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## The Video Deposition as a Civil Litigation Tool

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# SURVEY

## THE VIDEO DEPOSITION AS A CIVIL LITIGATION TOOL

### PART ONE: THE VIDEO DEPOSITION AS A CIVIL LITIGATION TOOL

#### INTRODUCTION

In 1970 Congress amended the Federal Rules of Civil Procedure to allow the use of non-stenographic means for recording depositions.<sup>1</sup> North Carolina followed the federal example and created rule 30(b)(4) in 1975.<sup>2</sup> Advocates of the technology declared that the video deposition was the answer to the oral deposition's many problems.<sup>3</sup> Opponents considered the medium a plague that too easily infected the jury with unfair prejudices.<sup>4</sup> After twenty years, most of the legal community has stopped believing either extreme. Yet, most attorneys are still unsure of the video deposition's place in litigation.<sup>5</sup>

Up to 90% of lawyers that use video depositions express disappointment in the results.<sup>6</sup> The verbal and written media are the tools of attorneys; video is a visual medium.<sup>7</sup> Attorneys must approach the visual medium in a radically different manner than that used for the verbal and written media.<sup>8</sup> On video, the attorney conveys his message by sight, not sound.<sup>9</sup> A deposition is "testimony

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1. FED. R. CIV. P. 30(b)(4).

2. N.C.R. Civ. P. 30(b)(4). See also Comment, *Videotape Depositions: An Analysis of use in Civil Cases*, 9 CUMB. L. REV. 195, 209 (1978).

3. Comment, *supra* note 2, at 196.

4. *Id.*

5. McElhaney, *Presenting Depositions; How to Make Transcripts and Videos Come Alive*, 74 A.B.A. J. 84, 86 (July, 1988).

6. *Id.*

7. Murry, *Videotaped Deposition: Putting Absent Witnesses in Court*, 68 A.B.A. J. 1402, 1402 (1982).

8. *Id.*

9. *Id.*

of a witness taken out of the court and reduced to writing to be used upon trial of an action in court."<sup>10</sup>

With video depositions, this is a misnomer because everything that happens before the cameras also happens in court.<sup>11</sup> The video tape serves only as a storage place for the light and sound signals until presentation at trial.<sup>12</sup> Failure to recognize this difference creates an amateurish presentation.<sup>13</sup> Such an amateurish presentation guarantees disaster in the courtroom.<sup>14</sup>

This Comment reports the findings of a research project on the video deposition's place in litigation. Professor Thomas P. Anderson, Norman Adrian Wiggins School of Law, supervised the project. The paper looks at video depositions from three perspectives. The first perspective outlines 30(b)(4)'s evolution through the court's interpretation of the rule. The second perspective synthesizes the many suggestions on video deposition production found in legal journals. The third perspective analyzes and collates empirical data collected from attorneys and jurors who participated in nine civil trials which used video depositions in the North Carolina Superior Court system. The empirical data also include data supplied by forty North Carolina Superior Court judges about video deposition use in their courts.

## HISTORY

Many judges first viewed video depositions as litigation Frankensteins.<sup>15</sup> This appearance created a diverse set of views on the scope of a judge's discretion in allowing the use of video depositions.<sup>16</sup> In the 1971 case of *Carson v. Burlington N., Inc.*,<sup>17</sup> the Nebraska Federal District Court allowed the first motion for a video deposition under the then infant Rule 30(b)(4) of the Federal Rules of Civil Procedure.<sup>18</sup> The Nebraska court emphasized that the video deposition would provide the trier of fact with cru-

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Underwood, *The Videotape Deposition: Using Modern Technology for Effective Discovery (Part 1)*, 31 *PRAC. LAW.* 61, 62 (1985).

16. *Id.* at 66.

17. 52 F.R.D. 492 (D. Neb. 1971). See also Comment, *supra* note 2, at 195.

18. 52 F.R.D. 492 (D. Neb. 1971).

cial demeanor and credibility evidence.<sup>19</sup> The court found that no amount of verbal courtroom description could equal the videotape's visual illustrations of the machine that allegedly caused the plaintiff's injury.<sup>20</sup> The court based its decision on the following factors.<sup>21</sup> First, the size and weight of the machine made transportation unrealistic.<sup>22</sup> Second, the complexity of the machine made models inadequate.<sup>23</sup> Third, a jury visit to the site would have consumed valuable court time, inconvenienced the defendant's operation, and possibly endangered the jury.<sup>24</sup> In *Carson* the enhancement of the evidence played an important part in the court's decision to allow the medium's use.<sup>25</sup> The court recognized and took safeguards against possibly unfair prejudicial use of the medium.<sup>26</sup> The order included provisions for insuring the deponent's safety, foiling opportunities for rigging the demonstration and imposing a duty of impartiality on the cameraman.<sup>27</sup>

*Perry v. Mohawk Rubber Co.*<sup>28</sup> reiterated the need for the medium to enhance the evidence before allowing the use of a video deposition.<sup>29</sup> In *Perry* the court denied the use of a video deposition for recording testimony concerning technical accounting material.<sup>30</sup> The judge denied the medium's use because the video deposition would not amplify the evidence nor was the procedure cost saving.<sup>31</sup>

In *United States v. LaFatch*<sup>32</sup> the court restrained the medium's ability to create emotional responses through graphic visu-

19. Comment, *supra* note 2, at 206.

20. *Carson v. Burlington N., Inc.*, 52 F.R.D. 492, 493 (D. Neb. 1971). See also UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES § 3.01, at 132-33 (2d ed. 1985).

21. *Carson v. Burlington N., Inc.*, 52 F.R.D. 492, 493 (D. Neb. 1971).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Carson*, 52 F.R.D. at 493. See also Underwood, *The Videotape Deposition: Using Modern Technology for Effective Discovery (Part 2)*, 31 PRAC. LAW. 65, 69 (1985).

26. *Carson*, 52 F.R.D. at 493.

27. *Id.*

28. 63 F.R.D. 603 (D.S.C. 1974).

29. *Id.* at 603.

30. *Id.* at 606. See also UNDERWOOD, *supra* note 20 § 3.03(b), at 148; Underwood, *supra* note 25, at 67.

31. *Perry*, 63 F.R.D. 603 (D.S.C. 1974).

32. 382 F. Supp. 630 (N.D. Ohio 1974).

als and imaginative camera angles.<sup>33</sup> The court only allowed the showing of the deponent's head and shoulders.<sup>34</sup> This requirement lessened the emotional impact of the deponent's physical condition and the hospital setting.<sup>35</sup> Also, the order did not allow the showing of any medical personnel in the videotape.<sup>36</sup>

The unavailability of a witness has often played a crucial role in courts allowing video depositions.<sup>37</sup> In *In re Daniels*<sup>38</sup> a crucial, but uncooperative witness was beyond the subpoena power of the court.<sup>39</sup> The witness, Daniels, gave an ambiguous response to his availability for trial.<sup>40</sup> Key issues revolved around the witness's vigorously disputed credibility.<sup>41</sup> The court ordered a video deposition, subject to approval of the district judge controlling Daniels' jurisdiction.<sup>42</sup> The controlling district judge, Judge O'Kelly, allowed the video deposition, subject to safeguards against harassment and exploitation.<sup>43</sup> The protective provisions forbade the use of zoom lenses, required a straight ahead camera angle and required avoidance of close-ups and the exhibiting of the tape to persons not involved in the case's preparation.<sup>44</sup> Judge O'Kelly stated, "[t]he court should not be like an ostrich, sticking its head in the sand and being oblivious to advances in technology which can aid in the judicial process."<sup>45</sup>

The federal courts in *Continental Fed. Sav. & Loan Ass'n* and *In re Daniels* prohibited the use of zoom lenses.<sup>46</sup> However, these courts did not specifically address the need for revealing pertinent details through the use of zoom lenses.<sup>47</sup> Other federal courts have approved the use of zoom lenses during the videotaping of demon-

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33. *Id.* at 631.

34. *Id.* See also Underwood, *supra* note 15, at 72-73.

35. *Perry*, 63 F.R.D. at 606 (D.S.C. 1974).

36. *Id.*

37. Underwood, *supra* note 15, at 64; UNDERWOOD, *supra* note 20, at 133-34.

38. 69 F.R.D. 579 (N.D. Ga. 1975).

39. *In re Daniels*, 69 F.R.D. 579, 580.

40. *Id.*

41. *Id.*

42. *Id.* at 582.

43. *Id.*

44. *Id.* at 581. See also Underwood, *supra* note 25 at 69-70.

45. *Daniels*, 69 F.R.D. at 581. For a similar order, see *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697 (W.D. Okla. 1976).

46. *Figari and Loewinsohn, Video Depositions Come to Court*, 14 LITIGATION 35, 36 (1988).

47. *Id.*

strations and accident reenactments.<sup>48</sup> These cases create the precedent for courts to allow the zoom lens technique when it aids juries in understanding the evidence.<sup>49</sup>

In *In re "Agent Orange" Prod. Liab. Litig.*<sup>50</sup> the plaintiff's rapidly deteriorating health presented the likelihood that he would be either dead or too ill to testify.<sup>51</sup> Again, the court found that many pivotal issues turned on the plaintiff's credibility.<sup>52</sup> His demeanor and responsiveness to questions were key factors in the case's resolution.<sup>53</sup> The inability to view the witness's demeanor would detract from the plaintiff's case and frustrate the fact finding process.<sup>54</sup> The court's primary concern was camera bias.<sup>55</sup> To guarantee against such bias the court added the following protective provision to its order.<sup>56</sup> "The videotape shall run continuously throughout the deposition from beginning to end. Videotaping shall not be discontinued during the colloquy among counsel; later editing can remove any portions that are not proper for the fact finder to see and hear."<sup>57</sup>

*In re "Agent Orange"* held that the judge enjoys a wide range of discretion in allowing the use of a video deposition.<sup>58</sup> However, accuracy of the recording method is paramount to the order's issuance.<sup>59</sup>

In *Lamb v. Globe Seaways, Inc.*<sup>60</sup> the plaintiff, a seaman, could not attend his trial due to a sea voyage.<sup>61</sup> The seaman's failure to use a video deposition as an effective alternative to a trial appearance was instrumental in the court's denial to reopen or

48. *Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664 (1986); *Carson v. Burlington N., Inc.*, 52 F.R.D. 492 (D. Neb. 1971).

49. *Figari and Loewinsohn, supra* note 46, at 36.

50. 28 Fed. R. Serv. 2d (Callaghan) 993 (E.D.N.Y. 1980).

51. *Id.* at 994. *See also Underwood, supra* note 15, at 63.

52. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 995. *See also Underwood, supra* note 20 § 3.01, at 133.

53. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 995.

54. *Id.*

55. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 996. *See also Underwood, supra* note 25, at 70.

56. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 996.

57. *Id.*

58. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 994. *See also Underwood, supra* note 25, at 66.

59. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 994.

60. 516 F.2d 1352 (2d Cir. 1975).

61. *Id.* *See also Underwood, supra* note 20 § 3.01, at 137; *Underwood, supra* note 15, at 67.

continue the case until the plaintiff returned from sea.<sup>62</sup>

*Colonial Times, Inc. v. Gasch*<sup>63</sup> stands for a narrow interpretation of the court's discretion in allowing depositions by alternate means.<sup>64</sup> In this case, the court stated it would only allow a method of recording if the proponent proved the medium was accurate.<sup>65</sup> The form of non-stenographic recording contemplated in *Colonial Times* was probably audio, not video.<sup>66</sup> The proponent's primary interest was cost savings and not demeanor testimony.<sup>67</sup> For this reason the case holding is invalid for use in an argument against allowing video depositions. Courts do not routinely follow *Colonial Times*.<sup>68</sup>

In *Rice's Toyota World, Inc. v. Southeastern Toyota Distribs., Inc.*,<sup>69</sup> the court expressed concern that the proponent would be less than diligent in arranging for live testimony.<sup>70</sup> The proponent might hope the court would allow the use of video depositions if witnesses conveniently did not appear in court.<sup>71</sup> The court required the proponent to prove a need for taking the video depositions.<sup>72</sup> The court found that Rule 30(b)(4) of the Federal Rules of Civil Procedure does not authorize a video deposition as a matter of right.<sup>73</sup> The proponent must show more than a personal preference for using the medium.<sup>74</sup> Under the North Carolina rule the burden would be on the opponent to show reasons why the court should not allow the video deposition.<sup>75</sup>

#### THE COURT'S ALLOWANCE OF VIDEO TAPED DEPOSITIONS

Many judges view video depositions in a favorable light.<sup>76</sup> "In general, video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can em-

62. *Lamb*, 516 F.2d at 1357.

63. 509 F.2d 517 (D.C. Cir. 1975).

64. *Id.*

65. *Id.* at 522.

66. Underwood, *supra* note 15, at 66.

67. *Id.*

68. Misko, *Videotape for Litigation*, 26 S. TEX. L.J. 485, 487 (1985).

69. 114 F.R.D. 647 (M.D.N.C. 1987).

70. *Id.*

71. *Id.* at 650.

72. *Id.* at 648.

73. *Id.*

74. *Id.*

75. N.C.R. Civ. P. 30(b)(4).

76. Figari and Loewinsohn, *supra* note 46, at 35.

ploy more of his senses in interpreting the information from the deposition.”<sup>77</sup>

Most courts view expense as only one of the factors in considering a video deposition order.<sup>78</sup> Demeanor evidence gained from the medium’s use often outweighs the expense factor.<sup>79</sup> In *Perry* the judge based his decision on the 1970 advisory committee’s notes that emphasized cost saving as the primary motive for using non-stenographic recordings.<sup>80</sup> The judge declared that the court must presume all requests for non-stenographic deposition orders are invalid unless the proponent proves the technique is less costly than the stenographic method.<sup>81</sup> This interpretation of the advisory committee’s notes does not consider their full wording.<sup>82</sup> “In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means - e.g., by mechanical, electronic, or *photographic means*” (emphasis added).<sup>83</sup>

The wording does not signify that the committee automatically concluded videotapes were more expensive.<sup>84</sup> The majority view interprets the advisory committee notes to regard cost as only one factor to be considered and not the pivotal issue.<sup>85</sup> Courts commonly allow video depositions when the medium adds an evidentiary dimension not fully realized by stenographic recordings.<sup>86</sup>

All courts agree that the judge can consider the accuracy of the recording method.<sup>87</sup> The advisory committee’s notes to the 1970 revisions to Rule 30(b)(4) of the Federal Rules of Civil Procedure are the basis for this unanimous view.<sup>88</sup> Only when the video deposition prejudices the rights of the deponent or a party, or is

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77. *Burlington Bd. of Educ. v. United States Mineral Prod. Co.*, 115 F.R.D. 188, 189 (M.D.N.C. 1987).

78. Underwood, *supra* note 25, at 67-68.

79. *Id.*

80. *Perry v. Mohawk Rubber Co.*, 63 F.R.D. 603 (D.S.C. 1974). *See also* Underwood, *supra* note 25, at 67.

81. *Perry*, 63 F.R.D. at 605.

82. Underwood, *supra* note 25, at 67.

83. FED. R. CIV. P. 30(b)(4) advisory committee’s notes.

84. Underwood, *supra* note 25, at 67.

85. UNDERWOOD, *supra* note 20 § 3.03(b), at 148-49.

86. *Id.* § 3.03(b), at 147.

87. Underwood, *supra* note 25, at 66; UNDERWOOD, *supra* note 20 § 3.03(b), at 147.

88. Underwood, *supra* note 25, at 66; UNDERWOOD, *supra* note 20 § 3.03(b), at 147.



unjustifiably expensive, should the court deny the motion for a video deposition.<sup>89</sup>

### RULES OF CIVIL PROCEDURE AND EVIDENCE

Under Rule 30(b)(4) of the Federal Rules of Civil Procedure, two avenues are available for gaining permission to take a video deposition.<sup>90</sup> The parties can stipulate to record the deposition on videotape.<sup>91</sup> The deposition's proponent also may seek a court order directing the taking of the deposition by videotape.<sup>92</sup> Rule 30(b)(4) of the North Carolina Rules of Civil Procedure requires only that the proponent notify the opponent of the plans to take the deposition by video.<sup>93</sup> This liberalized "notice only" rule requires a simultaneous stenographic recording.<sup>94</sup> The requirement finds its basis partially in the belief that video depositions are still experimental.<sup>95</sup> The video deposition's courtroom quality and value are not yet fail-safe.<sup>96</sup>

Critics attack the simultaneous recording of a deposition by both stenographic means and videotape.<sup>97</sup> These critics feel that the dual recording provides the deposing party with an unfair advantage.<sup>98</sup> The deposing party can assess the two products and use the most favorable medium.<sup>99</sup> The advantage of having an accompanying transcript outweighs this possible disadvantage. The stenographic transcript allows for a convenient method for ruling on objections before trial.<sup>100</sup> The edited transcript, used along with an index log, allows fast-forwarding past excluded portions of the tape.<sup>101</sup>

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89. UNDERWOOD, *supra* note 20 § 3.03(b), at 150.

90. FED. R. CIV. P. 30(b)(4). *See also* Underwood, *supra* note 25, at 65; Figari and Loewinsohn, *supra* note 46, at 35; UNDERWOOD, *supra* note 20 § 3.02, at 146.

91. FED. R. CIV. P. 30(b)(4).

92. *Id.*

93. N.C.R. CIV. P. 30(b)(4). *See also* SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 30-8, at 25 (3d ed 1988); UNDERWOOD, *supra* note 20 §§ 3.02, 3.03(b), at 146-50; Comment, *supra* note 2, at 213.

94. N.C.R. CIV. P. 30(b)(4).

95. Underwood, *supra* note 15, at 70.

96. *Id.*

97. Comment, *supra* note 2, at 224.

98. *Id.*

99. *Id.*

100. Murry, *supra* note 7, at 1403-04.

101. *Id.* Use of such techniques for handling objections effectively are discussed *infra* at notes 445-51 and accompanying text.

Rule 30(b)(4) and the notes of the advisory committee are silent on production requirements for video depositions.<sup>102</sup> The courts view this silence as giving them the authority to specify the manner of production that insures accuracy and trustworthiness.<sup>103</sup> Therefore, the courts consider accuracy and trustworthiness of video deposition their primary concern.<sup>104</sup>

Rule 30(b)(4) of the Federal Rules of Civil Procedure allows for the cameraman to be the oath-administering deposition officer.<sup>105</sup> This ends the need of retaining a notary specifically for administering the oath.<sup>106</sup> The advisory committee's encouragement of cost saving arrangements is the basis of this position.<sup>107</sup> The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath.<sup>108</sup>

Under both the North Carolina and Federal Rules of Civil Procedure, a clerk or paralegal can operate the video tape machinery.<sup>109</sup> If the clerk's or paralegal's skill is not beyond the amateurish home movie level the attorney must hire a professional cameraman.<sup>110</sup> Rule 28(c) of both the Federal and North Carolina Rules of Civil Procedure disallows the taking of a deposition before a person who is a relative or employee of any party to the action.<sup>111</sup> Under the North Carolina rule, the parties can stipulate otherwise, as provided in Rule 29 of the North Carolina Rules of Civil Procedure.<sup>112</sup> Rule 29 of the Federal Rules of Civil Procedure reads the same as the North Carolina rule.<sup>113</sup> However, Rule 28(c) of the

102. *Id.* at 1402-03.

103. Figari and Loewinsohn, *supra* note 46, at 35.

104. *Id.*

105. FED. R. CIV. P. 30(b)(4) *advisory committee's notes*. See also Underwood, *supra* note 15, at 70-71; UNDERWOOD, *supra* note 20 § 3.02, at 141.

106. FED. R. CIV. P. 30(b)(4) *advisory committee's notes*.

107. *Id.*

108. *Id.* However in North Carolina this is not a concern due to the required stenographic record. Most stenographers have the power to administer oaths.

109. *United States v. Hargo*, 104 F.R.D. 451 (N.D. Ga. 1984). See also N.C.R. Civ. P. 29; FED. R. CIV. P. 29.

110. McElhaney, *supra* note 5, at 86.

111. N.C.R. Civ. P. 28(c); N.C.R. Civ. P. 29; FED. R. CIV. P. 28(c); FED. R. CIV. P. 29. See also Comment, *supra* note 2, at 216-17.

112. N.C.R. Civ. P. 29

113. *Id.*; FED. R. CIV. P. 29.

