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Telling your client's story in a multimedia format

VIDEO EVIDENCE CAN BE PERSUASIVE AND SHORTER IS OFTEN BETTER, BUT FIRST YOU HAVE TO GET IT IN

Perhaps a picture is still worth a thousand words. But perhaps it is only worth 280 characters or just 140 not long ago. Maybe it is only worth a finite period of time – a few hours on an Instagram "story," or no more than 60 seconds for video on TikTok.

Technology has changed how society uses pictures, videos and media. What has also changed is the consumer. Technology is no longer just the young consumer. Technology is ubiquitous, with nearly every generation using smart phones to exchange photos and videos with family and friends through text or social media as a part of everyday life.

The point here is that technology has vastly changed how our society communicates and consumes information. We communicate through an abbreviated story-telling process that uses multiple photographs, short videos, and quick descriptive language to tell a longer story. Because of that change in communication, people have become conditioned to and, in fact, expect to receive information – stories – via short but multiple snippets.

As trial lawyers, we are story tellers. As much as we like to think we are all great story tellers on our own, stories today are told with pictures, videos, and animations – a multimedia presentation. That multimedia presentation can make for a compelling and interesting story that captures the attention of important decision makers (e.g. claims adjusters and jurors) and results in pre-trial claim resolutions or, if not, just verdicts. Preparing a multimedia collection of evidence starts at the beginning of a case and requires time. Here are some tips on how to use technology in your practice to develop a multimedia body of evidence.

The beginning: Act quickly to capture and preserve video evidence of an incident

Cameras are everywhere. Cars and trucks have dash cams, businesses have surveillance systems, and private homes have their own security systems or video doorbells. Though some camera systems record permanent video to cloud web storage, many other systems still record video locally, which makes footage available for only a short period of time. For that reason, it is important to engage in early investigation to identify cameras that may have recorded an incident and try to preserve incident video.

Many practitioners already send out preservation of evidence letters to prospective defendants. Those letters should always request that video of the incident or relevant subject matter be produced to the requestor or otherwise preserved.

But the search must not stop with potential defendants. Third parties may also have useful video. A simple starting point for a third-party investigation is the street view on Google Maps. Often, doing a 360-degree spin in street view at the scene of a car crash will reveal a camera affixed to a nearby traffic signal or an adjacent business. The next step is either going to the scene yourself or sending a private investigator to obtain potential footage.

Another way to find video footage is to contact witnesses when you learn their identities. One of those witnesses, for example, may have had a GoPro video camera that was recording at the time of the collision. Time here is not on your side. You must act quickly to discover and retain this evidence as the video footage may be deleted or automatically overwritten by the camera system or by the witness.

Something else to keep in mind is that a single video file is not just one item of evidence. A video file can yield multiple, different items of evidence. Video footage of an incident can obviously be relevant to issues of liability, but that footage can also be relevant and powerful evidence of your client's harm. Several seconds of video – or even a single video frame – may momentarily capture your client's face in agony or show the moment his right femur was pulverized, throwing his foot into an unnatural angle. That frame can become a separate piece of evidence that you can utilize in your case.

Video can also be advanced one frame at a time rather than playing the video at normal play speed, revealing otherwise unobservable details. For example, several years ago there was a case involving security guards using excessive force while escorting an allegedly combative patron outside of a night club. When watched in real time, the video of the incident was quick, making some details difficult to see. Analysis of the video showed that every second had several frames of footage. When viewed by clicking one frame at a time, one frame revealed that one security guard had quickly made a fist before quickly contacting the back of the patron's head.

Still frames like the security guard's fist or the one showing the agony on your client's face are separate pieces of evidence that can be used in addition to the whole video in building your multimedia presentation.

