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6Video depositions at trialJeffrey J. KrollBy Jeffrey J. Kroll

During the course of my 20 years as a trial lawyer, I have seen it all. Pen-flipping, swaying from side to side in a chair, getting up and looking out the window, asking the witness if he or she needs a glass of water ... all clever tactics used to "indirectly" distract witnesses during video depositions.

Witnesses cannot help themselves from following the flying pen or the strolling attorney. Attorneys exercise such tactics knowing they make for a bad videotaped presentation of the witness. The witness appears shifty and unconvincing. Opposing counsel inevitably points this out to the jury to weaken your case.

During a video deposition, nonverbal cues often dictate what the witness is *actually* saying.

For example, witnesses who sit with their arms crossed are saying, "I'm hiding something; I'm closed off." Those who look from side to side tend to be lying (hence the sneaky attorney who shifts from side to side behind the camera while examining your witness). Witnesses who touch their face tend to be testifying deceitfully and are typically withholding information. Witnesses who tilt their head to one side are bored. A witness who mirrors your gestures or leans toward you is open to your suggestions. Like a poker player interpreting a "tell" to assess another player's hand, lawyers must be aware of changes in witnesses' demeanor and educate the jury about such nonverbal communication.

In our ever-changing, tech-driven courtrooms, highlighting nonverbal cues recorded during a video deposition can be an effective visual aid at trial. Imagine the significant impact your opening or closing statement would make if you presented a montage of questions followed by shrugs and sighs recorded during the evidence deposition of your adversary's expert. No doubt this would create a powerful impression versus merely "telling" the jury that the expert is unsure and unreliable.

Illinois case law does not specifically address the use of evidence depositions during opening or closing statements, but I believe that the Illinois Supreme Court Rules provide for the use of video clips from evidence depositions if they do not mislead the jury.

Illinois Supreme Court Rule 212 permits the use of any part of an evidence deposition by any party for any purpose provided that the court finds, at the time of trial, that the witness is unavailable pursuant to 212 (b). As a safeguard, Illinois Supreme Court Rule 239 (d) permits the trial court to orally instruct the jury regarding cautionary or preliminary matters, including the receipt of evidence for a limited purpose during opening statement. Ill. Sup. Ct. R. 239(d)(i).

In fact, the Seventh Circuit Bar Association American Jury Project Commission has recently advocated increasing the use of preliminary jury instructions, finding that they "orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly." 58 DePaul L. Rev. 343 (Winter 2009).

The concern with using clips from evidence depositions will inevitably pertain to the fact that the video clips represent actual evidence in the case. However, the court has the discretion to allow any party to a

lawsuit to present exhibits during opening statements that will later be admitted into evidence. See, e.g., *LeMaster v. Chicago Rock Island & Pacific R.R.*, 35 Ill. App.3d 1001,1025, 343 N.E.2d 65, 84 (1st Dist. 1976).

Likewise, it is well-settled that the trial court has the discretion to permit counsel to read portions of witness testimony from trial transcripts during closing argument. *People v. Davies*, 50 Ill. App.3d 506, 514 365 N.E.2d 628, 635 (1st Dist. 1977). If you can read an excerpt and present other real evidence during opening and closing statements, why not allow a clip from a video evidence deposition?

At the end of every trial, and sometimes at the outset, jurors receive the instruction that they are the judges of the credibility of the witnesses, responsible for deciding the weight to give to each witness's testimony. It is essential that jurors have every opportunity to create well-rounded, informed opinions of witnesses. Jurors retain about 80 percent of information presented with visual aids versus retaining only 20 percent of information presented orally. 58 DePaul L. Rev. 343, n. 84.

Short, relevant clips from the evidence deposition of an important witness during opening statements and closing arguments will assist jurors in resolving the case based on the facts, instead of forcing them to rely on counsel's ability to paraphrase the testimony or to read from a transcript.

Few courts have actually addressed the appropriateness of permitting videotaped depositions during opening statements and closing arguments. In *MBI Acquisition Partners v. Chronicle Publishing Co.*, 2002 WL 32349903 (W.D. Wis. 2002), the trial court permitted defendants to use excerpts from a video deposition during opening argument. See also, *Spence v. Southern Pine Elec.*, 643 So.2d 970 (Ala. 1994).

The *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675 (Ky.App. 2000), decision concluded it is within the trial court's discretion to permit counsel to use such testimony during closing, but advised trial judges not to allow the replay of lengthy portions of video testimony or editing that misstates or takes statements out of context so as to mislead or confuse the jury. See also, *Condella v. Cumberland*, 298 N.J. Super. 531, 689 A.2d 872 (1996) ("Just as it is acceptable to read portions of the trial testimony from a transcript to the jury during summation, similarly, there should be no prohibition against showing actual portions of the videotape testimony.").

A Northern California district court, however, refused to allow the use of videotaped deposition testimony during opening statements for fear that the testimony may seem more believable or important. *Hynix Semiconductor v. Rambus*, 2008 WL 190990 (N.D. Cal. 2008).

Ultimately, the decision to permit or deny the use of video depositions during opening or closing lies with the trial court; thus, parties should always present trial briefs on the issue prior to the commencement of trial.

The benefit of using a clip from an evidence deposition is that it was created with the intention of introducing it at trial. Thus, you should be able to overcome admissibility and hearsay hurdles if you refrain from misconstruing or manipulating the recorded testimony.

When it comes to video depositions, nonverbal cues reveal a great deal about the credibility of witnesses. It is often what is not said that becomes more important than what is said. A simple yes or no question that draws a long pause from a witness is a "tell" that counsel must point out to the jury.

With the abundance of videotaped depositions used in trials today, both sides of the courtroom can

equally benefit from using clips from video evidence depositions during opening and closing statements. Trial lawyers must constantly think of creative ways to help jurors connect the evidence to the issues in a case. Providing jurors with as many visual aids as possible is the most effective way to help them make sense of the trial process.

[Jeffrey J. Kroll](#) is the principal at the [Law Offices of Jeffrey J. Kroll](#) in Chicago. He founded his firm with 17 years' experience representing victims and their families, and he has achieved settlements and verdicts in a wide range of cases, from trucking accidents to medical malpractice to sports safety cases.

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