Federal Rules of Civil Procedure makes no reference to rule 29.<sup>114</sup> In *United States v. Hargo*<sup>115</sup> the court stated that when reading Rule 28(c) with Rule 29 and Rule 30(b)(4) of the Federal Rules of Civil Procedure there is no compelling need for an independent third party to administer the deposition oath.<sup>116</sup> The court found that the use of two recording devices promoted efficient and economic administration of justice.<sup>117</sup> The simultaneous recording also preserved the accuracy and integrity associated with traditional stenographic records.<sup>118</sup>

Rule 32(a)(1) of the North Carolina Rules of Civil Procedure allows the use of a non-party witness deposition for any purpose permitted by the corresponding rules of evidence.<sup>119</sup> Under the federal rules, the use of a deposition at trial depends on whether the witness is a party or non-party.<sup>120</sup> Rule 32(a)(2) of the Federal Rules of Civil Procedure authorizes the use of a deposition of an adverse party for any purpose.<sup>121</sup> During his case-in-chief an attorney can present selective portions of a video deposition of an adverse party.<sup>122</sup> Under Rule 32 of the federal rules, the use of a video deposition for a non-party witness is more stringent.<sup>123</sup> Rule 32(a)(3) of the federal rules allows deposition usage for purposes other than those permitted by 32(a)(1) only if the witness is:

- 1)dead;
- 2)more than 100 miles from the place of trial;
- 3)unable to attend due to illness, infirmity, or imprisonment;
- 4)beyond subpoena power of the court; or
- 5)in "exceptional circumstances."<sup>124</sup>

To meet the exceptional circumstances requirement the deposition must satisfy a standard supporting "the interest of justice and with due regard to the importance of presenting the testimony

114. FED. R. CIV. P. 28(c).

115. 104 F.R.D. 451, 452 (N.D. Ga. 1984).

116. *Id.*

117. *Id.*

118. *Id.*

119. N.C.R. CIV. P. 32(a)(1). See also SHUFORD, *supra* note 93 § 32-8, at 272.

120. FED. R. CIV. P. 32(a)(2). See also Comment, *supra* note 2, at 218; Figari and Loewinsohn, *supra* note 46, at 36.

121. FED. R. CIV. P. 32(a)(2).

122. *Id.*

123. FED. R. CIV. P. 32(a)(3). See also UNDERWOOD, *supra* note 20 § 3.04, at 155.

124. *Id.*

of the witness orally in court."<sup>125</sup>

The deposition's proponent carries the burden of proof for allowing a video deposition under the "exceptional circumstances" exception.<sup>126</sup> The burden of proof found in this exception is not easily overcome.<sup>127</sup> The following "in the interest of justice" arguments may carry the burden of proof: 1) the expert's live testimony is needed in other cases, 2) a video deposition will allow the sponsoring party to obtain the superior knowledge of a particular expert which assists the court in the search for truth while saving cost for the sponsoring party, 3) a video deposition allows the testimony to fit logically into the trial evidence. Empirical data indicates that this last argument is gaining favor with the courts.<sup>128</sup>

Rule 32 of the North Carolina Rules of Civil Procedure has abolished the unavailability requirement for expert witnesses. The federal rules have not.<sup>129</sup>

Rule 703 of both the Federal and North Carolina Rules of Evidence permits asking experts hypothetical questions based on an assumption of certain facts.<sup>130</sup> An attorney may show key portions of a fact witness's video deposition which is the basis for the hypothetical question.<sup>131</sup> This highlights key facts, adds interest, and increases the credibility of the expert's conclusions.<sup>132</sup>

### LIVE TESTIMONY IS BETTER

The American judicial system favors live testimony.<sup>133</sup> Live testimony inspires a carefully reasoned search for the truth.<sup>134</sup> A witness's presence in front of judge, jury, counsel and parties allows complete inquiry through spontaneous interaction.<sup>135</sup> Eyewitness accounts of pivotal events present evidence which requires the

125. UNDERWOOD, *supra* note 20 § 3.04, at 155, quoting FED. R. CIV. P. 32(a)(3).

126. FED. R. CIV. P. 32(a)(3)(E). See also Underwood, *supra* note 25, at 74.

127. UNDERWOOD, *supra* note 20 § 3.04, at 155.

128. Comment, *supra* note 2, at 198, 222, 238; Underwood, *supra* note 25, at 74.

129. N.C.R. CIV. P. 32(a)(4); FED. R. CIV. P. 32(a)(3). See also Comment, *supra* note 2, at 219.

130. FED. R. EVID. 703; N.C.R. EVID. 703.

131. Figari and Loewinsohn, *supra* note 46, at 35.

132. *Id.*

133. UNDERWOOD, *supra* note 20 § 3.04, at 153.

134. *Id.* § 3.04, at 154.

135. *Id.* § 3.04, at 153-54; Underwood, *supra* note 25, at 72.

intense scrutiny and pressure of a face-to-face meeting with the jury.<sup>136</sup> Critics claim that the absence of the influence created by the traditional dignity and ritual of the courtroom affects the witness's veracity.<sup>137</sup> These critics also claim that a video deposition creates a psychological distance between jurors and the witness.<sup>138</sup> They base this theory on the fact that a deposition officer only functions in a ministerial capacity.<sup>139</sup> The officer is not as likely to facilitate interaction between examiner and witness as would a judge.<sup>140</sup> Thus, a video deposition can never truly gain that added flavor of live testimony.<sup>141</sup> This theory enforces the proposition that the court should allow use of a videotape deposition only if the tape enhances the evidence.<sup>142</sup>

Comments gathered from jurors, however, show that videotaped testimony moves faster than live testimony.<sup>143</sup> The jurors felt the videotaped testimony eliminated many of the distractions associated with live testimony.<sup>144</sup> Many jurors stated that testimony is easier to hear and exhibits are seen in more detail when viewed on videotape.<sup>145</sup>

### THE MEDIUM

Among the merits of videotape depositions are the fact that they can supply evidence that is unavailable in other forms, they can show certain evidence more clearly, and they can be a superior device for appellate review. On the negative side, they are usually expensive, they can lead to boredom, eye strain and ear strain for jurors. Also, they can lead to distorted and prejudicial impressions if lighting techniques and camera angles are not carefully considered or if the setting is one that might have an emotional impact

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136. UNDERWOOD, *supra* note 20 § 3.01, at 136.

137. Comment, *supra* note 2, at 222.

138. *Id.*

139. Underwood, *supra* note 25, at 72; UNDERWOOD, *supra* note 20 § 3.04, at 154.

140. Underwood, *supra* note 25, at 72; UNDERWOOD, *supra* note 20 § 3.04, at 154.

141. Underwood, *supra* note 25, at 72; UNDERWOOD, *supra* note 20 § 3.04, at 154.

142. UNDERWOOD, *supra* note 20 § 3.04, at 153.

143. Comment, *supra* note 2, at 220-21.

144. *Id.*

145. *Id.*

on the jurors.<sup>146</sup>

Obviously, the attorney's primary concern will center on the jury's reaction to the video deposition.<sup>147</sup> Juries generally react positively to video depositions.<sup>148</sup> In *McCall v. Clemons*<sup>149</sup> the jury expressed appreciation for not needing to disregard testimony ruled inadmissible.<sup>150</sup> The *McCall* jury felt it was helpful to not hear comments between counsel and the court concerning the admissibility of evidence.<sup>151</sup>

Studies show that a person retains more information through the sense of sight than through the sense of sound.<sup>152</sup> We learn 85% by sight and 15% by audio.<sup>153</sup> Modern day jurors accept the television as a provider of information.<sup>154</sup> Television's familiar and comforting effects are a common denominator that cuts across socio-economic lines.<sup>155</sup> To achieve maximum impact, attorneys must understand the characteristics, requirements and properties of the visual medium.<sup>156</sup> The medium shapes the message.<sup>157</sup> The close-up is the underlining of text.<sup>158</sup> The zoom is the exclamation point.<sup>159</sup> The fade-out is the period at the end of a sentence.<sup>160</sup> These techniques play major roles in a video deposition.<sup>161</sup> The

146. UNDERWOOD, *supra* note 20 § 3.02, at 138.

147. Comment, *supra* note 2, at 220. Under a grant from the Ohio Judicial Conference Judge James L. McCrystal tested his theory that the videotaped deposition was one possible solution to Ohio's congested civil docket. The test case was a simple personal injury action, *McCall v. Clemons*, *infra*, note 149. The defendant admitted liability. The only remaining fact questions concerned plaintiff's injuries and the amount of damages. The judge, jurors, and counsel critiques the case's video depositions in *First Videotaped Trial: Experiment in Ohio*, 21 DEF. L.J. 267 (1972).

148. Comment, *supra* note 2 at 220.

149. Civil No. 39,301 (C.P., Erie County, Ohio, Nov. 18, 1971).

150. *Id.*

151. *Id.* See also Comment, *supra* note 2, at 220.

152. Misko, *supra* note 68, at 485.

153. *Id.*

154. Feder and Feder, *Video: A New Litigation Tool for the 80's*, 8 TRIAL DIPL. J. 15, 18 (Summer 1985).

155. Misko, *supra* note 68, at 485.

156. Murry, *supra* note 7, at 1406.

157. Marcotte, *Putting the Jury in Your Shoes*, 73 A.B.A. J. 20, 20 (July 1, 1987).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

deposition's effectiveness depends on how the attorney uses these techniques.<sup>162</sup>

The sophisticated techniques of commercial television are the standards by which jurors judge the video deposition.<sup>163</sup> Commercial television has created an attention span of only 15 to 20 minutes.<sup>164</sup> The video deposition, no matter how good, can never live up to these sophisticated techniques.<sup>165</sup> However, the attorney must use his energies to come as close as possible to these standards.<sup>166</sup> When producing a video deposition, the attorney must remember the term "couch potato" and its connotation.

A 1974 study conducted in Utah showed that video depositions were superior to stenographic depositions for allowing accurate perception of a witness's credibility.<sup>167</sup> In the Prefatory Note of the Uniform Audio-Visual Deposition Act Judge Weis stated:

In the non-jury proceeding, the attorneys had decided to have a court stenographer take down the depositions as well as putting them on videotape. Again, I had the opportunity of contrasting the reading of a deposition with seeing the witness actually testify. I can tell you unequivocally that the difference between reading a cold page of testimony and seeing the witness is startling. The videotape did affect my feelings toward certain points in the testimony of these doctors differently than the simple reading of the depositions had accomplished.<sup>168</sup>

If a witness is unable to testify at trial, a video deposition is "the next best thing to being there."<sup>169</sup> Attorneys must accept this statement with several caveats.<sup>170</sup> Video depositions can only relieve the tedium of a stenographic deposition's sing-song reading when the video deposition's length is reasonable.<sup>171</sup> Lengthy video depositions create boredom and eye strain.<sup>172</sup> Jurors react to a long

162. *Id.*

163. McElhaney, *supra* note 5, at 86.

164. *Id.*

165. *Id.*

166. *Id.*

167. Unif. Audio-Visual Deposition Act, Prefatory Note, 12 U.L.A. 9, 9 (1990).

168. *Id.*

169. Heffernan, *Effective Use of Demonstrative Evidence: Seeing is Believing*, 5 AM. J. TRIAL ADVOC. 427, 430 (1982).

170. *Id.*

171. UNDERWOOD, *supra* note 20 § 3.02, at 140.

172. *Id.*

video deposition in the same manner they react to a poorly made late-night movie.<sup>173</sup> They mentally turn it off and fall asleep!<sup>174</sup>

Advocates of the video deposition claim that the medium can record the true nature of the overlapping verbal eruption of heated exchanges.<sup>175</sup> This statement is valid only if the deposition is taped using multiple cameras that allow the showing of each participant simultaneously.<sup>176</sup> The commonly used single camera set-up focuses on the deponent records all overlapping voices as background clatter.<sup>177</sup> In this situation, the single camera presentation is less accurate than the transcript prepared by an observant stenographic reporter.<sup>178</sup> The attorneys must contain the contentious and obtrusive behavior that is often present during a deposition. This, in turn, affects the demeanor of the attorneys.<sup>179</sup> There is a danger of unfair prejudice caused by flamboyant acting.<sup>180</sup> However, protective provisions and pre-trial editing can guard against this danger.<sup>181</sup>

#### THE LOGICAL ORDER OF EVIDENCE

Legitimate schedule conflicts often require the witness to testify outside the logical order of evidence.<sup>182</sup> The testimony will not merge logically and forcefully with the other evidence.<sup>183</sup> Evidence presented out of order confuses the jury and weakens the impact of critical testimony.<sup>184</sup> Jurors find evidence easier to understand when revealed in the proper order.<sup>185</sup> A video deposition is a solution to this problem.<sup>186</sup> The video deposition will allow the testimony to fit logistically into the stream of evidence.<sup>187</sup> The attorney

173. *Id.*

174. *Id.*

175. *Id.*; Underwood, *supra* note 15, at 69.

176. UNDERWOOD, *supra* note 20 § 3.02, at 140.

177. *Id.*

178. *Id.*

179. HAYDOCK AND HERR, DISCOVERY PRACTICE § 3.3.2, at 165.

180. UNDERWOOD, *supra* note 20 § 3.01, at 135.

181. *Id.* Camera set-ups, protective provisions and pre-trial editing techniques are discussed *infra*.

182. Figari and Loewinsohn, *supra* note 46, at 36.

183. *Id.*

184. *Id.*

185. Comment, *supra* note 2, at 220-21.

186. UNDERWOOD, *supra* note 20 § 3.01, at 134; Figari and Loewinsohn, *supra* note 46, at 36.

187. UNDERWOOD, *supra* note 20 § 3.01, at 134.



must determine the most effective testimony to present before and after the video deposition.<sup>188</sup>

### COST FACTORS

Normally the party taking the video deposition will pay all costs incurred.<sup>189</sup> Unusual circumstances, such as extraordinary length, may require other parties to share these costs.<sup>190</sup> Before plunging headfirst into the medium, the attorney must weigh the need against the increased expense and effort required.<sup>191</sup>

Video depositions are expensive,<sup>192</sup> but not inherently more expensive than stenographic depositions.<sup>193</sup> Many expert witnesses prefer video depositions over court appearances.<sup>194</sup> These expert witnesses' billing rates are usually higher for testifying than for depositions.<sup>195</sup> Many experts live outside the geographic location of the trial, using video depositions alleviates scheduling problems associated with distance.<sup>196</sup> The video deposition reduces the prohibiting cost factors of billable travel and waiting time.<sup>197</sup> The video deposition can prevent agitation of the witness caused by time lost due to travel and delay of testimony.<sup>198</sup> The medium's usage avoids frequent continuances due to the necessity of accommodating sudden changes in an expert's schedule.<sup>199</sup> This economical use of money and energy allows for obtaining better experts.<sup>200</sup> There is an added benefit; the community retains the expert's valuable services which the trial diverts from society.<sup>201</sup>

188. Feder and Feder, *supra* note 154 at 19.

189. Underwood, *supra* note 25, at 71; UNDERWOOD, *supra* note 20 § 3.03(b), at 152-53.

190. UNDERWOOD, *supra* note 25, at 71.

191. UNDERWOOD, *supra* note 20 § 3.02, at 138.

192. *Id.* § 3.02, at 141.

193. Underwood, *supra* note 15, at 70.

194. Misko, *supra* note 68, at 492; UNDERWOOD, *supra* note 20 § 3.01, at 135.

195. *Id.*

196. Misko, *supra* note 68, at 492; UNDERWOOD, *supra* note 20 § 3.01, at 135; Comment, *supra* note 2, at 222.

197. Misko, *supra* note 68, at 492; UNDERWOOD, *supra* note 20 § 3.01, at 135.

198. Comment, *supra* note 2, at 196, 202; Underwood, *supra* note 15, at 64-65; Misko, *supra* note 68, at 492.

199. Underwood, *supra* note 25, at 69.

200. UNDERWOOD, *supra* note 20 § 3.01, at 135.

201. Comment, *supra* note 2, at 222.

## USE, MISUSE, AND OVERUSE

Many early articles stated that video depositions were the complete cure for juror inattentiveness to long readings of oral depositions.<sup>202</sup> "Video transforms evidence depositions from a necessary evil into an exciting opportunity for advocacy unheard of in traditional deposition practice."<sup>203</sup>

The video deposition's ability to add evidence or enhance its value is an effective argument in gaining the court's permission to use the medium.<sup>204</sup> Video depositions allow the gathering of evidence at the convenience of witnesses and attorneys.<sup>205</sup> This allows all parties to better prepare for the deposition.<sup>206</sup> Video depositions also provide an element of convenience for the court.<sup>207</sup> The convenience allows inserting the testimony of an unavailable busy expert—or public official—at the most logical spot in the stream of evidence.<sup>208</sup> Video depositions also allow the removing of objectionable evidence in advance of trial.<sup>209</sup> Video depositions allow for less exposure of the jury to prejudicial evidence and endless debates concerning admissibility.<sup>210</sup>

However, experience has shown that video depositions do not cure all litigation ills, and can aggravate many.<sup>211</sup> Only a properly produced video deposition will reduce the boredom of an oral deposition.<sup>212</sup> The video deposition can only function as a strong and important litigation tool that enlightens, edifies, educates, and entertains when properly produced.<sup>213</sup> Merely relying on the medium to carry the day creates disastrous results.<sup>214</sup>

As illustrated in *In re "Agent Orange,"*<sup>215</sup> a plaintiff or witness

202. Misko, *supra* note 68, at 486.

203. *Id.* at 492.

204. UNDERWOOD, *supra* note 20 § 3.03(b), at 148.

205. Comment, *supra* note 2, at 202.

206. *Id.*

207. UNDERWOOD, *supra* note 20 § 3.03(b), at 149; Underwood, *supra* note 15, at 64-65.

208. UNDERWOOD, *supra* note 20 § 3.03(b), at 149.

209. *Id.*

210. *Id.*

211. UNDERWOOD, *supra* note 20 § 3.02, at 138.

212. Dombroff, "Videotape Depositions: Their Effective Use in Litigation," 11 BARRISTER 45, 45 (Winter, 1984).

213. Feder and Feder, *supra* note 154, at 19.

214. Dombroff, *supra* note 212, at 45.

215. 28 Fed. R. Serv. 2d (Callaghan) 993 (E.D.N.Y. 1980).

may be dead or too ill to testify in court.<sup>216</sup> A video deposition can preserve the person's testimony in a form that allows the jury to see and hear the witness.<sup>217</sup> The ability to see and hear the witness carries much more impact than a third party reading the statements the witness made.<sup>218</sup> As discovered by the hapless plaintiff in *Lamb v. Globe Seaway*, a video deposition would have been better than no appearance.<sup>219</sup>

The holding in *Hale v. Firestone Tire & Rubber Co.*<sup>220</sup> extended the ruling in *Carson v. Burlington, Inc.*<sup>221</sup> In *Hale* the court allowed the videotaping of an exploding tire striking a mannequin.<sup>222</sup> The videotape demonstrated the plaintiff's injuries by including close-ups of the mannequin's face.<sup>223</sup>

A personal injury trial is an ideal forum for a video deposition.<sup>224</sup> However, a video deposition can also increase jury interest in an otherwise dull commercial case.<sup>225</sup> The video deposition's proponent must argue against the holding of *Perry v. Mohawk Rubber Co.*<sup>226</sup> Video depositions may also be valuable in bench trials.<sup>227</sup> Judges are also human and susceptible to persuasive live testimony.<sup>228</sup> Summation presents another opportunity for use of a video deposition.<sup>229</sup> However, there is no case law on this technique.<sup>230</sup> Video deposition advocates suggest a liberal rule that would allow basic foundational testimony by uninterested public

216. Figari and Loewinsohn, *supra* note 46, at 36; Dombroff, *supra* note 212, at 45.

217. Figari and Loewinsohn, *supra* note 46, at 36.

218. *Id.*

219. 516 F.2d 1352, 1353 (2d Cir. 1975). The plaintiff-seaman missed his court appearance because of a sea voyage. The court suggested that the plaintiff could have strengthened his case by appearing via a video deposition. The plaintiff's failure to preserve his testimony via a video deposition caused the court denying his request to reopen the case.

220. 820 F.2d 928 (8th Cir. 1987).

221. 52 F.R.D. 492, 493 (D. Neb. 1971).

222. *Hale*, 820 F.2d 928.

223. *Id.* at 931-32.

