettes during the opening statement was extremely helpful to their understanding of the case. Nondisclosure was key to the plaintiffs' oppression and fiduciary duty claims; the video and audio of the defendant's testimony effectively communicated the self-righteous arrogance that permeated this relatively simple-sounding testimony. (Note that the court had convened an advisory jury on the plaintiffs' equitable claim of oppression.)

The video depositions provided additional testimony that I was able to use effectively in my opening statement—this time on the issue of how the defendants determined the prices for the RPTs. This testimony, like the testimony just discussed, had to be seen and heard to feel its full effect:

Q. Who negotiated that price on behalf of your new company?

A. My brother.

Q. Your brother—your co-defendant?

A. Yes.

Q. Who negotiated that price on behalf of the company my clients owned with you?

A. Me.

Q. All right. So you're saying you negotiated with your brother on the price?

A. Yes.

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The witness's expressions, tone of voice, and body language can be captured on video more effectively than trying to describe the same testimony to a jury.

Q. You're smiling because it's kind of—did that really happen? Did you really negotiate?

A. We talked about it.

Here, the defendant broke out in a huge grin, chuckling over his own unbelievable testimony that he negotiated with his brother on how many millions of dollars Company A (owned by the defendant brothers and in part by my clients) would pay to Company B (owned solely by the defendants). I had alerted the jury beforehand that they would see the witness break into a smile, chuckling and amused with his testimony; the jury was riveted when they actually saw it. The witness's grin was more powerful than a thousand words.

The idea that the two brothers aligned on the same side would engage in legitimate negotiation over how much they would be paid was laughable, but the main defendant's own chuckle and grin on the screen drove home this point better than words could have. Our mock juries and the actual jury thought this testimony was outrageous, and it helped to demonstrate the defendants' willfully unfair conduct and breach of fiduciary duty.

Another issue in the case was my clients' inability to unlock the value of their shares in this closely held, family company. Here, too, video deposition excerpts assisted our case and highlighted the defendants' oppressive attitude. When answering the question below, the defendant did so with a heavy dose of arrogance and condescension and a preachy tone:

Q. How does all the growth in the world benefit the shareholder if he's not going to get more than historically modest dividends?

A. Because at some point the shareholder, if he wants to sell his shares, will approach the majority shareholders and negotiate the proper kind of selling price. And then they can take advantage of the growth of the company.

So, here, the defendant was admitting that my clients would not realize any value from the company's growth without a buyout of their shares. This furthered my argument throughout the trial that a buyout under the shareholder oppression statute, MCL 450.1489, was reasonable and necessary to remedy my clients' being locked out of the increased value of the company. It was very helpful for the jury to see the defendant's dismissive attitude as he acknowledged this.

Finally, I ended the opening on a human note, playing for the jury a video deposition clip that summed up the defendants' greedy mentality toward my clients. In this clip, the defendant's physical demeanor was just as important as his testimony. He sat back in his chair with a look of total boredom, as if what he was saying was common sense and the question was a waste of his time:

Q. Should the shareholders see any benefit from the success of the company?

A. I don't know. I read that General Motors, the big companies, the guys get 10, 20, 30 million dollars; the shareholder still gets a buck fifty a share.

Q. And you think that's right?

A. That's the way it is, our society.

This statement was a shocking indictment of the defendants' actions and mistreatment of my clients, and it had a greater impact on the jurors because they saw and heard it delivered on the screen in the opening. Jurors told us later that they were livid when they heard this. These video clips and several others started the trial with the defendants in a very bad light, as they deserved to be.

In addition to the impact on the jury, the video clips also had a profound impact on the defendants. As they contemplated their own conduct, the defendants must have

known that a dark cloud had descended over them. Like Dorian Gray's portrait, the defendants appeared more and more ghastly as their conduct and motives were revealed. When I glanced over at the defendants after I sat down, they already looked defeated. Perhaps the jury saw what I saw: the principal defendant slouched over, his lower lip protruding in a pout. My partner noticed it, too, and he leaned over and said, "He looks like he's just been sent to the principal's office."

A few days later, the defendants settled before deliberations began, offering the entirety of my clients' \$13 million demand. That recovery was ultimately the largest reported settlement in the state that year.

Video depositions are an important tool for telling the story vividly. The witness's expressions, tone of voice, and body language can be captured on video more effectively than trying to describe the same testimony to a jury. Practitioners should keep this in mind when planning depositions and should look for effective ways to use video deposition clips in their opening and closing statements and examinations. If used correctly, this can convey to the jury, in a more effective and visceral way, the story that words alone cannot capture.

Lights, camera, action—and let truth emerge. ■



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ENDNOTE

1. MRE 801(d)(2); FRE 801(d)(2); see, e.g., *Shanklin v Norfolk Southern R Co*, 369 F3d 978, 990 (CA 6, 2004) [video deposition testimony admissible as admission of party-opponent]; *Howard v Abdellatif*, unpublished opinion of the U.S. District Court for the WD of Michigan, issued December 23, 2008 (Docket No. 2:05-CV-81) (permitting the use of deposition testimony during opening and closing statements).