

# Straight to Video

## Video Evidence Before and During Trial Can Bring Your Clients' Stories to Life

If a picture is worth a thousand words, then a video is worth thousands of words. When preparing a case for trial, attempting to settle a case before trial, or standing in front of a judge or jury, lawyers who use real-life video effectively believe that they achieve better results than they would have had they simply used documents, still photographs, diagrams or other more traditional methods of presenting evidence.

When most lawyers think of videotaped evidence, they tend to refer to more traditional videos, such as those of experts and other witnesses who could not testify live, or of pictures of accident sites and other locales that cannot easily be brought into the courtroom. But video is far more powerful, and with digital recording becoming ubiquitous, the sources for footage are more numerous than ever. Thus, when used effectively, video presentations can facilitate settlement or show a jury information with more impact than can any words that come out of a witness's mouth. Plus, because there are so many different sources of video evidence, an attorney's options are numerous.

"Using video serves many purposes," according to attorney Mark LeWinter of Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley, P.C., who integrates video both at trial and when preparing settlement brochures. "When creating a settlement brochure, for example, I will combine various videos, including those of my clients, the accident scene, and experts, to create the movie version of the 'book' I'm going to present to the jury," LeWinter says. More importantly, LeWinter, like other attorneys, also draws on other sources, such as films the client may have taken before the accident or footage from public locations that the client may not have realized was even taken.

By doing so, LeWinter feels that he is providing opposing counsel, their clients and the insurance carriers with an

opportunity to evaluate a case before trial. "When I prepare my video, I'm sequencing the case. I consider what facts I need, and in what order will I present them, and then compile the video in the same sequence in which I plan to present them to the jury," LeWinter says, adding, "The carrier can then review the video, convene a focus group, or do whatever it needs to try to predict how a jury will respond. Frequently, the videos can facilitate settlement without ever having to go to trial."

The content of the video remains crucial. Often, the best materials are not the traditional testimony prepared for trial. Rather, in this day and age, in which "Big Brother" seems to be watching everything we do, alternative sources of video evidence can provide fertile material for trial. For example, when someone goes to an ATM, a camera records every move he or she makes. Walk into a convenience store, and there will almost always be a camera focused on the checkout area. When parking at a big box store, look

up at the roof of the building. What you will often see is a battalion of cameras trained to record every move by every person in every corner of the parking lot. In short, it seems as though Big Brother has invaded every space, except, perhaps, at home.

Many people believe that Big Brother's eyes are yet another way that we have surrendered a portion of our privacy in the name of technology. After all, Big Brother now may know that you have run a red light or failed to pay a toll on the local interstate. After all, Big Brother not only knows what we do, but he also mails us a traffic ticket when we do it.

Lawyers tend to forget, however, that Big Brother visits us at other times and in a variety of locales, including our homes, at school and at family gatherings. During these moments, he may even be a welcome visitor because he records those celebrations for posterity. In those situations, the captured moments can be a crucial tool for lawyers in the courtroom. Plus, for better or worse, these moving pictures are generally worth far more than the 1,000-word value we have traditionally placed on a still photograph. In fact, for attorneys, movies and videos are often worth thousands and thousands of words.

"Still photos don't do," says attorney Edward F. Chacker of Gay, Chacker & Mitten, P.C., who for many years has used family films and other movies to demonstrate how his clients' lives have been impacted by a particular injury. "Everyone describes people as being 65 and viable," Chacker says. "You could show pictures of your clients all day long, but juries and defense counsel will often prejudge the plaintiff, concluding that they're not as good as they say they are. There's nothing like seeing the plaintiff with their own eyes to help jurors fully understand your clients."