224. Figari and Loewinsohn, *supra* note 46, at 38.

225. *Id.*

226. 63 F.R.D. 603, 606-07 (D.S.C. 1974). See *supra* note 28 and accompanying text.

227. See *supra* note 28 and accompanying text.

228. *Id.*

229. *Id.*

230. *Id.*

officials via video deposition.<sup>231</sup> This rule would add public responsibilities as a possible allowance under the "exceptional circumstances" of Rule 32(a)(3) of the Federal Rules of Civil Procedure.<sup>232</sup>

A video deposition is a dramatic method of evidence presentation.<sup>233</sup> However, a video deposition is a sword that cuts both ways.<sup>234</sup> The proponent's governing concern must be jury boredom.<sup>235</sup> The typical video deposition is an hour or two of a person's head pictured on the television screen answering questions from a disembodied voice.<sup>236</sup> This inappropriate form of presentation is known as the "talking head."<sup>237</sup> The proponent must use the video deposition in a manner that makes it more than a mere recording device.<sup>238</sup>

The opportunities and risk associated with pictures in court increase when the pictures move.<sup>239</sup> Misuse creates an aura of showmanship which undermines the trial's underpinnings of seriousness and truth seeking.<sup>240</sup> Long video depositions create eye strain.<sup>241</sup> Breaks to relieve this strain can cause a loss of concentration.<sup>242</sup> The camera exaggerates pauses or delays of the participants.<sup>243</sup> Bad camera-work distracts the jury.<sup>244</sup> Unbroken use of a single camera view becomes tedious and hypnotic.<sup>245</sup> Poor audio control creates ear strain and distracting amplification of everyday noises.<sup>246</sup>

Excessive use of video depositions also creates admissibility problems along with the boredom.<sup>247</sup> In *Westmoreland v. CBS*,<sup>248</sup>

231. Comment, *supra* note 2, at 212.

232. *Id.*

233. *Id.*; See also Figari and Loewinsohn, *supra* note 46, at 37.

234. Comment, *supra* note 2, at 212.

235. *Id.*

236. *Id.*

237. Murry, *supra* note 7, at 1402.

238. McElhaney, *supra* note 5, at 86.

239. Chernow, *Video in the Courtroom: More Than a Talking Head*, 15 LITIGATION 3, 3 (1988).

240. Underwood, *supra* note 25, at 74.

241. Comment, *supra* note 2, at 221.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*; UNDERWOOD, *supra* note 20 § 3.02, at 143; Underwood, *supra* note 15, at 71.

247. UNDERWOOD, *supra* note 20 § 3.02, at 139.

the profession relearned that too much of anything is bad.<sup>249</sup> A jury can become desensitized to the impact of video depositions.<sup>250</sup> In *Westmoreland*, every time counsel announced another deposition audible groans came from the jury box.<sup>251</sup>

Correctly used, a video deposition grasps the jurors' attention and draws them into the testimony.<sup>252</sup> Jurors perceive a video deposition as an almost-true-to-life picture that is not achievable through a stenographic deposition.<sup>253</sup> The almost-true-to-life picture allows jury assessment of the witness's demeanor and credibility while reducing the boredom of the deposition.<sup>254</sup>

The proponent must use video depositions as evidence depositions that present evidence to a judge and jury.<sup>255</sup> Video depositions do not work well as discovery depositions that are probing in nature.<sup>256</sup>

#### WHEN TO USE, WHEN NOT TO USE

No one advocates video depositions as a wholesale substitute for live testimony.<sup>257</sup> Video depositions are not the universal antidote for all litigation woes.<sup>258</sup> Appropriately used video depositions deliver effective demonstrative evidence.<sup>259</sup> Inappropriately used, a video deposition is a fiasco where every wrong is enhanced by sight and sound.<sup>260</sup> A poorly produced tape reflects unfavorably on the competence, credibility, and professionalism of the attorney offering the deposition.<sup>261</sup> Too many video depositions end up looking

248. 584 F. Supp. 1206 (D.D.C. 1984), *aff'd*, 770 F.2d 1168 (D.C.C. 1985). In this defamation action General William C. Westmoreland alleged that CBS and others libelled him in a television documentary entitled "The Uncounted Enemy: A Vietnam Deception."

249. *Id.*

250. McElhaney, *supra* note 7, at 84.

251. *Id.*

252. Comment, *supra* note 2, at 196.

253. *Id.* at 221.

254. *Id.*

255. McElhaney, *supra* note 5, at 86.

256. *Id.* The law in most jurisdictions does not distinguish between the two types of depositions. However, the attorney using the medium must make the distinction in order to create an interesting presentation.

257. UNDERWOOD, *supra* note 20 § 3.04, at 153.

258. Underwood, *supra* note 15, at 67.

259. *Id.*

260. *Id.*

261. Murry, *supra* note 7, at 1402.

like home movies.<sup>262</sup> The reason for these amateurish presentations is the legal profession's lack of knowledge of the art and mechanics of light, motion, and sound.<sup>263</sup> A lawyer wanting to use the medium must consider the problems encountered in video deposition production and learn how to deal with them.<sup>264</sup>

A video deposition is often too expensive and elaborate for a particular purpose.<sup>265</sup> When the witness's testimony deals with noncontroversial issues a traditional stenographic deposition is more convenient, effective, and cost efficient.<sup>266</sup> However, Mr. Bruce Cunningham of Southern Pines suggests using video depositions only for noncontroversial issues.<sup>267</sup> Mr. Cunningham's approach forces the attorneys to face objections before the taping.<sup>268</sup> In turn, this practice avoids costly editing and elimination of the need for a professional camera operator.<sup>269</sup>

The process of reading a deposition in court is at best, tedious and at worst, as one judge put it, "an act of contributory somnolence."<sup>270</sup> Video presentations add excitement and appeal to a deposition.<sup>271</sup> Many advocates believe this is its strongest reason for using video depositions.<sup>272</sup> The production cost and juror eye strain often counters the flexibility provided by the video deposition.<sup>273</sup> Some deponents become extremely nervous in front of a camera.<sup>274</sup> Others become so preoccupied with the camera that they ignore the attorney's questions.<sup>275</sup> An attorney considering a video deposition must weigh the pros and cons.<sup>276</sup> Relying on the razzle-dazzle of the medium to carry the day leads to litigation suicide.<sup>277</sup>

262. *Id.*

263. *Id.*

264. *Id.*

265. Underwood, *supra* note 15, at 67.

266. UNDERWOOD, *supra* note 20 § 3.01, at 133.

267. Cunningham, *Use of Video in Court*, N.C.A.T.L. Pre-Trial Procedure: What You Don't Know Can Hurt You § 5 (1989).

268. *Id.*

269. *Id.*

270. Murry, *supra* note 7, at 1402.

271. Figari and Loewinsohn, *supra* note 46, at 35.

272. *Id.*

273. Underwood, *supra* note 15, at 61.

274. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 170.

275. *Id.*

276. Underwood, *supra* note 15, at 67.

277. *Id.*

## PROTECTIVE PROVISIONS: STIPULATIONS AND ORDERS

Video depositions can be highly dramatic.<sup>278</sup> The greater the drama, the more vigorous the objections raised by the opponent that criticize the evidence as flamboyant and prejudicial.<sup>279</sup> The use of protective provisions and pre-trial rulings on objections can reduce the slant of the testimony in favor of the proponent.<sup>280</sup> The proponent must prepare for objections to the questions in the deposition and the production of the videotape.<sup>281</sup> An opposing party can imagine many abuses.<sup>282</sup> There is the chance of unauthorized release of the tape to the public.<sup>283</sup> The proponent can use the production process to intimidate a witness.<sup>284</sup> A rigged demonstration can cast the opponent in an unfavorable light.<sup>285</sup> The technician can use camera and light in a prejudicial manner.<sup>286</sup> The parties must determine if objections not made at the deposition are waived under Rule 30(c).<sup>287</sup>

"Advocacy tasks concerning the taking of a videotape deposition focus on two areas that are ripe for controversy: (1) obtaining authority to use the videotape technique and (2) obtaining court orders or stipulations that guard against abuse of the videotape format."<sup>288</sup> Upon receiving notice of a video deposition, an attorney must carefully consider protective provisions that will guarantee accuracy and trustworthiness.<sup>289</sup> The parties should first try to overcome objections to the use of the medium through agreeable stipulations.<sup>290</sup> A court order is necessary only when the parties cannot agree upon the stipulations.<sup>291</sup>

An excellent source of information on procedural plans is the proposed Uniform Audio-Visual Deposition Act.<sup>292</sup> The National

278. Underwood, *supra* note 15, at 65.

279. *Id.*

280. *Id.*

281. UNDERWOOD, *supra* note 20 § 3.03(b), at 150.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

287. FED. R. CIV. P. 30(c); N.C.R. CIV. P. 30(c). *See also* Figari and Loewinsohn, *supra* note 46, at 38.

288. UNDERWOOD, *supra* note 20 § 3.03, at 146.

289. Comment, *supra* note 2, at 213.

290. Dombroff, *supra* note 212, at 46; Comment, *supra* note 2, at 213-14.

291. Dombroff, *supra* note 212, at 46.

292. Murry, *supra* note 7, at 1403.

Conference of Commissioners on Uniform State Laws has approved and recommended the enactment of this act.<sup>293</sup> The act offers a step-by-step model for handling the procedural requirements of a video deposition.<sup>294</sup> If there are objections that require moving for an order, the proposed act can aid the court in fashioning an acceptable order.<sup>295</sup> The proponent should suggest in the video deposition notice, that the taking of the video deposition follow the Uniform Act's provisions.<sup>296</sup> The proponent should enclose a copy of the act with the notice.<sup>297</sup>

To protect all parties, the notice, stipulation, or court order must list all production procedures.<sup>298</sup> The deposition officer should mark and present the notice, stipulation, or court order as an exhibit during the video deposition.<sup>299</sup> The proponent must include protective provisions to lessen both the judge's and opponent's concerns.<sup>300</sup> These provisions should cover the following:

- 1) staging and photographic technique;<sup>301</sup>
- 2) use of a zoom lens;<sup>302</sup>
- 3) camera angles;<sup>303</sup>
- 4) background and setting of the deposition<sup>304</sup>
- 5) whether the videotape should run continuously throughout the video deposition;<sup>305</sup>

293. *Id.*

294. *Id.* Only North Dakota and Virginia have adopted the Uniform Audio-Visual Deposition Act. The provisions of the act are located in Appendix C.

295. *Id.*

296. *Id.*

297. *Id.*

298. Dombroff, *supra* note 212, at 46; UNDERWOOD, *supra* note 20 § 3.03(b), at 150; Underwood, *supra* note 25, at 71.

299. Dombroff, *supra* note 212, at 46; UNDERWOOD, *supra* note 20 § 3.03(b), at 150; Underwood, *supra* note 25, at 71.

300. Underwood, *supra* note 25, at 69; Figari and Loewinsohn, *supra* note 46, at 35.

301. *In re "Agent Orange" Prods. Liab. Litig.*, 28 Fed. R. Serv. 2d (Callaghan) 993, 996 (E.D.N.Y. 1980); *In re Daniels*, 69 F.R.D. 579, 582-83 (N.D. Ga. 1975); *Carson v. Burlington, N. Inc.*, 52 F.R.D. 492, 493 (D. Neb. 1971).

302. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996; *Daniels*, 69 F.R.D. at 582.

303. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996.

304. *Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664, 668 (N.D. Ind. 1986); *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996.

305. *Roberts*, 109 F.R.D. at 668; *In re "Agent Orange,"* 28 Fed. R. Serv. 2d (Callaghan) at 996; *Moncrief v. Fecken-Kipfel America, Inc.*, (E.D. Penn. 1988).



- 6) who can attend the video deposition;<sup>306</sup>
- 7) who shall pay for the videotape;<sup>307</sup>
- 8) whether a log index of videotape must be made;<sup>308</sup>
- 9) manner of handling objections;<sup>309</sup>
- 10) the production of copies of the videotape.<sup>310</sup>

A professional cameraman is a visual artist.<sup>311</sup> This artist can use camera and lighting techniques to transform a deponent with a mild dose of nerves into a hypersensitive sinister character.<sup>312</sup> Selective taping can create unfair prejudice.<sup>313</sup> There must be a protective provision requiring that the tape run constantly during the deposition and with no camera or lighting manipulation.<sup>314</sup> The protective provision should also require the cameraman to take an oath to record in an accurate and trustworthy manner.<sup>315</sup> The court in *In re Daniels* forbade the use of a zoom lens and required a straight-ahead camera angle.<sup>316</sup> The purpose of the camera angle was to avoid close-ups and bizarre angles that would make the deponent appear guilty.<sup>317</sup> The protective provisions in *In re "Agent Orange"* required that the camera run continuously during the deposition.<sup>318</sup> However, the cameraman could stop taping during counsel colloquy.<sup>319</sup> The court reviewed objections at a pre-trial hearing and ordered the editing of sustained objections from the

306. *Roberts*, 109 F.R.D. at 668; *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996; *Moncrief*, 1988 U.S. Dist.

307. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996; *Daniels*, 69 F.R.D. at 583; *Roberts*, 109 F.R.D. at 668-69.

308. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996; *Daniels*, 69 F.R.D. at 583; *Roberts*, 109 F.R.D. at 668.

309. *Daniels*, 69 F.R.D. at 582-83; *Moncrief*, 1988 U.S. Dist.; *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 703 (W.D. Okla. 1976).

310. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 996; *Daniels*, 69 F.R.D. at 583.

311. UNDERWOOD, *supra* note 20 § 3.02, at 143, 152; Underwood, *supra* note 15, at 70, 72.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *In re Daniels*, 69 F.R.D. 579, 582 (N.D. Ga. 1975).

317. UNDERWOOD, *supra* note 20 § 3.03(b), at 151.

318. 28 Fed. R. Serv. 2d (Callaghan) at 996. *See also* UNDERWOOD, *supra* note 20 § 3.03(b), at 151.

319. *In re "Agent Orange,"* 28 Fed. R. Serv. 20.

tape.<sup>320</sup>

Judge Charles Leibson suggests the following requirements can thwart the possible problem of prejudicial camera angles and bias:

The camera focus will be principally on the witness with an occasional change in view to the attorney asking the question or making the objection in order to provide a point of reference. The cameraman shall be permitted to telescope in and out on the witness and any exhibits being displayed at the taking of the deposition. The camera focus shall be left to the discretion of the cameraman, who shall be responsible for proceeding fairly. An objection to the camera focus will not be considered unless there is flagrant and demonstrated abuse of fairness.<sup>321</sup>

*Carson v. Burlington N., Inc.* included provisions for the plaintiff's safety and safeguarding against rigging of the accident reenactment.<sup>322</sup> A reenactment of an event is an effective, but easily abused, way to illustrate testimony.<sup>323</sup> A protective provision against such abuse is a necessity.<sup>324</sup> Video depositions staged at dramatic locales can create unfair prejudice and exaggerate the intrinsic worth of the testimony.<sup>325</sup> Protective provisions must bar the pandering of the jury's emotions.<sup>326</sup>

The protective provisions must insure that the parties adhere to procedural rules that require that clerical notations accompany the deposition.<sup>327</sup> This insures a comprehensive following of procedural rules concerning examination and cross examination, motion to terminate or limit examination, submission to deponent for changes and signing, and certification of officers.<sup>328</sup> The protective provisions should require that the witness take the oath on

320. *Id.*

321. UNDERWOOD, *supra* note 20 § 3.02, at 144; Underwood, *supra* note 15, at 72 (quoting Leibson, *How and When to Use Video Tape Depositions*, 42 KY. BENCH & B. 30, 30-31 (1978)).

322. 52 F.R.D. 492, 493 (D. Neb. 1971); *See also* Roberts v. Homelite Div. of Textron, Inc., 109 F.R.D. 664, 668 (N.D. Ind. 1986); Moncrief v. Fecken-Kipfel America, Inc., 1988 U.S. Dist. (E.D. Penn. 1988). *See also* Underwood, *supra* note 25, at 71; UNDERWOOD, *supra* note 20 §§ 3.03(b), 3.04, at 151, 153.

323. Underwood, *supra* note 15, at 70-71.

324. *Id.*

325. UNDERWOOD, *supra* note 20 § 3.02, at 144.

326. *Id.*

327. *Id.* § 3.03(b), at 152.

328. FED. R. CIV. P. 30; N.C.R. Civ. P. 30. *See also* Underwood, *supra* note 25, at 70.

camera.<sup>329</sup>

Courts require proper recording, filing, and preservation of the deposition.<sup>330</sup> As with a stenographic deposition, all exhibits used during the video deposition must accompany the deposition when filed with the court.<sup>331</sup>

The protective provisions must include safeguards against anyone tampering with the recording.<sup>332</sup> Filing the original tape with the court is the best form of protection against tampering.<sup>333</sup> The protective provisions should indicate the allowed number of duplicate tapes made for distribution to the parties.<sup>334</sup> This prevents prejudicial publicity or commercial exploitation.<sup>335</sup> This can range from one copy per party to no copies.<sup>336</sup>

Protective provisions should include quality standards that the video equipment must meet.<sup>337</sup> This provision will insure recording accuracy.<sup>338</sup> This provision should be a general exhortation of quality, accuracy, and completeness.<sup>339</sup> However, the protective provisions need not specify specific brand names or types of equipment used.<sup>340</sup>

Counsel should begin with these basic guidelines for stipulations:

first, that if the witness is instructed by counsel not to answer any questions, it shall be deemed that the witness has been directed to answer by the notary public (or court official), but that the witness still refuses to answer; second, that all objections relating to questions asked of the witness, other than objections to the form of questions, shall be reserved by all parties; third, that the deposition shall be recorded by videotape by a named operator and that the original recording will be filed with the court in accordance with the applicable rules; finally, that if the witness fails to examine and sign the deposition after having a reasonable op-

329. Underwood, *supra* note 25, at 70.

330. Comment, *supra* note 2, at 213.

331. Dombroff, *supra* note 212, at 47.

332. Underwood, *supra* note 25, at 71; Dombroff, *supra* note 212, at 47; UNDERWOOD, note 20 § 3.03(b), at 152.

333. Underwood, *supra* note 25, at 71.

334. Underwood, *supra* note 25, at 71.

335. UNDERWOOD, *supra* note 20 § 3.03(b), at 152.

336. Underwood, *supra* note 25, at 71.

337. UNDERWOOD, *supra* note 20 § 3.03(b), at 151.

338. *Id.*

339. Underwood, *supra* note 25, at 70.

340. *Id.*

portunity to do so it may be used with the same force and effect as if he had. If it becomes necessary to make objections counsel should follow any governing rules in doing so. Objections should be stated clearly with the camera focused upon the attorney. Interruptions from other participants should be avoided because of the resulting confusion. Some courts have already developed procedures by which objections may be submitted to the court. The use of exhibits should be planned, and the necessary marking for identification should be done before commencing the deposition. When charts, documents, drawings, photographs, X-rays or other similar visual aids are to be used the operator should be told before the deposition so that he can bring any special equipment which he may need.<sup>341</sup>

If the circumstances require asking for a video deposition order the proponent must address several factors.<sup>342</sup> These include:

1. steps that the parties will take to insure accuracy of the recording,
2. whether the videotape deposition will add or enhance evidence needed for trial,
3. any considerations regarding expense and convenience, and
4. protective provisions needed to protect against abusive use of the medium.<sup>343</sup>

The proponent should submit a proposed order for the judge to review as he considers the motion.<sup>344</sup> The better the factual record the easier it is to get an order.<sup>345</sup>

#### DEMEANOR EVIDENCE

The greatest advantage of video depositions is their ability to present demeanor evidence.<sup>346</sup>

The witness's personal appearance is desirable because the jury may well be influenced in judging his credibility by seeing and hearing him in person. It enables the jury to note the readiness and promptness of a witness's answers or the reverse; the dis-

341. Comment, *supra* note 2, at 214. More detailed sets of protective provisions that follow the Uniform Video Deposition Act can be found in Appendix E.

342. UNDERWOOD, *supra* note 20 § 3.03(b), at 146.

343. *Id.*

344. UNDERWOOD, *supra* note 20 § 3.03(b), at 146; Underwood, *supra* note 25, at 68.

345. Underwood, *supra* note 25, at 68.

346. Comment, *supra* note 2, at 197 (quoting 3 J. WIGMORE, EVIDENCE 276 (3d ed. 1970)).

tinctness of what he related or lack of it; the directness or evasiveness of his answers; the frankness or equivocation; the responsiveness or reluctance to answer questions; the silences; the explanations; the contradictions; and the apparent intelligence or lack of it.<sup>347</sup>

The jury can see the plaintiff's demeanor on the videotape.<sup>348</sup> The stenographic deposition does not convey anything about the witness's demeanor, appearance, or attitude. Unless counsel interjects, the jury cannot perceive how long it takes for a witness to answer a question.<sup>349</sup> Nor, can the stenographic deposition record the witness squirming in his seat as he desperately tries to formulate an answer.<sup>350</sup> A video deposition preserves not only the statement, but the statement's inflection along with the setting, atmosphere, and conduct of the proceedings.<sup>351</sup> Only video tape can recreate the tears, the tension, and the tactics of a deposition.<sup>352</sup>

Video depositions show the most potential in recording expert witness testimony.<sup>353</sup> Video depositions are superior to stenographic depositions when the adverse party presents a contradicting expert.<sup>354</sup> Only by viewing the demeanor of both experts can the jury properly judge the testimony.<sup>355</sup> The mobility of the equipment allows taking the video deposition at the expert witness's office.<sup>356</sup> An expert is more relaxed in his own environment.<sup>357</sup> An expert's environment is usually a library, laboratory, or medical facility.<sup>358</sup> The ambiance of this locale aids in proving the absent witness's credibility and knowledge of the subject.<sup>359</sup>

### THE VISUAL PRESENTATION

Knowledge of the fact of not being in front of the judge and

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347. *Id.*

348. UNDERWOOD, *supra* note 20 § 3.01, at 137.

349. Dombroff, *supra* note 212, at 45.

350. *Id.*

351. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 169.

352. *Id.*

353. Comment, *supra* note 2, at 222.

354. *Id.* at 223.

355. *Id.*

356. Figari and Loewinsohn, *supra* note 46, at 36.

357. *Id.*

358. *Id.*

359. *Id.*

jury shape the parties' actions during a stenographic deposition.<sup>360</sup> The atmosphere is casual with coats off and coffee in hand.<sup>361</sup> A video deposition visually presents the witness to the courtroom.<sup>362</sup> The visual presentation requires conducting the deposition with greater formality than the stenographic deposition.<sup>363</sup> Both the witness and counsel must dress and act appropriately.<sup>364</sup> The video deposition presents emotions not displayed in a stenographic deposition.<sup>365</sup> Attorneys must remember that and must advise the witness that his demeanor is on view.<sup>366</sup> Throughout the entire video deposition, the attorney's mind set must be "the jury is watching this now."<sup>367</sup> The camera represents the judge and jury.<sup>368</sup> The examination requires simple words, and short questions.<sup>369</sup> The attorney must frame the direct examination in a manner that allows the witness to tell a story.<sup>370</sup> The attorney must ask follow-up questions that the fact finder would contemplate on hearing the testimony.<sup>371</sup>

The camera emphasizes the sense of time, as well as those of sight and sound.<sup>372</sup> The viewer will perceive momentary pauses as lengthy periods of indecision.<sup>373</sup> The viewer will perceive the leafing through papers as the floundering of an inefficient slouch.<sup>374</sup> Yet, many attorneys that express disappointment in video depositions have most likely committed litigation suicide via videotape.<sup>375</sup> They failed to view the video deposition from a jury's perspective.<sup>376</sup> The attorney must properly prepare for the video deposition and use common sense in its production.<sup>377</sup> The attorney will

360. McElhaney, *supra* note 5, at 86.

361. *Id.*

362. Dombroff, *supra* note 212, at 46.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. McElhaney, *supra* note 5, at 86.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. Underwood, *supra* note 15, at 71; UNDERWOOD, *supra* note 20 § 3.02, at 143.

373. Underwood, *supra* note 15, at 71.

374. *Id.*

375. McElhaney, *supra* note 5, at 86.

376. *Id.*

377. Underwood, *supra* note 15, at 71.

commit litigation suicide if he relies on the medium to carry the deposition, because a bad video causes tedium and acute cases of eye strain.<sup>378</sup>

Video depositions are only effective when they deliver evidence unavailable in other forms, or when other forms produce a lower level of clarity and persuasiveness.<sup>379</sup> Case law shows that courts allow video depositions when the medium adds a dimension of realism to evidence not available for an in-court presentation.<sup>380</sup> Examples are:

- 1) The witness's testimony involves demonstration of: heavy non-transportable equipment;<sup>381</sup> or is in a remote inaccessible location; or is not easily recreated by models, photographs, or drawings.<sup>382</sup>
- 2) The witness is too ill to testify in open court; or may die before the time of trial.<sup>383</sup>
- 3) The witness is a recalcitrant witness beyond the subpoena power of the court.<sup>384</sup>
- 4) The witness is a busy expert whose practice often makes it impossible to be present in court when his testimony would most logically fit into the sequence of the evidence.<sup>385</sup>
- 5) A plaintiff's testimony is vital, but his job carries him unpredictably to locations far from the trial site.<sup>386</sup>

378. *Id.*

379. Underwood, *supra* note 15, at 68; Comment, *supra* note 2, at 211.

380. Underwood, *supra* note 25, at 68.

381. *Carson v. Burlington N., Inc.*, 52 F.R.D. 492, 492 (D. Neb. 1971). *See also* *Misko*, *supra* note 68, at 492; UNDERWOOD, *supra* note 20 § 3.03(b), at 148; Comment, *supra* note 2, at 211; Underwood, *supra* note 15, at 62.

382. *Roberts v. Homelite Div. of Textron, Inc.*, 109 F.R.D. 664 (N.D. Ind. 1986); *Moncrief v. Fecken-Kipfel American, Inc.*, 1988 U.S. Dist (E.D. Pa. 1988). *See also* *Figari and Loewinsohn*, *supra* note 46, at 36; Underwood, *supra* note 15, at 62.

383. *In re "Agent Orange" Prods. Liab. Litig.*, 28 Fed. R. Serv. 2d (Callaghan) 993, 993 (E.D.N.Y. 1980); *Rubino v. G.D. Searle & Co.*, 73 Misc. 2d 447, 340 N.Y.S.2d 574, 574 (N.Y. Sup. Ct. 1973). *See also* Underwood, *supra* note 15, at 63; Comment, *supra* note 2, at 202.

384. *In re Daniels*, 69 F.R.D. 579, 581 (N.D. Ga. 1975); *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 702 (W.D. Okla. 1976). *See also* Underwood, *supra* note 15, at 63; Underwood, *supra* note 25, at 68; UNDERWOOD, *supra* note 20 § 3.03(b), at 147-48; Comment, *supra* note 2, at 202.

385. Underwood, *supra* note 25, at 68; Underwood, *supra* note 15, at 64; Comment, *supra* note 2, at 202.

386. *Lamb v. Globe Seaways, Inc.*, 516 F.2d 1352 (2d Cir. 1975); *Johnson v. Circuit Court*, 61 Wis. 2d 1, 212 N.W.2d 1 (1972). *See also* UNDERWOOD, *supra* note 20 § 3.01, at 137; Underwood, *supra* note 15, at 64.

The jury often believes there is a weakness in the case when the witness does not appear in court.<sup>387</sup> Plausible excuses will not dispel the jury's suspicion that the witness is ducking a court appearance.<sup>388</sup> A video deposition can lessen this suspicion by allowing the jury to view the demeanor of the witness.<sup>389</sup>

Close-up shots created by zoom lenses allow the observation of evidence in minute detail.<sup>390</sup> Such close-ups can discreetly show specific injuries without causing embarrassment to the plaintiff, judge, or jury.<sup>391</sup> A video deposition can preserve perishable evidence, such as witness's age or physical injury, for presentation in court months or years later.<sup>392</sup> The video deposition's sight and sound qualities allow effective perception of the evidence.<sup>393</sup>

### PRODUCTION

Unfortunately, many video depositions end up being facsimiles of home movies.<sup>394</sup> The reason for this poor presentation is an attorney's lack of understanding of visual arts and video mechanics.<sup>395</sup> Unless the attorney considers the video deposition's production he could create a weapon of self-destruction for himself and his client.<sup>396</sup>

To create a successful video deposition, the attorney must be producer, director, and performer.<sup>397</sup> The television viewer processes information in a series of brief segments lasting about 30 seconds each.<sup>398</sup> The deposition process by nature does not lend itself to this type of presentation.<sup>399</sup> However, it is the attorney's responsibility to come as close as possible to the form of presentation of the evening news.<sup>400</sup> This requires intense preparation by both the deponent and counsel.<sup>401</sup>

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387. UNDERWOOD, *supra* note 20 § 3.01, at 137.

388. *Id.*

389. Underwood, *supra* note 15, at 67.

390. *Id.* at 65.

391. *Id.*

392. Comment, *supra* note 2, at 202-03.

393. *Id.* at 202.

394. Murry, *supra* note 7, at 1402.

395. *Id.*

396. *Id.*

397. *Id.* at 1406.

398. Feder and Feder, *supra* note 154, at 18.

399. *Id.*

400. *Id.*

401. *Id.*



The extreme close-up of people, a popular broadcast technique, is not appropriate for a video deposition.<sup>402</sup> This technique places too much emphasis on facial features and creates an unfair prejudicial image of the subject.<sup>403</sup> The extreme close-up curtails the jury's ability to view gestures, body movement and other non-verbal indicators of demeanor.<sup>404</sup> Extremely wide-angled shots make these indicators of demeanor so small the jury cannot detect them.<sup>405</sup> The ideal camera shot shows the witness from mid-torso. The cameraman must frame the shot with space above the witness's head and to either side.<sup>406</sup> This space allows the witness some freedom of movement.<sup>407</sup> A witness that constantly moves out of the camera's view will distract the jury.<sup>408</sup> This shot provides a perspective that is similar to the jury's view of a witness in open court.<sup>409</sup> Occasional pans from the witness to the questioning attorney and close-ups of visual evidence create enough visual stimulation to prevent tedium and the "absorption effect."<sup>410</sup> The "absorption effect" is the hypnotic effect caused by seeing one image from the same perspective for long periods.<sup>411</sup> The continuous projection of one image lulls the viewers into a hypnotic state.<sup>412</sup> Once trapped in this hypnotic state, the jurors fail to hear the verbal communications that accompany the image they see.<sup>413</sup>

All necessary production arrangements are the responsibility of the proponent.<sup>414</sup> The attorney must coordinate the what, when, where and how of people, places, and things.<sup>415</sup> The equipment is simple to operate, but there is a qualitative difference between the tape made by a novice and one made by a professional.<sup>416</sup> Video depositions used as evidence must be of the highest quality. A trial judge may bar the use of videotape on grounds that the poor qual-

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402. Murry, *supra* note 7, at 1405.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 1406.

407. *Id.*

408. *Id.*

409. *Id.*

410. Figari and Loewinsohn, *supra* note 46, at 38.

411. *Id.*

412. *Id.*

413. *Id.*

414. Comment, *supra* note 2, at 215.

415. Murry, *supra* note 7, at 1406.

416. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 170.

ity prejudicially outweighs the tape's evidentiary value.<sup>417</sup>

As a television performer, the attorney must communicate through both sight and sound.<sup>418</sup> A video deposition turns a traditional *in camera* proceeding into a televised event.<sup>419</sup> This change requires an alteration of the attorney's perception of the event.<sup>420</sup> The attorney must concern himself with how the jury will react to the video deposition.<sup>421</sup> The screen, like the courtroom, becomes the attorney's stage.<sup>422</sup>

Extended verbal exchanges and discussions between counsel divert the jury's attention away from the deponent's testimony.<sup>423</sup> The cameraman should not record extended verbal exchanges and discussions between counsel.<sup>424</sup> All "off the record" discussions require turning off the camera.<sup>425</sup> Some protective provisions require continuous running of the tape.<sup>426</sup> Such provisions may be necessary for highly contested matters.<sup>427</sup> However, the proponent must insist the court allow the editing of these discussions before presentation at trial.<sup>428</sup>

The attorney's director/producer responsibilities require determining when to use various shots during the session.<sup>429</sup> Before the deposition, the attorney should instruct the operator when to pan to the examiner.<sup>430</sup> A pan is the rotating of the camera on its supporting tripod to allow viewing of another part of the scene.<sup>431</sup> The attorney must advise the opponent of the planned use of the panning technique.<sup>432</sup> This allows the opponent to use the tech-

417. *Tsesmely v. Doblin Truck Leasing*, 78 F.R.D. 181, 185 (E.D. Tenn. 1976); Fed. R. Evid. 403; N.C.R. Evid. 403; *see also* Figari and Loewinsohn, *supra* note 46, at 37.

418. Murry, *supra* note 7, at 1406.

419. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. Dombroff, *supra* note 212, at 47.

424. *Id.*

425. *Id.*

426. *In re "Agent Orange" Prods. Liab. Litig.* 28 Fed. R. Serv. 2d (Callaghan) 993, 993 *See also* Underwood, *supra* note 25, at 70.

427. *In re "Agent Orange,"* 28 Fed. R. Serv. 2d at 993.

428. *Id.* Pre-trial editing techniques are discussed *infra* at notes 535-54 and accompanying text.

429. Murry, *supra* note 7, at 1406.

430. *Id.*

431. *Id.*

432. *Id.*

nique during the cross-examination.<sup>433</sup> The best way of cueing a cameraman is to instruct the operator verbally.<sup>434</sup> The attorney should phrase the instructions in the manner used to ask a witness to move to an exhibit during trial.<sup>435</sup> This method reduces confusion, mistakes, and conforms to courtroom procedure.<sup>436</sup>

The attorney may consider using a zoom lens along with the panning technique to reduce the "absorption effect."<sup>437</sup> However, the attorney must remember that several federal cases have prohibited the use of a zoom lens.<sup>438</sup>

Procedural rules and local rules are often silent on basic production procedures. The attorney must create a procedural plan that determines:

- 1) who will serve as the deposition officer,
- 2) tape duplication, and
- 3) handling of objections.<sup>439</sup>

The attorney should conduct the video deposition following usual courtroom procedure.<sup>440</sup> The deposition should begin by the witness taking an oath on camera.<sup>441</sup> The recording should be continuous except for unexpected delays and off-camera conferences.<sup>442</sup> The parties must conduct the video deposition in a manner that avoids these delays and off-camera conferences.<sup>443</sup> The attorneys must conduct the video deposition as a trial examination.<sup>444</sup>

## OBJECTIONS

The need to adjourn a video deposition for rulings on legiti-

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. Figari and Loewinsohn, *supra* note 46, at 36. For a complete discussion of the "Absorption Effect", see *supra* notes 416-18 and accompanying text.

438. In re Daniels, 69 F.R.D. 579, 582 (N.D. Ga. 1975); In re "Agent Orange" Prods. Liab. Litig., 28 Fed. R. Serv. 2d Callaghan 993, 996 (E.D.N.Y. 1980). See also Figari and Loewinsohn, *supra* note 46, at 38.

439. Murry, *supra* note 7, at 1403. A production checklist can be found in Appendix D.

440. Comment, *supra* note 2, at 215.

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

macy of questions concerning privileged materials creates rescheduling complications.<sup>445</sup> The parties must realize that adjourning a video deposition to seek a ruling on legitimacy of questions requires finding a new time agreeable for both the parties and the cameraman.<sup>446</sup>

While preparing the examination, the attorney must consider potential objections on both admissibility and form.<sup>447</sup> The attorney must prepare the examination to reduce potential objections.<sup>448</sup> If opposing counsel objects to one of the questions, ask the next question without referring to the previous objection.<sup>449</sup> This technique reduces the number of edits required.<sup>450</sup> Before the deposition the attorney should give opposing counsel a list of the questions and ask if there are any objections.<sup>451</sup> Avoiding controversies before the deposition avoids costly editing later.<sup>452</sup>

#### WHO MAKES THE VIDEO

The attorney has three available sources from which to choose a camera operator.<sup>453</sup> These sources are:

- 1) in-house production,
- 2) video production companies, and
- 3) court reporting firms.<sup>454</sup>

Some firms buy their own video equipment and gain the level of expertise that allows in-house video deposition production.<sup>455</sup> However, most attorneys do not have the time needed for the training and practice required to produce the necessary quality images.<sup>456</sup>

The training and equipment of a video production company's videographers are usually more in-depth than that of a court re-

445. UNDERWOOD, *supra* note 20 § 3.02, at 143.

446. Underwood, *supra* note 15, at 72.

447. Cunningham, *supra* note 267 § 5.

448. *Id.*

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.*

453. Murry, *supra* note 7, at 1404.

454. *Id.*

455. Misko, *supra* note 68, at 489. Owning one's own equipment follows the photographic adage that one will most likely use the equipment one owns.

456. Murry, *supra* note 7, at 1404.

porter.<sup>457</sup> However, production company personnel probably do not understand deposition proceedings.<sup>458</sup> The attorney that hires a video production company can easily spend money on talent that exceeds the need.<sup>459</sup>

Many reporting firms have studios set up in their offices. This set-up reduces the difficulty associated with carrying the equipment on location.<sup>460</sup> The reporter's familiarity with traditional depositions, and prior experience with video can provide invaluable help to an attorney unfamiliar with the medium. The reporting firm can help:

- 1) determine procedural matters,
- 2) select proper camera shots,
- 3) create a fair and efficient system of direction by all participating lawyers,
- 4) determine how to use visual evidence in the recording, and
- 5) when to go off the record.<sup>461</sup>

Use of a reporter can lessen the concerns of a hesitant opponent or trial judge.<sup>462</sup>

The attorney must hire a cameraman with video deposition experience.<sup>463</sup> A video deposition is no place to gain technical and visual experience by doing.<sup>464</sup> Since North Carolina requires an accompanying stenographic transcript the stenographer will most likely be the deposition officer.<sup>465</sup> Therefore, in North Carolina, the provider of the video service is moot on all points except quality.<sup>466</sup>

#### PREPARING THE WITNESS

The attorney must consider the medium's effect on the witness.<sup>467</sup> Cleveland attorney, Tom Hefferman, bases his theory of witness credibility on *Ode to a Grecian Urn*.<sup>468</sup> The ode states that

457. *Id.*

458. *Id.*

459. *Id.*

460. Dombroff, *supra* note 212, at 46.

461. Murry, *supra* note 7, at 1404.

462. *Id.*

463. Dombroff, *supra* note 212, at 46.

464. *Id.*

465. N.C.R. Civ. P. 30(b)(4).

466. *Id.* See also Murry, *supra* note 7, at 1404.

467. Comment, *supra* note 2, at 222.

468. McElhaney, *supra* note 5, at 84.

“beauty is truth and truth is beauty.”<sup>469</sup> Authoritative, well-dressed, well-groomed people present an appearance of truth.<sup>470</sup> The deponent’s selection of apparel must enhance the subconscious perception of credibility as controlled by color.<sup>471</sup>

Some witnesses may feel more relaxed in front of a camera than in front of a judge.<sup>472</sup> Other witnesses are not compatible with videotape.<sup>473</sup> Some witnesses have a damaging effect in the courtroom, and the same may happen on video tape.<sup>474</sup> Some people make a better impression on paper than in person.<sup>475</sup> Language, demeanor, or appearance problems may require that the proponent use an oral deposition.<sup>476</sup>

The attorney must remember that preparation affects confidence and confidence affects demeanor.<sup>477</sup> A witness’s demeanor is highly visible on videotape.<sup>478</sup> It is imperative that the attorney prepare the deponent for the television appearance.<sup>479</sup> The witness must be fluid with the testimony.<sup>480</sup> The deponent must appear and sound truthful. The deponent must be responsive.<sup>481</sup> The standard instruction to pause and think before answering a question creates disastrous results on tape.<sup>482</sup> The video deposition requires the same level—if not a higher level—of preparation needed for trial.<sup>483</sup>

The best way to prepare a witness for a video deposition is in front of a video camera.<sup>484</sup> This familiarizes the witness with the medium and exposes any visually aggravating factors.<sup>485</sup> Attorneys must remember that they are also subject to the camera’s scrutiny.

469. *Id.*

470. *Id.*

471. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 169. The human mind associates color with mood. “Hot colors” such as red and yellow depict anger and aggression. “Cool colors” dark blues and greens depict sincerity and cooperation.