Chacker recalls one case he tried in the early 1990s. His client was in her late 60s and claimed to live a very active life before suffering a serious knee injury. Defense counsel was skeptical, claiming that the woman's deposition testimony about her dancing and other activities was embellished for personal gain. Chacker dug deeply into the woman's social life and learned that she had attended a wedding just a few weeks before her accident. He then obtained a copy of the wedding video, which



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showed his client “doing the Mummies Strut with a bunch of 17-year-olds. There she was dancing around like someone half her age, or younger. That video told a story that words just couldn’t convey,” he says.

At trial, to demonstrate the dramatic change in his client’s condition to the jury, Chacker juxtaposed footage from the wedding with a day-in-the-life video that showed his client going to therapy and shopping both in a wheelchair and while using a cane. “The difference was vivid,” Chacker recalls, “especially to the defendant, which settled the case before the jury ever had an opportunity to render a verdict, and for substantially more than it offered before trial.”

Chacker emphasizes that the “idea is to bring people alive. There is nothing better than a jury seeing something with their own eyes.” In one wrongful death case, for example, Chacker interviewed the decedent’s co-workers, all of whom were listed as trial witnesses. “We did a profile of the person at work, then at home. Next, we showed our client at home after the accident, struggling to get around the living room, and segued to footage of the same person at home on a respirator days before death,” Chacker recalls. “The video was very powerful and said more than any witness could.”

“Juries respond favorably to videos they know aren’t staged,” LeWinter says. That is why defendants often utilize video surveillance films — not because they generally prove that the plaintiff is either lying or is a malingerer. Rather, surveillance movies, even when benign, often show a party performing physical activity that exceeds what he or his doctor says the person can do, thus creating an “Aha” moment for the jury. “It allows the jury some insight into the actual life of the claimant, separate and apart from the posturing in the courtroom,” says attorney James Haggerty, of Swartz Campbell, LLC in Philadelphia and president of the Pennsylvania Defense Institute. “It gives them an opportunity to feel as though they are observing the real facts of the case.”

There are many other ways to incorporate video into trial preparation. First, investigate locations where your client has been that may provide videotaped evidence of some point you are trying to prove or to disprove. For example, does your client’s job regularly film employees at work? Banks often do, as do supermarkets and many other retailers. If your client works in a regulated industry, such as a casino, cameras may capture virtually everything done during a workday. Or, if your client lives in a city that regularly films certain streets, the footage may also be help-

ful. Once you obtain copies of any films, it is far easier to demonstrate how active your client was before being injured. On the other hand, if your client has exaggerated his or her injuries or pre-injury activities, you can discover it and address that issue before defense counsel brings it up in front of a jury during cross examination.

Using video evidence, however, is not without its pitfalls. Consider some common technological problems with video evidence, and address them before walking into a courtroom. For example, does the film have sound, and if so, do you need to include the audio? Most types of video do not contain audio or, if they do, the audio might be bad or of very poor quality. Look at the film. How is the lighting? Can anyone really see what is happening without squinting? Is the camera angle helpful? Does the film convey the message you intend to convey? And most importantly, does the film corroborate other evidence you have or intend to present? If not, a judge may rule the evidence inadmissible.

Similarly, as with other evidence, credibility is critical, and inaccurate or misleading evidence can do dramatic harm. For example, during a 1999 federal antitrust trial,

Microsoft presented video evidence showing how a computer could perform a certain task. Opposing counsel discovered, however, that the video was not of one computer — as Microsoft claimed. Instead, as Microsoft later admitted, multiple computers were used to create the videotape, thus explaining how, for example, an icon for Microsoft Outlook appeared in one frame and was gone in another. At one point, Judge Thomas Penfield Jackson asked James Allchin, Microsoft’s senior vice president, “How can I rely on it [the tape] if you can’t tell me it’s the same machine?” At another point, the judge said that the discrepancies “cast doubt on the reliability — the entire reliability” of the videotaped demonstration.

Like any form of evidence, video evidence has its benefits, its limitations and its pitfalls. When used effectively, video evidence will streamline your case, bolster your witnesses’ credibility and lead to better results. ■

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