472. Comment, *supra* note 2, at 222.

473. Dombroff, *supra* note 212, at 46.

474. *Id.*

475. McElhaney, *supra* note 5, at 84.

476. *Id.*

477. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 169.

478. *Id.*

479. *Id.*

480. Comment, *supra* note 2, at 216.

481. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 169.

482. McElhaney, *supra* note 5, at 86.

483. *Id.*

484. *Id.*

485. *Id.*

The attorney must personally be aware of all the above factors.<sup>486</sup>

### EXHIBITS AND TESTIMONY

A stenographic deposition is unsatisfactory when testimony requires a demonstration of the testimony, manipulation of machinery relevant to an accident or use of charts and graphs.<sup>487</sup> A stenographic deposition impairs the attorney's use of visual aids.<sup>488</sup> The video deposition is the answer to this problem.<sup>489</sup> A video deposition can illustrate with force and clarity the results of a laboratory demonstration, action of a piece of heavy machinery, or condition of an injury.<sup>490</sup> Technical demonstrations that cannot practically be performed in the courtroom can easily be accomplished in a laboratory or other location.<sup>491</sup> These demonstrations may be invaluable to an expert witness's testimony.<sup>492</sup> These factors make video depositions, at times, more effective and valuable than live testimony.<sup>493</sup>

A video deposition is a visual medium. The attorney must take advantage of the medium.<sup>494</sup> The use of exhibits or models can accent a witness's testimony and enhance the presentation to the fact finders.<sup>495</sup> Opponents to the deposition must be concerned that the camera will not bias the presentation in favor of the proponent.<sup>496</sup> Protective provisions are necessary to guard against such abuse.<sup>497</sup>

The parties should refer to exhibits used in the video deposition as "deposition exhibits."<sup>498</sup> The deposition officer should mark all exhibits for identification before the deposition to avoid delay

486. Comment, *supra* note 2, at 216.

487. UNDERWOOD, *supra* note 20 § 3.01, at 134.

488. Misko, *supra* note 68, at 491-92.

489. Underwood, *supra* note 15, at 64.

490. UNDERWOOD, *supra* note 20 § 3.01, at 131, 135; Underwood, *supra* note 15, at 62.

491. Comment, *supra* note 2, at 223.

492. *Id.*

493. UNDERWOOD, *supra* note 20 § 3.02, at 144; Comment, *supra* note 2, at 224.

494. Dombroff, *supra* note 212, at 47.

495. *Id.*

496. UNDERWOOD, *supra* note 20 § 3.02, at 144; Comment, *supra* note 2, at 224.

497. UNDERWOOD, *supra* note 20 § 3.02, at 144. For a complete discussion of protective provisions, see *supra* notes 278-345 and accompanying text.

498. McElhaney, *supra* note 5, at 86.

during taping.<sup>499</sup> The presenting attorney should supply enough copies of documents used during the questioning to avoid the shuffling of papers between participants.<sup>500</sup> A deposition exhibit requires laying of a proper foundation during taping or prior stipulation to the exhibit's admissibility.<sup>501</sup>

At trial, the presenting attorney should display the original exhibit next to the display monitor.<sup>502</sup> The exhibit creates a realistic link between the taped deposition and the trial.<sup>503</sup> The jury's eyes will constantly move from the television screen to the exhibit.<sup>504</sup> This constant movement relaxes the eye muscles and alleviates eye strain.<sup>505</sup>

#### USE OF A TIME/DATE GENERATOR

At trial, the proponent must quickly locate the desired portions of the taped testimony.<sup>506</sup> The best method is to use a log indexed to the time generated on the tape by a time/date generator.<sup>507</sup> During taping, the time/date generator electronically marks a time, down to the second, on the tape.<sup>508</sup> The deposition officer keeps a log of the point in time that parties make certain statements and objections.<sup>509</sup> At the point of objection, the deposition officer notes the counter time in the objection log.<sup>510</sup> This log allows for the quick location of portions of the deposition.<sup>511</sup> The electronic marking of the tape by the generator also verifies that the original is unedited.<sup>512</sup> The proponent should index the stenographic transcript to the video deposition.<sup>513</sup> This allows efficient review and removal of objectionable material.<sup>514</sup> This indexing

499. *Id.*

500. Dombroff, *supra* note 212, at 47.

501. McElhaney, *supra* note 5, at 86.

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.*

506. Comment, *supra* note 2, at 217.

507. *Id.*

508. Underwood, *supra* note 15, at 73.

509. *Id.*

510. *Id.*

511. *Id.*

512. Comment, *supra* note 2, at 216.

513. Dombroff, *supra* note 212, at 47.

514. *Id.*



screens the fact-finder from potentially objectionable answers.<sup>515</sup> Screening is especially important in non-jury cases.<sup>516</sup> In *Continental Fed. Sav. and Loan Ass'n.* the court required a time/date generator indexing of all objections<sup>517</sup>

An alternate method is to have a log indexed to the digital counter of the playback unit.<sup>518</sup> The counter method is error-prone and awkward to use for a large number of objections.<sup>519</sup>

To avoid segment location problems, hire a skilled operator and supply the person with a detailed log of key deposition segments.<sup>520</sup> If the attorney expects a witness will change his testimony, the attorney should prepare an edited version of these sections of the deposition.<sup>521</sup> Newer VCR units are programmable to locate pertinent portions of a video tape by internal mechanical techniques.<sup>522</sup> These machines allow another method of effectively locating portions of a video deposition.<sup>523</sup>

#### THE HANDLING OF PRE-TRIAL OBJECTIONS

Evidence presented by video deposition is in its final form.<sup>524</sup> This allows the judge to rule on the testimony with greater certainty.<sup>525</sup> The video deposition's proponent must discover if the trial judge has a preferred method of handling the objections raised during the video deposition.<sup>526</sup> Advance rulings allow for a smoother trial presentation.<sup>527</sup> Unless the video deposition is extremely short, the judge should review and rule on the objections at a pre-trial admissions hearing, unless the judge has a preferred

515. *Id.* at 48.

516. *Id.*

517. *Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 703 (W.D. Okla. 1986); *See also* Figari and Loewinsohn, *supra* note 46, at 38.

518. Comment, *supra* note 2, at 217.

519. Dombroff, *supra* note 212, at 48.

520. Figari and Loewinsohn, *supra* note 46, at 36.

521. *Id.*

522. *Id.* Local electronics dealers can provide information on VCRs which have this Auto Search feature.

523. Figari and Loewinsohn, *supra* note 46, at 36.

524. UNDERWOOD, *supra* note 20 § 3.02, at 139; Underwood, *supra* note 6, at 68.

525. UNDERWOOD, *supra* note 20 § 3.02, at 139; Underwood, *supra* note 6, at 68.

526. Figari and Loewinsohn, *supra* note 46, at 38.

527. *Id.*

method.<sup>528</sup> The interruptions caused by a large number of objections can ruin the presentation.<sup>529</sup>

Pre-trial editing allows the jurors to focus on "pure evidence," without the clutter of irrelevant, objectionable, and inadmissible evidence.<sup>530</sup> Pre-trial admissibility rulings avoids sending the jury out of the room when objections arise<sup>531</sup> or instructing them to disregard certain testimony.<sup>532</sup> The use of video depositions and pre-trial admissions hearings end the normal interruptions and delays of admitting evidence.<sup>533</sup> The pre-trial admissions hearing allows for more efficient use of court time.<sup>534</sup> Pre-trial rulings on admissibility also help avoid the chance a jury will vent its anger against the side constantly raising objections.<sup>535</sup> A pre-trial hearing requires the attorney to decide, before trial, which portion of the deposition he will offer into evidence.<sup>536</sup> This discloses the material to the opposing counsel.<sup>537</sup> However, such a pre-trial preview of a witness, that places the opposition in less than favorable light, may induce settlement.<sup>538</sup>

Many judges have neither the time, equipment, or inclination to view lengthy tapes before trial.<sup>539</sup> This requires providing the judge with a written transcript from which to make rulings.<sup>540</sup> A time/date generator log, cross-indexed with the written transcript and the tape creates a convenient way for the judge to review objections.<sup>541</sup>

Judge McCrystal, of Ohio, uses a system requiring lawyers to state all objections and reasons for the objections after the witness answers the question.<sup>542</sup> The deposition officer creates an index of

528. Misko, *supra* note 68, at 489.

529. *Id.*

530. Comment, *supra* note 2, at 221.

531. UNDERWOOD, *supra* note 20 § 3.02, at 139.

532. Comment, *supra* note 2, at 200.

533. *Id.* at 201.

534. *Id.*

535. Underwood, *supra* note 15, § 3.02, at 68.

536. Figari and Loewinsohn, *supra* note 46, at 38.

537. *Id.*

538. UNDERWOOD, *supra* note 20 § 3.02, at 138-39. See *infra* notes 637-42 and accompanying text.

539. Murry, *supra* note 7, at 1404.

540. *Id.*

541. *Id.* For a complete discussion of production of a date/time index, see *supra* notes 506-23 and accompanying text.

542. Murry, *supra* note 7, at 1404.

all objections during the video deposition using a time/date generator.<sup>543</sup> Before trial, Judge McCrystal uses the log of objections to locate, review, and rule on all objections.<sup>544</sup> The playback equipment operator uses the log in court for by-passing the sustained objections.<sup>545</sup> The operator by-passes the sustained objections by using the fast forwarding feature on the play back equipment.<sup>546</sup>

The in-court-by-pass-system creates minimal disturbance to the video deposition's flow, with less cost and inconvenience.<sup>547</sup> The operator blocks out objectionable material by suppressing both the audio and video portions of the tape.<sup>548</sup> Blacking out the audio portion and not the visual portion will distract the jury.<sup>549</sup> Unfortunately, confusion and delay can occur when the operator under or overshoots the next permissible segment.<sup>550</sup>

Creating an edited duplicate tape is the more sophisticated method of handling objections.<sup>551</sup> Once the court rules on the objections the proponent creates a duplicate tape deleting the inadmissible segments.<sup>552</sup> The edited tape curtails the often futile jury instruction ordering the jury to disregard the testimony just heard.<sup>553</sup> This method is both time consuming and expensive.<sup>554</sup> The attorney must consider whether the case's economics justifies creating an edited tape.<sup>555</sup>

#### SINGLE AND MULTI-CAMERA SYSTEMS

The deposing attorney has control over the number of cameras used.<sup>556</sup> Attorneys ask questions with body movement and gestures as well as with voice.<sup>557</sup> The multi-camera approach more closely duplicates the live presentation of testimony at trial.<sup>558</sup> This tech-

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.*

548. *Id.* at 1403.

549. HAYDOCK AND HERR, *supra* note 179 §3.3.3, at 172.

550. *Id.*

551. *Id.*; Murry, *supra* note 7, at 1404.

552. UNDERWOOD, *supra* note 20 §3.02, at 139.

553. *Id.*

554. Murry, *supra* note 7, at 1404.

555. *Id.*

556. Figari and Loewinsohn, *supra* note 46, at 37.

557. *Id.* at 38.

558. *Id.*

nique allows greater visual variety.<sup>559</sup> Using a split screen format allows the jury to view both the witness and questioning counsel concurrently.<sup>560</sup> A split screen format simultaneously projects two or more images on the television screen.<sup>561</sup> This allows counsel to communicate by his demeanor and avoids giving undue weight to the witness.<sup>562</sup> There is also greater flexibility in producing images of demonstrative evidence.<sup>563</sup>

The multi-camera technique allows the technician to:

- 1) edit back and forth between the interrogator and the witness (an approach used in news broadcasts);
- 2) produce a split screen showing both the interrogator and the witness (an approach used in sports broadcasting);
- 3) place the witness's image in the center of the screen and insert the interrogator's picture in one corner of the screen.<sup>564</sup>

The multi-camera system's potential for bias is greater than the single camera system.<sup>565</sup> No court has dealt with the issue of acceptability of the multi-camera approach.<sup>566</sup> However, the ability to view the demeanor of all parties and avoid the "absorption effect" gives weight to the argument that the multi-camera system creates a deposition as fair and accurate as that created by a single camera system.<sup>567</sup>

The single camera technique uses one camera focused on the witness.<sup>568</sup> This method is the least costly method of producing a video deposition.<sup>569</sup> The single camera's coverage is limited and must remain on one subject to be effective.<sup>570</sup> The primary pitfall of a single-camera system is turning the witness into a "talking

559. Underwood, *supra* note 15, at 71.

560. *Id.*

561. *Id.*

562. *Id.*

563. Murry, *supra* note 7, at 1406.

564. Figari and Loewinsohn, *supra* note 46, at 38.

565. Comment, *supra* note 2, at 216; UNDERWOOD, *supra* note 20 §3.02, at 142.

566. Figari and Loewinsohn, *supra* note 46, at 38.

567. *Id.* For a complete discussion of the "absorption effect," see *supra* notes 410-13 and accompanying text.

568. Comment, *supra* note 2, at 216; Figari and Loewinsohn, *supra* note 46, at 38.

569. Figari and Loewinsohn, *supra* note 46, at 38.

570. Murry, *supra* note 7, at 1406; Figari and Loewinsohn, *supra* note 46, at 38.

head" that hypnotizes the jury.<sup>571</sup> To avoid the "absorption effect," the cameraman must vary the camera shots without impairing basic accuracy and fairness.<sup>572</sup> The best way of creating camera variety with a single camera system is to keep the witness framed until the answer is complete.<sup>573</sup> The cameraman pans the camera to the interrogator when the jury's attention should be on the questioning attorney.<sup>574</sup> A proper use of this technique is during lengthy hypothetical questions.<sup>575</sup> This technique avoids the monotonous fixed-lens presentation and directs the jury's attention to the question, as well as the answer.<sup>576</sup> Some cases have required protective provisions specifically forbidding the use of a zoom lens.<sup>577</sup> If not prohibited by a protective provision, the deposition should begin with a wide-angle shot that shows all the participants.<sup>578</sup> This wide-angle shot shows the setting in which the deponent gave the deposition.<sup>579</sup> This introductory shot helps the jury understand that all parties could question the deponent during the deposition.<sup>580</sup>

Some authorities believe that only the witness should appear in the video deposition.<sup>581</sup> These authorities believe the cameraman should frame the witness in a manner that only shows him from the waist up.<sup>582</sup> This image portrays the witness in much the same manner as the jury sees the witness in the courtroom.<sup>583</sup> These authorities also believe counsel should never appear on the video tape unless there is a specific need, because counsel will be present in the courtroom during the deposition's presentation.<sup>584</sup>

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571. Murry, *supra* note 7, at 1406; Figari and Loewinsohn, *supra* note 46 at 38.

572. Murry, *supra* note 7, at 1406.

573. *Id.*

574. *Id.*

575. *Id.*

576. Figari and Loewinsohn, *supra* note 46, at 38.

577. *In re Daniels*, 69 F.R.D. 579, 582 (N.D. Ga. 1975). *See also* Underwood, *supra* note 25, at 69; Underwood, *supra* note 15, at 64; UNDERWOOD, *supra* note 20 § 3.01, at 133-34.

578. Figari and Loewinsohn, *supra* note 46, at 38.

579. *Id.*

580. *Id.*

581. Dombroff, *supra* note 212, at 46.

582. *Id.*

583. *Id.*

584. *Id.*

## EDUCATING THE JURY

During voir dire the jury should be alerted to the upcoming video deposition.<sup>585</sup> By using positive connotations, the attorney can enhance the status of the testifying witness.<sup>586</sup> This introduction justifies the use of videotape by emphasizing the importance of an unavailable witness.<sup>587</sup> In addition, the jurors will realize they have a familiar object, the television, to relate to in the cold, intimidating, formal courtroom.<sup>588</sup> Before presenting the video deposition, the attorney must explain that the court required the editing of the tape.<sup>589</sup> The attorney must explain that the editing conforms the witness's testimony to the rules of evidence.<sup>590</sup> This advance explanation lessens the chance that the jury will discredit the presentation.<sup>591</sup>

The judge must make a statement to the jury about the video deposition and its use in trial before showing the deposition. The wording of this statement should be agreed to by all parties.<sup>592</sup> The following is a sample format of such a statement:

Ladies and gentlemen of the jury, under certain circumstances, a party to a lawsuit such as this has the right to present testimony through the use of a deposition. This is done instead of bringing the witness physically to court.

Essentially, a deposition is nothing more than sworn testimony under oath that has been taken down stenographically and then later read to you. Counsel in this case however, in addition to having stenographic depositions (if appropriate), have also taken videotape depositions, the first of which you are about to see on the television monitor(s) in front of you.

You are to treat the testimony and evidence presented to you by way of the videotape deposition in the same fashion as you treat any of the other evidence being presented to you in this case. No more or no less weight should be given to any piece of evidence based solely upon the format in which it is presented to you, either by live witness, videotaped witness or stenographic

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585. Feder and Feder, *supra* note 154, at 18.

586. *Id.*

587. *Id.* at 19.

588. *Id.* at 19-20.

589. *Id.* at 19.

590. *Id.*

591. *Id.*

592. Dombroff, *supra* note 212, at 47.

deposition.<sup>593</sup>

Finally, the attorney can use the court reporter's transcript taken during videotaping, or portions of the video tape for summation of a key point during closing argument.<sup>594</sup>

### THE PRESENTATION

A trial attorney's preoccupation with other details requires that other personnel be available to operate the equipment.<sup>595</sup> The proponent must avoid disrupting the courtroom.<sup>596</sup> The playback equipment operator should set-up the equipment during a recess immediately preceding the presentation.<sup>597</sup>

The bigger the screen, the greater the viewer's attention. The greater the viewer's attention, the greater the viewer's retention.<sup>598</sup> Requiring the jury to focus on a small monitor for long periods causes tedium and acute eye strain.<sup>599</sup> The attorney can strategically locate several TV screens in the courtroom so that no one must move to view the taped witness.<sup>600</sup> The attorney must remember to have the cables and electrical cords laid in a manner that does not create a safety hazard.<sup>601</sup>

The attorney can locate one 19-20 inch television near the witness box.<sup>602</sup> This approximates the physical appearance of a witness in a courtroom.<sup>603</sup> The one-set approach presents less technical and logistic problems than the multi-set approach.<sup>604</sup> Economics and technology presently prohibit the use of large screen televisions (40-72 inch).<sup>605</sup> As technology advances the cost of the big screen televisions will drop and their quality improve.<sup>606</sup> These advances probably will place more big screens in homes.<sup>607</sup>

593. *Id.*

594. Feder and Feder, *supra* note 154, at 19.

595. Misko, *supra* note 68, at 489.

596. Dombroff, *supra* note 212, at 47.

597. *Id.*

598. Figari and Loewinsohn, *supra* note 46, at 38.

599. UNDERWOOD, *supra* note 20 § 3.02, at 142.

600. Dombroff, *supra* note 212, at 47.

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. Figari and Loewinsohn, *supra* note 46, at 38.

606. *Id.*

607. *Id.*

This home use will diffuse fears that the big screens decrease witness credibility by correlating the big screen television with the movie screen or the large units will create a circus-like atmosphere in the courtroom.<sup>608</sup>

Technical problems are always a possibility. As in all of life, Murphy's Law will only be in effect the day the attorney presents the video deposition.<sup>609</sup> Inspect and reinspect the playback equipment before the presentation; mechanical malfunctions are intolerable.<sup>610</sup> Expect, and be equipped for, all lighting and electrical needs.<sup>611</sup>

### TRIAL ETIQUETTE

Theoretically, an attorney can use the video deposition along with live testimony for general substantive evidence.<sup>612</sup> However, this rule does not allow uses that are cumulative.<sup>613</sup> In most cases it is poor trial strategy and etiquette to substitute a video deposition for testimony of an available party.<sup>614</sup> Juries perceive these tactics as cheap theatrical presentations.<sup>615</sup>

The attorney may intend to present only specific portions of the tape at trial.<sup>616</sup> There are no cases, or rules, governing this situation.<sup>617</sup> However, etiquette dictates that the attorney give opposing counsel written notice of such intentions within a reasonable time before trial.<sup>618</sup> Lack of such notice will deprive opposing counsel of the right to offer the omitted portions into evidence.<sup>619</sup> In such situations, it is best if each attorney has a copy of the tape.<sup>620</sup>

### THE VIDEO DEPOSITION AS AN IMPEACHMENT VEHICLE

An attorney can use a video deposition for impeaching a wit-

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608. *Id.*

609. Dombroff, *supra* note 212, at 46.

610. Feder and Feder, *supra* note 154, at 19.

611. *Id.*

612. Underwood, *supra* note 25, at 72.

613. *Id.*

614. *Id.*

615. *Id.*

616. Misko, *supra* note 68, at 490.

617. *Id.*

618. *Id.*

619. N.C.R. Civ. P. 32(a)(5)

620. Misko, *supra* note 68, at 490.



ness,<sup>621</sup> though such use may require the court's permission.<sup>622</sup> Video depositions can play an important role in cross-examining a live witness.<sup>623</sup> Using the video deposition to discredit the witness can be devastating.<sup>624</sup> This technique allows the jury to compare the demeanor of the witness at trial and at the deposition.<sup>625</sup> The comparison allows the jury to assess the value of an admission.<sup>626</sup> Seeing the witness's actions, gestures, and facial expressions enhances the effectiveness of the impeachment.<sup>627</sup>

An effective alternative to cross-examination concerning specific inconsistencies is to show an edited version of the most damaging admission made during the deposition.<sup>628</sup> This technique requires early planning both at the deposition and in gaining permission from the court to show the edited version.<sup>629</sup>

When impeaching a witness using pertinent portions of the video deposition, the segments will be difficult to locate.<sup>630</sup> The use of a time/date generator log index of these pertinent points is a necessity.<sup>631</sup> The effectiveness of impeachment by video may be lost if the jury becomes hostile toward the attorney who fumbles with machinery trying to locate the testimony.<sup>632</sup> The only one discredited by such a blunder is the impeaching attorney.<sup>633</sup>

In federal court, this technique is permissible whether or not the witness is a party or meets the "exceptional circumstances" standard of Rule 32(a)(3)(E) of the Federal Rules of Civil Procedure.<sup>634</sup> The North Carolina Rules of Civil Procedure also allow

621. FED. R. CIV. P. 32(a)(1); N.C.R. CIV. P. 32(a)(1). See also Underwood, *supra* note 25, at 72. Comment, *supra* note 2, at 211.

622. Figari and Loewinsohn, *supra* note 46, at 37.

623. *Id.*

624. *Id.*

625. *Id.*

626. *Id.*

627. Comment, *supra* note 2, at 212.

628. Figari and Loewinsohn, *supra* note 46, at 36.

629. *Id.*

630. UNDERWOOD, *supra* note 20 § 3.02, at 144-45.

631. *Id.*

632. Figari and Loewinsohn, *supra* note 46, at 37.

633. *Id.*

634. FED. R. CIV. P. 32(a)(3) (The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infir-

such use for any party.<sup>635</sup>

Also, attorneys can also use video depositions to refresh a witness' past recollection.<sup>636</sup>

### SETTLEMENTS

Video depositions can provide a critical review of how a witness will relate to the jury.<sup>637</sup> The camera exposes grating personalities, nervous characteristics, and unpersuasiveness to scrutiny.<sup>638</sup> The witness's sponsor may become amenable to settlement after seeing the witness's weaknesses.<sup>639</sup> Video deposition advocates claim that the medium significantly strengthens the negotiation posture of a case and promotes settlement.<sup>640</sup> They argue that this increase in settlements lessens the burden on the dockets<sup>641</sup> and saves court time.<sup>642</sup>

mity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used). *See also* Figari and Loewinsohn, *supra* note 46, at 36.

635. N.C.R. Civ. P. 32(a)(4) (The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness meansis unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4)). *See also* Shuford, *supra* note 93, § 32-1, at 269.

636. Dombroff, *supra* note 212, at 45.

637. UNDERWOOD, *supra* note 20 §3.02, at 138; Underwood, *supra* note 15, at 68.

638. UNDERWOOD, *supra* note 20 §3.02, at 138.

639. Underwood, *supra* note 15, at 68.

640. HAYDOCK AND HERR, *supra* note 179 § 3.3.3, at 169; Underwood, *supra* note 15, at 68; Comment, *supra* note 2, at 198.

641. Comment, *supra* note 2, at 201-02.

642. *Id.* at 198.

## THE VIDEO DEPOSITION ON APPEAL

A video deposition attached to an appellant record allows the appellant court to review demeanor evidence as seen by the trial judge.<sup>643</sup> However, the attorney must realize that an appellant judge without playback equipment is forced to ignore the tape.<sup>644</sup>

## CONCLUSION

Unbridled use of video depositions could easily disrupt the traditional dignity of the courtroom causing usurpation of the judicial function.<sup>645</sup> Wholesale use of video depositions would create admissibility problems and viewer boredom.<sup>646</sup> Video depositions can only supplement rather than replace live testimony.<sup>647</sup> If all is equal, live witnesses are more interesting than any deposition. Unfortunately, reality does not allow equality. When used selectively, the videotape deposition can be an accurate, effective, and dramatic technique for presenting evidence.<sup>648</sup> Successful use of the visual medium requires the attorney to think visually.

Courthouse tales speak of attorneys springing dramatic video depositions just before jury selection.<sup>649</sup> In all these tales the opponent watches the tape and immediately hands over a whopping settlement check.<sup>650</sup> Upon hearing such tales one must remember that these attorneys earned every penny of the settlements. Behind every successful video deposition there is an attorney that spent a lot of time and energy putting the "D" in dramatic.

## PART TWO: SURVEY ANALYSIS

## EXPLANATION OF PRESENTATION

This survey of video deposition use in the North Carolina Superior Court system consists of answers to questionnaires by 40 judges, 15 attorneys, and 48 jurors.

643. UNDERWOOD, *supra* note 20 § 3.02, at 140.

644. Underwood, *supra* note 15, at 69; UNDERWOOD, *supra* note 20 § 3.02, at 140.

645. Comment, *supra* note 2, at 223, (citing Salvan, *Videotape for the Legal Community*, 59 JUDICATURE 222, 228 (1975)).

646. Underwood, *supra* note 15, at 68.

647. Underwood, *supra* note 25, at 72.

648. UNDERWOOD, *supra* note 20 §3.04, at 153.

649. Chernow, *supra* note 239, 267, at 3.

650. *Id.*

The presentation allows the reader to view the questions and tabulation of the participants' responses. All participants did not answer all the questions. Some participants marked more than one answer for some questions. The presentation includes tabulations of all the answers.

The presentation references the questions to Part One's discussion of production and use of video depositions. Readers will find the referenced pages in bold brackets at the end of each question.

Several participants included personal comments about their experiences with video depositions. The presentation includes some comments under the pertinent questions. Other comments that were general in nature are listed under a separate heading. The comments under the separate heading are referenced to Part One.

## QUESTIONNAIRE RESPONSES FROM SUPERIOR COURT JUDGES

1. Based upon your experience are jurors more attentive to video depositions than to oral depositions of equal length? [See Page 19]

37 Yes      1 No

2. Do you feel that the following statement is true? "In general video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition."

20 Yes      3 No      16 Under certain circumstances  
[See Page 19]

*Judge's Comment: It allows the jury to better assess the weight and credibility of each witness.*

3. The video deposition is taken: [See Pages 45, 48]

Usually      Occasionally      Rarely      Never

<u>7</u>	<u>24</u>	<u>7</u>	<u>    </u>	a) at an attorney's office,
<u>33</u>	<u>4</u>	<u>1</u>	<u>    </u>	b) at the expert's work environment,
<u>    </u>	<u>1</u>	<u>11</u>	<u>22</u>	c) at the scene of the accident,
<u>3</u>	<u>3</u>	<u>14</u>	<u>15</u>	d) at the location of equipment that is too large to bring into the Courtroom.

4. For video depositions that are used in your court, have rules—either by party agreement or court order—been placed on the video deposition concerning the following: [See Page 37]

Usually Occasionally Rarely Never

Usually	Occasionally	Rarely	Never	
<u>    </u>	<u>  4  </u>	<u>  8  </u>	<u> 22 </u>	a) staging and photographic technique,
<u>    </u>	<u>  1  </u>	<u>  6  </u>	<u> 25 </u>	b) use of zoom lens,
<u>    </u>	<u>    </u>	<u>  6  </u>	<u> 27 </u>	c) camera angles,
<u>    </u>	<u>  1  </u>	<u>  6  </u>	<u> 25 </u>	d) background and setting in which the deponent is placed,
<u>  3  </u>	<u>  1  </u>	<u>  6  </u>	<u> 22 </u>	e) whether the video tape must run continuously throughout the video deposition,
<u>  4  </u>	<u>  3  </u>	<u>  8  </u>	<u> 18 </u>	f) who can attend the video deposition,
<u>  8  </u>	<u>  9  </u>	<u>  6  </u>	<u> 10 </u>	g) who shall pay for the video deposition,
<u>  1  </u>	<u>  3  </u>	<u> 10 </u>	<u> 17 </u>	h) whether a log index of video tape is required,
<u> 18 </u>	<u>  5  </u>	<u>  6  </u>	<u>  5  </u>	i) manner of handling objections,
<u>  6  </u>	<u>  5  </u>	<u>  7  </u>	<u> 14 </u>	j) whether copies of the video tape can be made?

5. How do you rule on objections to material on video tape: [See Page 65]

Usually Occasionally Rarely Never

Usually	Occasionally	Rarely	Never	
<u> 27 </u>	<u>  3  </u>	<u>  2  </u>	<u>  3  </u>	a) at a pretrial hearing where objections are raised,
<u>  5  </u>	<u>  5  </u>	<u>  6  </u>	<u> 13 </u>	b) only on objections as made and recorded during the deposition,
<u>  5  </u>	<u>  6  </u>	<u>  5  </u>	<u> 13 </u>	c) a combination of the above two,
<u>  5  </u>	<u>  2  </u>	<u>  7  </u>	<u> 19 </u>	d) at trial when the video deposition is presented?

6. Do you prefer to handle objections to portions of a video deposition by: [See Page 65]

Yes No

<u> 28 </u>	<u>    </u>	review of a written transcript of the video deposition,
<u>  3  </u>	<u> 17 </u>	viewing the video deposition itself,
<u>  1  </u>	<u> 14 </u>	combination of the above two?

7. Which of the following persons do you allow, require, or bar from operating the playback equipment during a trial? [See Page 74]

Allow Require Barred

<u> 37 </u>	<u>    </u>	<u>  1  </u>	Employee of firm presenting the deposition;
<u> 23 </u>	<u>    </u>	<u>  7  </u>	Bailiff or other court official;
<u> 34 </u>	<u>  1  </u>	<u>  1  </u>	Independent source hired for this purpose?

*Judge's Comment: Bailiff or court officials should not be required to do this. It is not part of their duties.*

8. Do you allow attorneys to mention the use of video depositions during Voir Dire? [See Page 73] 28 Yes      No

9. Are attorneys allowed to mention the use of video depositions during opening statements for: [See Page 73]

Usually Never

- |           |           |  |
|-----------|-----------|--|
| <u>26</u> | <u>9</u>  | a) emphasizing the content of the upcoming video deposition,   |
| <u>32</u> | <u>5</u>  | b) explaining how the video deposition fits into the pattern of evidence,  |
| <u>25</u> | <u>9</u>  | c) informing the jury that the deposition was taken at a remote place and time,  |
| <u>28</u> | <u>5</u>  | d) alerting the jury to the use of exhibits in the video deposition,   |
| <u>24</u> | <u>10</u> | e) advising the jury that opposing counsel was present and allowed to examine the witness, during the video deposition's taping, |
| <u>10</u> | <u>25</u> | f) explaining that the video tape was edited to conform to the Rules of Evidence.  |

*Judge's Comment: Although allowed, attorneys seldom go into this much details as to all of these items.*

10. Must attorneys wait until their respective cases-in-chief to:

[See Page 73]

Yes No

- |          |          |   |
|----------|----------|---|
| <u>4</u> | <u>7</u> | a) emphasize the content of the upcoming video deposition,  |
| <u>7</u> | <u>5</u> | b) explain how the video deposition fits into the pattern of evidence,  |
| <u>8</u> | <u>4</u> | c) inform the jury that the deposition was taken at a remote place and time,  |
| <u>6</u> | <u>6</u> | d) alert the jury to the use of exhibits in the video deposition,   |
| <u>9</u> | <u>3</u> | e) advise the jury that opposing counsel was present and allowed to examine the witness during the video deposition's taping, |
| <u>7</u> | <u>3</u> | f) explain that the video tape was edited to conform to the Rules of Evidence?  |

11. Are attorneys required to ask your permission to use segments of a video deposition to impeach a witness? [See Page 78]

29 Yes 8 No

12. Are attorneys allowed to use portions of a video deposition in case summation? [See Page 29, 74] 9 Yes 25 No

*Judge's Comment: However, I will consider any reasonable request to do so.*

13. In your court about how long do most of the video depositions last? [See Pages 21, 30, 50]

25 1/2 to 1 hour, 7 1 to 1 1/2 hours,
7 1 1/2 to 2 hours, 11 2 to 3 hours,
over 3 hours

14. How is the video deposition most often presented to the jury? [See Page 74]

a) Size of monitor: 36 19/20 inch 2 40-72 inch big screen
b) Number of monitors: 29 one 18 one or two 8 two
7 separate monitor for the bench
c) Do you require, or prefer, to have a separate monitor for the bench? (Please check the better word choice.)
2 require 34 prefer

15. Using a ratio (eg. one in eighteen cases) how often are video depositions used in your court.

3 1 in 4 cases 5 1 in 5 cases
5 1 in 10 cases 15 1 in 15 cases
3 1 in 18 cases 2 1 in 20 cases
2 1 in 25 cases 5 1 in 30 cases
1 1 in 35 cases 3 1 in 40 cases
2 1 in 50 cases 2 1 in 100 cases
1 1 in 150 cases

16. In your court, which types of cases have used video depositions? [See Page 29]

40 Personal Injury 35 Medical Malpractice
5 Corporate/Business 3 Contract

17. In your court are video depositions used for: [See Page 48] Usually Occasionally Rarely Never

26 14 a) an expert witness that is difficult or impossible to schedule,
4 19 15 2 b) an important fact witness that is beyond the subpoena power of the court,
2 24 10 3 c) an important fact witness that is unavailable for trial,
1 7 19 11 d) showing visual aids or equipment that is impossible to move to court,
6 32 e) reenacting an accident?

18. Have you presided over multi-camera video depositions? [See Page 69]

Frequently 2 Occasionally 2 Rarely 36 Never

19. If multi-camera video depositions are presented in your court, please indicate to what extent the following techniques are used: [See Page 69]

Usually	Occasionally	Rarely	Never	
_____	<u>3</u>	<u>2</u>	<u>2</u>	a) fading from the interrogator to the witness as questions are asked and answers given,
<u>1</u>	_____	<u>1</u>	<u>3</u>	b) splitting of the screen to show both the interrogator and the witness, both dominating equal space on the screen,
<u>1</u>	_____	<u>1</u>	<u>5</u>	c) placing the witness's image in center of the screen while the interrogator's picture, smaller in size, is inserted in a corner of the screen.

20. Have you ever viewed a video deposition during a bench trial?

[See Pages 22]

14 Yes      25 No

### QUESTIONNAIRE RESPONSES FROM ATTORNEYS

[The survey asked attorneys acting as proponents or opponents many of the same questions. However, there are some differences in several of the questions. The following presentation highlights differences with an asterisk (\*) and explanation in bold face type. A question directed only to proponents or opponents naturally list a lower number of responses.]

#### INSTRUCTIONS FOR ATTORNEYS:

1. Please **DO NOT** sign your name to the questionnaire.
2. Please answer the questions by checking, circling, or writing the best response.
3. Return the questionnaire in the attached self addressed stamped envelope.

- 
1. The video deposition was taken according to: [See Page 12]
    - 7 Notice as prescribed in North Carolina's Rule of Civil Procedure 30(b)(4)
    - 11 Stipulation between the parties
    - \_\_\_\_\_ Court Order
  2. **\*[PROONENTS ONLY]** Why was the video deposition used? [See Page 48]
    - 10 An expert witness that was difficult or impossible to schedule
    - 2 An important fact witness that was beyond the subpoena power of the Court
    - 2 An important fact witness that was unavailable for trial
    - \_\_\_\_\_ To show a visual aid or equipment that was impossible to move to court



\_\_\_ To reenact an accident

**\*[OPPONENTS ONLY]** What reason was given by the video deposition's proponent for utilizing the medium? [See Page 48]

5 For an expert witness that was difficult or impossible to schedule

1 An important fact witness that was beyond the subpoena power of the Court

1 An important fact witness that was unavailable for trial

1 To show a visual aid or equipment that was impossible to move to court

\_\_\_ To reenact an accident

3. **\*[PROPONENTS ONLY]** What factors affected your decision to use a video deposition?

(check all appropriate responses) [See Pages 24, 25, 26, 44, 48]

2 Cost

8 Logistical reasons mentioned in question #2

1 Need for showing demonstrative evidence

3 Impact of the television medium

3 Placement of testimony in the stream of evidence

\_\_\_ Saving court time

**\*[OPPONENTS ONLY]** Were you concerned that the medium might unfairly prejudice the case in favor of the video deposition's proponent? [See Page 34]

\_\_\_ Yes 4 No

4. Was the deponent:

**[PROPONENTS]** 9 Your witness 4 The opponent's witness.

**[OPPONENTS]** 2 Your witness 5 The proponent's witness.

5. Based upon your experience were the jurors more attentive to the video deposition than the reading of oral depositions of equal length? [See Page 19]

13 Yes 1 No 2 Unascertainable

6. Were any oral depositions presented at the same trial?

6 Yes 10 No

7. How did the video deposition affect your case?

**[PROPONENTS]** 3 Very Helpful

5 Helpful

4 No more helpful than other evidence presented

\_\_\_ Harmful

\_\_\_ Very Harmful

**[OPPONENTS]** \_\_\_ Very Helpful

2 Helpful

2 No more helpful than other evidence presented

\_\_\_\_\_ Harmful  
 \_\_\_\_\_ Very Harmful

8. Do you feel in this case the video deposition was: (Check all appropriate responses.)

[PROPONENTS]   1   More effective than live testimony.  
  5   As effective as live testimony.  
  6   Less effective than live testimony.  
  9   More effective than an oral deposition.  
 \_\_\_\_\_ As effective as an oral deposition.  
 \_\_\_\_\_ Less effective than an oral deposition.

[OPPONENTS] \_\_\_\_\_ More effective than live testimony.  
  2   As effective as live testimony.  
  2   Less effective than live testimony.  
  4   More effective than an oral deposition.  
 \_\_\_\_\_ As effective as an oral deposition.  
 \_\_\_\_\_ Less effective than an oral deposition.

*Attorney's Comment: I believe that video depositions of doctors are usually as effective as live testimony. I do not believe that video depositions are ever more effective than live testimony.*

*Attorney's Comment: Live witnesses are far better, but video depositions allow counsel to use experts (i.e. expert medical witnesses) who could not schedule your trial or would be too expensive to pay to come to trial. One unanticipated problem I ran into—after my experts' video depositions were taken, the other side then hired their experts, who testified live and reacted to my experts on video. This allowed the other side a persuasive edge of their experts' directly refuting mine, with explanations of why their experts were correct. The lesson—if possible, save one video deposition until close to trial (if no live expert is available).*

9. After the trial did you interview the jurors to determine the effectiveness of the video deposition?

  5   Yes       12  No

10. Do you feel that the following statement is true. "In general video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition."

[See Page 19]

 15  Yes        1  No        2  Under certain circumstances

11. Where was the video deposition taken? [See Page 45, 48]

[PROPONENTS]   2  At my office  
 \_\_\_\_\_ At my opponent's office  
  8  At the expert's work environment  
  1  At the scene of the accident  
 \_\_\_\_\_ At the location of equipment that was too large to bring into the courtroom.

- [PROPONENTS]    1 At deponent's residence  
                                 At my office  
                                 At my opponent's office  
                          4 At the expert's work environment  
                                 At the scene of the accident  
                                 At the location of equipment that was  
                          too large to bring into the courtroom.  
                          1 At the unavailable witness's home, due to  
                          medical problems.
12. **\*[PROPONENTS ONLY]** Who taped the deposition?  
**[See Page 56]**  
       2 My employee using my equipment  
              My employee using rented/borrowed equipment  
       9 Stenographic/Court Reporting Service  
       4 Advertising/Commercial Video Production Company
13. **\*[PROPONENTS ONLY]** *Answer this question only if the deposition was taped by someone other than an employee.* Was legal training and familiarity with deposition procedure a major factor in deciding who to hire? **[See Page 57]**  
       4 Yes        4 No
14. Compared to the preparation required for an oral deposition, the time spent preparing for the video deposition was:  
**[See Pages 52, 55, 58]**  
**[PROPONENTS]**    3 More  
                          8 The same  
                                 Less  
**[OPPONENTS]**           More  
                          4 The same  
                                 Less
15. *Answer this question only if the deponent was your witness.* Did the video deposition require more witness preparation time than you normally need for oral depositions? **[See Page 58]**  
**[PROPONENTS]**    3    6  
                          Yes    No  
**[OPPONENTS]**    1    2  
                          Yes    No
16. How much time did you spend in preparing for the video deposition?  
       (Please state an approximate number of hours.)  
**[See Pages 52, 55, 58]**  
**[PROPONENTS]**    1 .5 hr.    4 1-2 hr.  
                          1 1.5 hr.    4 4 hr.  
                          1 4-5 hr.    1 6-7 hr.  
**[OPPONENTS]**    1 1 hr.     1 2 hr.  
                          1 6-7 hr.

17. This is approximately \_\_\_\_\_ hours **MORE/LESS** (Please state an approximate number of hours and circle the appropriate word.) than I normally spend on preparation for an oral deposition.  
**[See Pages 52, 55, 58]**  
**[PROPONENTS]**    4 The same    1 .2 hr. More  
                               2 .5 hr. More    1 1 hr. More  
   1 2 hrs. More  
**[OPPONENTS]**    2 The same    1 1 hr. More
18. Were any exhibits used during the taping of the deposition to illustrate the witness's testimony? **[See Page 60]**  
10 Yes    4 No
19. **\*[PROPONENTS ONLY]** Were any of the following protective provisions placed on the video deposition? **[See Page 37]**  
2 Staging and photographic technique  
1 Use of zoom lens  
1 Camera angles  
1 Background and setting in which the deponent was placed  
\_\_\_\_ Whether the video tape was to run continuously throughout the video deposition  
\_\_\_\_ Who could attend the video deposition  
3 Who would pay for the video deposition  
\_\_\_\_ Whether a log index of video tape was required  
2 Manner of handling objections  
\_\_\_\_ Whether copies of the video tape could be made
- \*[OPPONENTS ONLY]** Did you request any of the following protective provisions be placed on the video deposition? **[See Page 37]**  
3 No  
\_\_\_\_ Staging and photographic technique  
\_\_\_\_ Use of zoom lens  
\_\_\_\_ Camera angles  
\_\_\_\_ Background and setting in which the deponent was placed  
1 Whether the video tape was to run continuously throughout the video deposition  
1 Who could attend the video deposition  
1 Who would pay for the video deposition  
\_\_\_\_ Whether a log index of video tape was required  
3 Manner of handling objections  
\_\_\_\_ Whether copies of the video tape could be made
20. When did the judge rule on objections to material on the video tape? **[See Page 65]**  
3 At a pretrial hearing  
10 At trial
21. How did the judge review objections? **[See Page 65]**  
(Check all appropriate responses.)  
7 Review of a written transcript of the video deposition  
2 Viewing the video deposition itself

- 1 On objections as made and recorded during the deposition  
3 On objections made after completion of the deposition  
 \_\_\_\_\_ During presentation in court
22. How were sustained objections deleted? [See Page 67]  
1 An edited version of the original tape was made  
8 The original tape was used at trial, but the playback equipment operator (Please check appropriate method.)  
2 fast forwarded through the objectionable material  
6 turned off the sound during the objectionable material  
3 turned off both the sound and the visual image during the objectionable material
23. Approximately how much time was spent in pretrial hearings concerning the video deposition? \_\_\_\_\_ hours  
6 None 3 .5 hr. 1 3 hr. 2 8-10 hrs.
24. This is approximately \_\_\_\_\_ hours MORE/LESS (Please state an approximate number of hours and circle the appropriate word.) than normally needed for an oral deposition.  
6 The same 1 .5 hr. Less 1 .5 hr. More  
1 2 hrs. More 1 5 hrs. More
25. \*[PROponents ONLY] The video deposition cost approximately \_\_\_\_\_ percentage MORE/LESS (Please state an approximate percentage and circle the appropriate word.) than would a comparable oral deposition. [See Page 24]  
1 20% More 3 50% More 2 100% More  
1 250% More 2 300% More
26. Who operated the playback equipment during the trial? [See Page 74]  
9 Employee of firm presenting the video deposition  
 \_\_\_\_\_ Bailiff or other Court Official  
4 Independent source hired for this purpose  
3 By presenting attorney
27. Did you, or would you have been, allowed to mention the video deposition during Voir Dire? [See Page 73] 14 Yes \_\_\_\_\_ No
28. Did you, or would you have been, allowed to mention the video deposition during opening statements? [See Page 73]  
14 Yes \_\_\_\_\_ No
29. Did you use, or could you have used, portions of the video deposition in case summation? [See Page 74] 5 Yes 5 No
30. How long was the video deposition? [See Page 21, 30, 50]  
6 1/2 to 1 hour, 4 1 to 1 1/2 hours,  
3 1 1/2 to 2 hours, 3 2 to 3 hours,  
1 over 3 hours
31. How was the video deposition presented to the judge and jury? [See Page 74]

Size of monitor: 13 19/20 inch 2 40-72 inch big screen  
 Number of monitors: 12 one 1 two  
 \_\_\_\_\_ separate monitor for the bench

32. Do you prefer to have a separate monitor for the bench?

[See Page 74]

5 Yes 14 No

33. Did the video deposition made for this case utilize a:

[See Page 69]

15 Single camera system  
 \_\_\_\_\_ Multi-camera system

34. Was this your first video deposition?

3 Yes 14 No

**IF THIS WAS NOT YOUR FIRST VIDEO DEPOSITION  
 PLEASE ANSWER THE FOLLOWING QUESTIONS.**

35. Using a ratio (e.g. one in *eighteen* cases) how often do you use video depositions? 1 in \_\_\_\_\_ cases.

4 1 in 4      3 1 in 5      1 1 in 6  
1 1 in 8-to-10      3 1 in 10      1 1 in 20

36. In which of the following types of cases have you used video depositions? [See Page 29]

11 Personal Injury      4 Medical Malpractice  
2 Corporate/Business      1 Contract

*Attorney's Comment: I will never again use a video deposition of an economist. It was too boring and was not effective in this case.*

37. What is the approximate number of video depositions in which you have participated?

1 3 or 4      1 5      5 10      1 8  
1 15      1 20-to-30      1 100

*Attorney's Comment: I'm always defending and the other side utilizes them quite often.*

38. Please divide the total number into approximate numbers for:

\_\_\_\_\_ Deposition's Proponent  
 \_\_\_\_\_ Deposition's Opponent

[NOTE: This answer is presented in percentages designated by Proponent/Opponent]

1 100/0      1 75/25      1 65/35  
2 50/50      1 35/65      2 10/90

39. Please divide the total number indicated for "Deposition's Proponent" in question #38 into:

\_\_\_\_\_ Friendly Witness  
 \_\_\_\_\_ Adverse Witness

[NOTE: This answer is presented in percentages designated by Friendly/Adverse]

8 100/0    1 90/10    1 75/25    1 50/50

40. Please divide the total number indicated for "Deposition's Opponent" in question #38 into:

\_\_\_\_ Friendly Witness  
\_\_\_\_ Adverse Witness

[NOTE: This answer is presented in percentages designated by Friendly/Adverse]

8 100/0    1 65/35    1 0/100

41. Please rate this case's video deposition against previous video depositions in which you have participated.

\_\_\_\_ More effective than most  
11 Average  
1 Less effective than most

42. Have you ever participated in multi-camera video depositions?

\_\_\_\_ Frequently, 1 Occasionally, 2 Rarely, 9 Never

43. If you have participated in multi-camera video depositions please indicate to what extent the following techniques were utilized:

[See Page 69]

Usually    Occasionally    Rarely    Never

- |          |          |      |          |  |
|----------|----------|------|----------|--|
| ____     | <u>1</u> | ____ | <u>1</u> | a) Fading from interrogator to witness as questions were asked and answers given;  |
| ____     | ____     | ____ | <u>2</u> | b) Splitting of the screen to show both the interrogator and witness, both dominating equal space on the screen;                                 |
| <u>1</u> | ____     | ____ | <u>1</u> | c) Placing the witness's image in center of the screen while the interrogator's picture, smaller in size, is inserted in a corner of the screen. |

### QUESTIONNAIRE RESPONSES FROM JURORS

#### INSTRUCTIONS FOR JURORS:

1. Please **DO NOT** sign your name to the questionnaire.
2. Please answer the questions by checking the best response at the end of each question.
3. Please do not answer any questions that you do not understand.
4. Return the questionnaire in the attached self addressed stamped envelope.

1. Do you remember viewing a video of a witness when you were a juror?

45 Yes    \_\_\_\_ No    \_\_\_\_ Do Not Remember

2. Do you remember the judge explaining the purpose of the video deposition? [See Page 73]  
42 Yes 2 No 1 Do Not Remember
3. Did you understand the judge's explanation? [See Page 73]  
42 Yes      No 2 Do Not Remember
4. Was being able to see the witness on the television screen helpful in understanding and evaluating the witness's testimony? [See Pages 10, 19, 26, 31, 34]  
42 Yes 3 No      Do Not Remember
5. Could you have as easily understood and evaluated the witness's statements if they had been read to you?  
26 Yes 19 No      Do Not Remember
6. Was any witness's testimony read to you during the trial?  
17 Yes 23 No 3 Do Not Remember
7. *Answer this question only if you answered question #6 yes.* Was the material read to you as easy to understand and evaluate as what you saw on the television? [See Pages 10, 19, 26, 31, 34]  
7 Yes 10 No      Do Not Remember
8. Was the television presentation of the witness too long? [See Pages 21, 30, 50]  
26 Yes 19 No      Do Not Remember
9. Did the witness in the video make the same statements repeatedly? [See Page 59]  
18 Yes 24 No 1 Do Not Remember
10. Were there attorneys shown in the video? [See Page 51, 53, 69, 70, 71]  
13 Yes 32 No 1 Do Not Remember
11. Was the witness shown during the entire television presentation? [See Page 51, 53, 69, 70, 71]  
32 Yes 10 No 3 Do Not Remember
12. Did you ever see an attorney asking the witness questions in the video? [See Page 51, 53, 69, 70, 71]  
13 Yes 28 No 3 Do Not Remember
13. Did you only hear, and not see, people asking the witness questions in the video? [See Page 51, 53, 69, 70, 71]  
29 Yes 14 No 2 Do Not Remember
14. Was the television set big enough for you to see the witness without difficulty? [See Page 74]  
42 Yes 2 No      Do Not Remember
15. Were you able to hear the witness presented on the television screen clearly? [See Page 19]  
39 Yes 5 No      Do Not Remember



16. Was there only one television set placed near the jury box? [See Page 74]  
44 Yes      No      Do Not Remember
17. Did your eyes start to hurt while viewing the witness's testimony on the television? [See Pages 19, 23]  
9 Yes 35 No      Do Not Remember
18. Did you get a headache while viewing the witness's testimony on the television? [See Pages 19, 23]  
6 Yes 27 No 1 Do Not Remember
19. Did the witness's testimony help you reach the verdict?  
32 Yes 10 No 1 Do Not Remember
20. Did seeing the witness on television help you reach the verdict?  
20 Yes 21 No 1 Do Not Remember
21. Would you have preferred that the witness's statements have been read to you, instead of seeing the witness on television?  
4 Yes 27 No      Do Not Remember  
*Juror's Comment: But only when necessary. I would not want to be read to.*
22. Was the video presentation easy and comfortable to watch? [See Pages 19, 23, 74]  
34 Yes 9 No      Do Not Remember
23. Did the witness in the video ever act confused? [See Page 59]  
2 Yes 41 No 1 Do Not Remember
24. Did the witness understand the questions he was asked in the video? [See Page 59]  
41 Yes 1 No      Do Not Remember
25. Did the witness in the video appear nervous about being on television? [See Page 34, 59]  
2 Yes 41 No      Do Not Remember
26. Did the witness in the video hesitate for long periods before answering questions? [See Page 59]  
3 Yes 40 No      Do Not Remember
27. Did seeing the witness on television help you remember what the witness said? [See Page 20]  
33 Yes 11 No      Do Not Remember
28. Would it have been easier to remember what the witness said if the witness's statements had been read to you? [See Page 20]  
2 Yes 40 No 1 Do Not Remember
29. Would it have been easier to remember what the witness said if the witness had testified in person at the trial? [See Page 18]  
34 Yes 19 No      Do Not Remember

30. If you were a juror again, would you want to see more witnesses presented to the jury by video?

16 Yes 25 No

## COMMENTS BY PARTICIPANTS

### Judges:

"Court will instruct attorneys to work out objection. If the attorney can't do so, court will review marked pages during lunch or over night. Then note sustains or overrules. Sustains will be "silenced" on sound." [See Pages 34, 55, 67]

"Video depo used frequently for medical witnesses-even in most rural areas." [See Pages 25, 29, 45, 47]

The condition and quality of the equipment used should be such that witness can be seen and heard by the jurors. There should be someone there who knows how to operate the equipment and it should be set up in advance so as not to delay the trial. When handled properly, video depositions can be useful." [See Pages 14, 41, 56, 74]

"One area you might examine is the "over use" of video depositions and what effect this might have on jurors. Often times, if too many witnesses are presented by video depositions, especially experts, the jury tends to get bored. Also the quality of the cameraman's work and the setting for the deposition can greatly affect its impact on the jury." [See Pages 31, 32]

"We have a vcr and monitor in the courthouse and it is readily available for use in court."

[Paraphrasing of telephone conversation with presiding judge] Possible playback equipment malfunctions require that the presenting attorney have available an alternate method of presentation. This alternate method can be backup equipment or personnel available to read the deposition. At this trial, the video equipment worked before the beginning of the days court session, but malfunctioned soon after the deposition started. This predicament necessitated that the presenting attorney read the deposition questions and opposing counsel read the deponent's answers. This situation reduced the deposition's effectiveness. [See Page 76]

### Jurors:

"In this case it was a doctor. The lawyer seemed to think the plaintiff's case was based on her getting hurt. He really wanted us to feel sorry for her. Who caused the accident was what the trial was about. The video (witness) served no real purpose in this case. I feel a video should be used only if the witness is

unable to appear in court.” [See Pages 18, 76]

“Attorney took part of witness and other attorney questioned.”  
[See Page 51, 53, 69, 70, 71]

“In person is better, but the videos we saw were very good, I thought so it’s O.K. and much better than being read to. Being read to tended to be hard to concentrate on after a period of time. Tended to be a bore, even though vital. 1st-Witness, 2nd-Video, 3rd-Read.” (Note: *This juror saw a live witness, viewed a video deposition, and heard a stenographic deposition during the trial.*) [See Pages 10, 18, 19, 31, 34]

“Video did not have impact of “in person” testimony. Video had greater impact than read testimony.” [See Pages 10, 18, 19, 31, 34]

“I know for a fact that the jury’s decision was reached within a few hours after the court convened, yet we all sat, sat, and sat some more listening to depositions which had no bearing on the “*at fault*” or “*not at fault*” decision. Many, many of the depositions I would not call witnesses. For example doctors (legitimate) who state scientific facts but none of them know for sure if a person or persons are *at fault* or *not at fault*. It seems *common sense* is what decides a lot of issues. Unfortunately *common sense* isn’t very *common*.”

## APPENDIX

## APPENDIX A

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action unless the parties agree otherwise by stipulation as provided in Rule 29.

N.C.R. Civ. P. 28(c).

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

Fed. R. Civ. P. 28(c).

Unless the court orders otherwise, the parties may be written stipulation (i) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (ii) modify the procedures provided by these rules for other methods of discovery.

N.C.R. Civ. P. 29.

Unless the court orders otherwise, the parties may be written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

Fed. R. Civ. P. 29.

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness meansis unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally

in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4).

N.C.R. Civ. P. 32(a)(4).

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Fed. R. Civ. P. 32(a)(3).

In addition to stenographic means, testimony at a deposition may also be taken without order of court by other methods, including videotape. If the testimony is to be taken by other methods in addition to stenographic means, the notice shall state the methods by which it shall be taken, and the deposing party shall provide for the transcribing of the testimony taken and the filing of the transcript of such testimony with the clerk in the manner provided in subsection (f)(1) of this rule.

N.C.R. Civ. P. 30(b)(4).

The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in a writing to accompany a deposition recorded by non-stenographic means.

## Fed. R. Civ. P. 30(b)(4)

In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means—e.g., by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

## Fed. R. Civ. P. 30(b)(4) advisory committee notes.

The amendment is made to encourage parties to agree to the use of electronic recording of depositions so that conflicting claims with respect to the potential of electronic recording for reducing costs of depositions can be appraised in the light of greater experience. The provision that the parties may stipulate that depositions may be recorded by other than stenographic means seems implicit in Rule 29. The amendment makes it explicit. The provision that the stipulation or order shall designate the person before whom the deposition is to be taken is added to encourage the naming of the recording technician as that person, eliminating the necessity of the presence of one whose only function is to administer the oath. See Rules 28(a) and 29.

## Fed. R. Civ. P. 30(b)(4) advisory committee notes.

## APPENDIX B

## NOTICE OF VIDEOTAPE DEPOSITION TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on \_\_\_\_\_, 19\_\_\_\_, commencing at \_\_\_\_\_ o'clock \_\_\_\_m. at the offices of \_\_\_\_\_ [attorneys for defendant], located at \_\_\_\_\_ [address] in the City of \_\_\_\_\_, State of \_\_\_\_\_, defendant, \_\_\_\_\_, will before a Notary Public take the oral deposition of plaintiff. Said depositions shall continue from day to day from said date and time, excluding Sundays and legal holidays, until completed. Said deposition will be recorded by videotape.

Dated: \_\_\_\_\_, 19\_\_\_\_\_.

\_\_\_\_\_  
[Signatures].

Blankenship, *supra* note, at 213 (1978).

## APPENDIX C

### The Uniform Video Deposition Act

#### § 1. [Authorization of Audio-Visual Deposition].

(a) Any deposition may be recorded by audio-visual means without a stenographic record. Any party may make at his own expense a simultaneous stenographic or audio record of the deposition. Upon his request and at his own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording.

(b) The audio-visual recording is an official record of the deposition. A transcript prepared by an official court reporter is also an official record of the deposition.

[(c) On motion the court, for good cause, may order the party taking, or who took, a deposition by audio-visual recording to furnish, at his expense, a transcript of the deposition.]

#### § 2. [Use].

An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

#### § 3. [Notice].

The notice for taking an audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio-visual means.

#### § 4. [Procedure].

The following procedure must be observed in recording an audio-visual deposition:

(1) (Opening of Deposition.) The deposition must begin with an oral or written statement on camera which includes:

- (i) The operator's name and business address;
- (ii) The name and business address of the operator's employer;
- (iii) The date, time, and place of the deposition;
- (iv) The caption of the case;
- (v) The name of the witness;
- (vi) The party on whose behalf the deposition is being taken;

and

(vii) Any stipulations by the parties.

(2) (Counsel.) Counsel shall identify themselves on camera.

(3) (Oath.) The oath must be administered to the witness on camera.

(4) (Multiple Units.) If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera.

(5) (Closing of Deposition.) At the conclusion of a deposition, a statement must be made on camera that the deposition is con-

cluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

(6) (Index.) Depositions must be indexed by a time generator or other method specified pursuant to Section 6.

(7) (Objections.) An objection must be made as in the case of stenographic depositions.

(8) (Editing.) If the court issues an editing order, the original audio-visual recording must not be altered.

(9) (Filing.) Unless otherwise stipulated by the parties, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits must be filed forthwith with the clerk of the court.

§ 5. [Costs].

The reasonable expense of recording, editing, and using an audio-visual deposition may be taxed as costs.

§ 6. [Standards].

[The [Supreme Court, Court Administrator, Clerk] may promulgate rules establishing standards for audio-visual equipment and guidelines for taking and using audio-visual depositions.] Incompatible audio-visual recordings must be conformed to the standards at the expense of the proponent. Both recordings are originals.

§ 7. [Uniformity of Application and Construction].

This [Act] [Rule] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] [Rule] among states enacting it.

§ 8. [Short Title].

This [Act] [Rule] may be cited as the "Uniform Audio-Visual Deposition [Act] [Rule]".

Uniform Audio-Visual Act, 12 U.L.A. 9 (Supp. 1990).

## APPENDIX D

### CHECKLIST: GENERAL CONSIDERATIONS IN PREPARING FOR A VIDEOTAPE DEPOSITION

As a general matter, the preparation that will go into a videotape deposition is not significantly different from that which would be required for a regular stenographic deposition. In fact, all of the considerations that should be taken into account in connection with preparing a witness for a stenographic deposition are equally applicable to a videotape deposition.

\_\_\_\_\_ (A) Explanation of the litigation



- \_\_\_\_\_ (1) Who is suing whom - interested parties
- \_\_\_\_\_ (2) Issues involved - general theories
- \_\_\_\_\_ (3) What is at stake - damages sought/reputation/precedent
- \_\_\_\_\_ (4) Case - the lawyers/investigators/experts/judge/jury
- \_\_\_\_\_ (5) Witness involvement in the case:
  - \_\_\_\_\_ (a) Not being sued personally
  - \_\_\_\_\_ (b) No impact on employment
  - \_\_\_\_\_ (c) Time limitations
  - \_\_\_\_\_ (d) Likelihood of having to come to trial
  - \_\_\_\_\_ (e) Involvement with other witnesses/experts
- \_\_\_\_\_ (B) Background of the deponent/witness
  - \_\_\_\_\_ (1) Connection with litigation
  - \_\_\_\_\_ (2) Education - special license/skills
  - \_\_\_\_\_ (3) Employment history
  - \_\_\_\_\_ (4) Exposure to legal system
  - \_\_\_\_\_ (5) Prior testimonial experience
  - \_\_\_\_\_ (6) Anxieties concerning upcoming deposition/trial
  - \_\_\_\_\_ (7) Personal stake in the outcome
  - \_\_\_\_\_ (8) Prior briefing/prior conversations
- \_\_\_\_\_ (C) Deposition procedures
  - \_\_\_\_\_ (1) Room arrangement
  - \_\_\_\_\_ (2) No judge present at deposition
  - \_\_\_\_\_ (3) Order of interrogation/description of lawyers
  - \_\_\_\_\_ (4) Court reporter present/transcript typed/oath
  - \_\_\_\_\_ (5) Read back capability
  - \_\_\_\_\_ (6) Witness review and signature
  - \_\_\_\_\_ (7) Purpose of testimony as distinguished from deposition - discovery, preservation
  - \_\_\_\_\_ (8) Demeanor/dress
  - \_\_\_\_\_ (9) Objectives of opposing lawyers/opponents' methods
  - \_\_\_\_\_ (10) Use of deposition/impeachment
  - \_\_\_\_\_ (11) Presence of consultants, observers, etc.
  - \_\_\_\_\_ (12) Requirement to answer all questions unless valid restriction is enforced, such as an instruction not to answer and objection sustained
  - \_\_\_\_\_ (13) Objections/legalese
  - \_\_\_\_\_ (14) State duty to tell truth, and not to speculate, volunteer information, or render personal opinions.
  - \_\_\_\_\_ (15) Conduct interrogation, not conversation.
  - \_\_\_\_\_ (16) Explain that you may not ask too many questions

of your own witness except for clarification in deposition.

\_\_\_\_\_ (17) Explain that it will be difficult to give advice during the deposition while on the record; therefore, it is necessary to suggest some pointers at the predeposition conference.

\_\_\_\_\_ (D) Advice for witness on conduct during deposition

\_\_\_\_\_ (1) Do not bring notes, books, or other such materials with you to the deposition, even if you relied on them in preparation. They can be taken from you and you can be cross-examined about them.

\_\_\_\_\_ (2) Tell the truth succinctly.

\_\_\_\_\_ (3) Avoid long narrative answers if possible, unless agreed on in advance.

\_\_\_\_\_ (4) The more subjects that you bring up, the more questions will be asked.

\_\_\_\_\_ (5) Do not volunteer information, explanations, opinions, or rumors.

\_\_\_\_\_ (6) Do not try to memorize your answers.

\_\_\_\_\_ (7) Listen to questions carefully - if you do not understand, have the lawyer repeat the question.

\_\_\_\_\_ (8) Answer the question asked, not what you suspect the lawyer is trying to get at; do not help the lawyer with questions. In other words, let the lawyer earn the fee.

\_\_\_\_\_ (9) Treat questions on important matters with caution.

\_\_\_\_\_ (10) Ponder the question, consider the interrogator's choice of words (e.g., "Do you always. . .?").

\_\_\_\_\_ (11) Watch for buzzwords (e.g., safe, duty, mistake, emergency).

\_\_\_\_\_ (12) Beware of the questioner's attempts to put words in your mouth with leading questions. Correct the wording in your answer.

\_\_\_\_\_ (13) Be alert for a questioner's attempts to set you up, pin you down, or build you up, followed by a showing that you do not measure up to that image.

\_\_\_\_\_ (14) You must pause before answering in order to:

\_\_\_\_\_ (a) Give yourself time to formulate an honest, direct answer.

\_\_\_\_\_ (b) Give your lawyer time to analyze the question/answer factually.

\_\_\_\_\_ (c) Give your lawyer time to analyze the question/answer legally, and then object, if appropriate.

COMMENT:

Emphasize that even if the witness' profession requires his immediate reaction to situations (e.g., police officer, firefighter, emergency medical technician), his giving testimony is not such a situation. Therefore, advise the witness to take his time, find answers in documents if appropriate, and if no answer is known, say so.

\_\_\_\_\_ (15) After you have answered, explain or rephrase your answer only to correct an error or obvious misunderstanding.

\_\_\_\_\_ (16) Listen to attorney's objections for a hint as to what is wrong with a question.

\_\_\_\_\_ (17) Beware of a questioner's inquisitive stare, whereby the questioner hopes you will elaborate.

\_\_\_\_\_ (18) If interrupted, make sure you go back and finish your answer.

\_\_\_\_\_ (19) Avoid a rapid question/answer conversation with the questioner; remember, lawyers want to put you at ease in order to get you to agree with their version of the facts.

\_\_\_\_\_ (20) Remember to answer the question in the appropriate time frame (e.g., procedures at the time of the accident versus current procedures).

\_\_\_\_\_ (21) Recollection: If you do not remember, say so. If you are not sure, qualify your answer. For example, state that the response is approximate or "as best as I can recall right now."

\_\_\_\_\_ (22) Be careful when explaining distances, time, amounts, speeds, degrees, and so on.

\_\_\_\_\_ (23) Exhibits: peruse the entire document, and check carefully for the following:

\_\_\_\_\_ (a) Its effective date

\_\_\_\_\_ (b) Who authored it

\_\_\_\_\_ (c) Completeness

\_\_\_\_\_ (d) Out-of-date materials

\_\_\_\_\_ (e) Whether a passage is being taken out of context

\_\_\_\_\_ (f) Why a document was published

\_\_\_\_\_ (g) Maps, photographs, diagrams: if asked to draw large circles, brackets, or otherwise, do not pin yourself down if there is a possibility of inaccuracy

\_\_\_\_\_ (24) Explain that even if a question asks for a yes or no answer, you (the witness) may need to explain your answer briefly where qualification is necessary.

\_\_\_\_\_ (25) If asked on cross-examination, readily admit that you had a conference with your attorney and that you were advised

to tell the truth, listen carefully, and the like.

\_\_\_\_\_ (26) Be courteous, avoid jokes and wisecracks, temper, one-upmanship.

\_\_\_\_\_ (27) Be reluctant to express opinions in areas that are outside of your expertise.

\_\_\_\_\_ (28) Do not look to your attorney for help in answering.

\_\_\_\_\_ (29) Do not discuss the case of your testimony with opposing lawyers or their assistants during breaks and lunch.

\_\_\_\_\_ (30) Do not get involved in arguments among attorneys.

\_\_\_\_\_ (31) Be careful not to second guess what other people did and why. It is easy to have 20/20 hindsight, but without knowing all the factors surrounding another person's actions, such retroactive analysis is speculative.

\_\_\_\_\_ (32) Be careful of hypothetical questions that are constructed to be analogous to the facts of the case. If not portrayed exactly as you know the situation to be, explain that you cannot answer because you do not have enough essential information in the hypothetical to answer it correctly. Be prepared, however, to supply the needed information. If at any time you need a break, tell your attorney.

\_\_\_\_\_ (33) Beware of trick questions (e.g., assuming facts which have not been established, words with double meaning, compound questions).

\_\_\_\_\_ (34) Explain to the witness that sometimes a lawyer can create a false or incomplete picture by asking only certain questions and that the witness cannot always set things straight, but must wait until his attorney has a chance to clear up the record on redirect or cross-examination.

\_\_\_\_\_ (35) Be careful of questions such as "Are these documents all you have reviewed?"; "Have you told me everything you know about. . .?" Qualify your answer in the event that you remember something between the time of the deposition and the time of trial.

\_\_\_\_\_ (E) Factual review of the case

\_\_\_\_\_ (1) Explore witness' recollection.

\_\_\_\_\_ (2) Explain that the lawyer needs to be educated on:

\_\_\_\_\_ (a) Factual/technical information

\_\_\_\_\_ (b) Potential witnesses

\_\_\_\_\_ (c) Documents

\_\_\_\_\_ (d) Statements/notes

\_\_\_\_\_ (e) Rumors

\_\_\_\_\_ (3) Find out what manuals, directives, policies, guidelines, and the like, if any, have controlled the witness' actions in this case.

\_\_\_\_\_ (4) Explore responsibilities in relation to other witnesses.

\_\_\_\_\_ (5) Go over critical details of incident giving rise to lawsuit.

\_\_\_\_\_ (6) Advise the witness to brush up on terminology or some aspect of the particular profession in which the witness has gotten rusty since the incident(s) giving rise to the lawsuit.

\_\_\_\_\_ (7) Be careful about overeducating the witness concerning matters that are outside the witness' area of responsibility.

\_\_\_\_\_ (8) Avoid revealing specific legal theories to witnesses.

\_\_\_\_\_ (9) Explain what you believe to be opposing counsel's version of the facts.

\_\_\_\_\_ (10) Review anything your witness has prepared, written, signed, testified to, or recorded.

\_\_\_\_\_ (F) Rehearsal

\_\_\_\_\_ (1) Conduct a mock interrogation.

\_\_\_\_\_ (2) If a colleague is present, have that person make objections.

\_\_\_\_\_ (3) Make sure the witness is following the advice given.

\_\_\_\_\_ (4) Try out some of the tough questions you anticipate opposing counsel will ask.

\_\_\_\_\_ (5) If videotape equipment is available, allow the witness to view the videotape after he answers questions and is examined.

\_\_\_\_\_ (6) Try to trap the witness into admissions.

\_\_\_\_\_ (7) Answer witness' questions and encourage witness to ask questions.

\_\_\_\_\_ (8) Leave your telephone number with the witness in case questions come to mind after the conference.

Dombroff, *Discovery*, § 9.06, 348-54. (1986).

**CHECKLIST: SPECIAL CONSIDERATIONS IN PREPARING FOR A VIDEOTAPE DEPOSITION**

Because of the special nature of a videotape deposition, which brings the witness visually into the courtroom, there are a number of special considerations when taking a videotape deposition or preparing your client for such a deposition.

\_\_\_\_\_ (1) The witness should be advised to dress appropriately. This is even more important at a videotape deposition than at a stenographic deposition, because the image of the witness as

he appears at the deposition will be presented in court. Remember, the nature of the videotape deposition is that it will be played in court; it is not typically taken as a discovery tool alone.

\_\_\_\_\_ (2) Prior to speaking at a videotape deposition, identify yourself as the attorney because counsel should not be on camera. This is important to ensure that objections are appropriately attributed to the attorney making them.

\_\_\_\_\_ (3) Videotape depositions should utilize a clip-on lapel microphone with the witness to ensure maximum audio pickup. In addition, remember that the microphones will pick up stray sounds. As a result, sounds such as the witness or counsel tapping a pencil will be clearly recorded.

\_\_\_\_\_ (4) The witness should be instructed to neither smoke nor drink coffee during the deposition. Although such activities may be acceptable during a stenographic deposition because smoking or coffee drinking is not conveyed on the record, it is not acceptable during a videotape deposition.

\_\_\_\_\_ (5) Despite the fact that it is a videotape deposition that will likely be used in court, do not forget that it is still, first and foremost, a deposition. As a result, your witness should be instructed that if he desires a break, such a break should be requested; or, if a witness desires to speak to you, the witness should indicate the fact. In response to those statements, the videotaping technician should be directed to stop the taping at that point.

\_\_\_\_\_ (6) All stops in the videotape deposition or editing of the deposition should be indicated by the presence of a time/date series of numbers on the screen. This is brought about by a time/date generator which superimposes the time and date onto the bottom portion of the videotape picture. An alternative to the use of a time/date generator is to simply place a clock in the picture. The disadvantage of using a clock is that if the camera is moved for the purpose of, for example, panning to an exhibit, the clock may leave the picture. Most videotape technicians can easily superimpose a time/date sequence onto the picture through the use of a generator.

\_\_\_\_\_ (7) Your witness should be instructed that exhibits must be carefully used, and their placement rehearsed. In this regard, it is especially important that there be some rehearsal so that the witness is as effective as possible in the utilization of exhibits.

\_\_\_\_\_ (8) The monitor used to monitor the taping should not face the deponent. This will cause the witness to either freeze or to stare at it. Rather, it should be placed where the videotape techni-

cian can easily see it. In addition, many videotape firms will place a small black-and-white monitor in front of the witness, but facing toward the attorneys. This permits the attorneys to monitor the picture as it is being taped and, if appropriate, object to what is being projected onto the videotape. Second, in the event there is no objection recorded at the time, and then later, objection is made at trial relative to the image on the videotape being unfair or misleading, you may respond that the objecting counsel had the opportunity to object at the time of the videotape deposition, and waived it by failing to do so.

Dombroff, *Discovery*, § 9.07, 354-56 (1986).

#### PRODUCTION CHECK LIST:

\_\_\_\_\_ 1) Notify all witnesses, parties and their attorneys of the video-tape deposition pursuant to Rule 202(a) [Texas' equivalent of rule 30(b)(4)]. This will alert the attorneys to the fact that the deposition will likely be played back at trial. Accordingly, they should dress for the deposition as they would for court appearances.

\_\_\_\_\_ 2) Advise the court reporter that the deposition will be videotaped.

\_\_\_\_\_ 3) Telephone the office or visit the room in which the deposition will be taken. Determine the number and location of electrical outlets as well as grounded electrical outlets. Also, an initial decision concerning camera and equipment placement can be made at this time.

\_\_\_\_\_ 4) Arrange for the camera operator to set up and test the video equipment at least forty-five minutes prior to the beginning of the deposition.

\_\_\_\_\_ 5) Bring extra tapes, extension cords, and grounded plug adapters to the deposition.

\_\_\_\_\_ 6) Position the court reporter so that any transcription machinery noises will not be picked up by the microphone(s).

\_\_\_\_\_ 7) If desired, make advance arrangements with the other attorneys and the camera operator concerning cues to zoom in on the deponent or attorneys.

\_\_\_\_\_ 8) Make the sound adjustments by having someone sit in the various chairs and speak into the microphone(s). Also, white paper or cardboard can be used to make lighting balance adjustments when necessary.

\_\_\_\_\_ 9) All visual aids to be used during the taping should be available in advance so that visibility will not be a problem when the aid is used.

\_\_\_\_\_ 10) Remove all wires and equipment from the view of the camera.

\_\_\_\_\_ 11) It is best to disallow smoking and to remove all ashtrays from the room.

\_\_\_\_\_ 12) Use bright lights sparingly and remove all white objects such as paper and coffee cups from the table.

\_\_\_\_\_ 13) Remind the witnesses and attorneys to sit erect, to speak distinctly, and to refrain from making distracting noises during taping, such as clicking a pen.

\_\_\_\_\_ 14) Instruct the camera operator to focus on each attorney and court reporter as introduced. If desired, the operator can also create visual interest by zooming in on the attorneys and deponents.

\_\_\_\_\_ 15) Remember to monitor and adjust the sound and light during the taping.

Misko, *supra* note 68, at 490-91.

## APPENDIX E

The following are sample forms of stipulations for video depositions. The samples are based on the Uniform Video Deposition Act.

### Sample One:

It is hereby stipulated by and between undersigned counsel that all videotape depositions to be taken in the above captioned case shall be taken pursuant to the following terms and conditions:

1. Any party, may at its option, take a videotape deposition. However, all videotape depositions will also be simultaneously taken stenographically.

2. The cost of the original of both the videotape deposition and stenographic copy will be borne by the party noticing the deposition. An original of each will be filed with the court. Each party shall bear the cost of its own copies.

3. The individual(s) operating the videotape recorder and/or camera shall be sworn by the stenographic reporter and this fact shall be stated on the record. The stenographic reporter shall thereafter swear all witnesses.

4. The videotape deposition shall depict the witness in a waist-up shot seated at a table. The camera and lens settings shall not be varied except as may be necessary to follow natural body movements of the witness or to present exhibits or evidence that are being used during the deposition.

5. Videotape recording will stop at all "off the record"



discussions.

6. The counter on the videotape recorder shall be used to reference the beginning of the deposition, all recesses, the point at which exhibits are marked or used for the first time, the beginning and ending of each counsel's questioning and the termination of the deposition.

7. Whenever questions or answers are to be recorded during the deposition, this will be done by having the stenographic reporter re-read the question and/or answer.

8. All objections, except as to form, will be reserved.

9. No smoking will be permitted during the videotape deposition.

NOTE:

Not only will smoke distract the viewer, but, remember, one of the key reasons for presenting a witness on videotape is to "bring" them into the courtroom. A witness or attorney would not be allowed to smoke during courtroom testimony and should not be allowed to smoke during videotape deposition testimony.

10. The party seeking to offer a videotape deposition shall have the responsibility for having appropriate playback equipment available for all pre-trial or trial purposes as necessary.

11. The party seeking to offer a videotape deposition shall have an unedited version of that videotape available at all times.

12. Any party participating in a videotape deposition shall have a sufficient number of copies of any exhibit to be used during the deposition to assure no delays during the deposition. In addition, all such exhibits shall be marked prior to the commencement of videotaping.

13. If feasible, copies of all exhibits utilized during the videotape deposition shall be appended to the stenographic deposition."

Dombroff, *Discovery*, § 9.05, 345-48 (1986).

Sample Two:

There exists a Uniform Audio-Visual Deposition Act, which regulates the procedures to be employed in a videotaped deposition. The act provides that any deposition may be recorded by audio-visual means without a simultaneous stenographic record and without approval of the opposing party or a court. Another party is entitled to make a stenographic or audio record (if it bears the expense) and is also entitled to a copy of the videotape recording (at no expense). The act further dictates that the audio-visual record is an official record, along with any transcript later prepared by an official court reporter; that such a deposition may be used for any

purpose and under any circumstances in which a stenographic deposition may be used; and that the notice of subpoena for videotaped deposition must state that the deposition will be recorded by audio-visual means.

The procedures to be observed during the deposition, as detailed by the act, include:

1. The deposition must begin with statements explaining the identity of the operator, case, deponent, the date, time, and place, parties, and any stipulations.

2. Counsel must identify themselves on camera.

3. The oath must be administered on camera.

4. The ending of one tape and the beginning of another must be announced on the audio recording portion.

5. The deposition must end with statements that the deposition has concluded and with any stipulations regarding custody of the tapes or exhibits.

6. The deposition must be indexed by a time generator or another method established by court rules. A video counter will provide an external means of indexing the deposition and may be enhanced with a timer indicating the length of segments. A time-date generator provides an internal indexing means, by placing the elapsed tape time in minutes and seconds, and the date if necessary, in one corner of each frame of the videotape.

7. Objections and instructions not to answer, and other comments by the deponent's counsel, will proceed as in a stenographic recorded deposition.

8. The video recording may be edited or altered only by court order or approval.

9. The original recording, any later edited copies, and all exhibits must be immediately filed with the court.

10. Reasonable expenses incurred with a videotaped deposition may be taxed as costs.

Haydock and Herr, *supra* note 48, at 170-71.

*Hugh B. Lewis*