Look to technology to tell the damages story through photos and videos

As plaintiffs' attorneys, we have the burden of demonstrating our client's damages and do so by telling her or his story. Presenting that story must be done through photos and video. California courts have long recognized the evidentiary value of a photograph:

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A photograph is shown to be an accurate and faithful representation of what it purports to reproduce, it is admissible, on sufficient foundation being laid to that effect, as an appropriate aid in applying the evidence, whether the photographs are of persons, things, or places. (*Hicks v. Ocean Shore R.R.* (1941) 18 Cal.2d 773, 786-87; *Berkovitz v. American River Gravel Co.* (1923) 191 Cal. 195, 201-02; *Adams v. City of San Jose* (1958) 164 Cal.App.2d 665, 667-68; *La Gue v. Deigaard*, (1956) 138 Cal.App.2d 346, 348-49.) This includes video recordings. (*People v. Gonzalez* 38 Cal. 4th 932, 952-53, cert. denied, 549 U.S. 1140 (2007); *People v. Mayfield* (1997) 14 Cal.4th 668, 747-48; *McGarry v. Sax* (2008) 158 Cal.App.4th 983, 990-91; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440-43.)

Photos and videos can be shared paperless these days through email, shared albums, AirDrop on Apple products, Dropbox, and many other mediums. Consequently, collecting media does not need to be difficult. For older print photos, there are dozens of scanning applications, or apps, available on cell phones, like Scannable or Scanner Pro. Many apps are free, at least for the initial download, and utilize a cell phone's camera as a scanner. The scanned images can then be sent by text, email, or AirDrop from the cell phone.

Collect as many photos and videos as you can, but then take the extra analytical step to learn the stories behind them. Each photo or video tells a story. When reviewed together, threads and common themes or characteristics of your client should start to jump out. By identifying those common threads, several key photographs and videos can be then be selected to help you tell an important part of your client's story.

Here is an example of this in application: Last year I assisted Brian Panish and Andrew Owen in a trial involving a client who snapped his femur and badly damaged his dominant hand that he used to not only perform the everyday activities of life but also to earn a living as an artist. Our client also loved the outdoors, specifically hiking. While reviewing his photos and drawings, we saw multiple photos of him hiking the Camino de Santiago in Spain the year before the incident. We then came across a sketch book from the trip where he logged a sketch for nearly every day of the 25-day hike. At trial, we paired several photos of the hike with several sketches and also used a map of the Camino de Santiago (generated by Google Maps). We then presented those photos, sketches, and map like it was being presented on the "Your Story" platform on Instagram. That format was familiar to our jury, and they were able to see what our client was like before the incident and observe what he had lost.

Addressing the cumulative and prejudicial objections to photos and video at trial

As a rule of thumb, more photos and videos are better than fewer. However, be thoughtful in what you select as you should anticipate the common defense trial objections of "cumulative" or "prejudicial" as soon as the second photo of a plaintiff is shown. If the analysis has already been done, then you already know that the photos and videos you plan to use are not cumulative because they are probative of different relevant items of noneconomic damages, i.e., physical pain, mental suffering, loss of enjoyment of life, etc.

Remember, the plaintiff must prove the extent of the general damages as a fact. (*Chaparkas v. Webb* (1960) 178 Cal. App. 2d 257, 259.) The plaintiff has the burden to prove the extent of damages that she or he has suffered. (See *Hahn v. Wilde* (1930) 211 Cal. 52, 54.) The evidence must support the jury's determination of general damages, also known as noneconomic damages. (See *Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 506-08.) Under the relevant jury instruction CACI 3905A, there are at least ten items of noneconomic damages: 1) physical pain; 2) mental suffering; 3) loss of enjoyment of life; 4) disfigurement; 5) physical impairment; 6) inconvenience; 7) grief; 8) anxiety; 9) humiliation; and 10) emotional distress. Accordingly, photographs and videos tending to prove the nature and extent of plaintiff's noneconomic damages are relevant even when a photograph is only pointing to one of those ten items.

As to the objections of prejudice, those are circumstantial but often not successful. A trial judge's exclusion of evidence relevant to general damages under Evidence Code section 352 can be grounds for reversal when the exclusion of evidence results in a manifest miscarriage of justice or prevents a plaintiff from proving general damages. (See *People v. Holloway* (2004) 33 Cal.4th 96, 125; see also *People v. Holford* (2012) 203 Cal.App.4th 155, 168.) Consider videos of daily activities post-incident – those videos can come into evidence over a 352 objection. For example, in *Jones v. Los Angeles* (1993) 20 Cal.App.4th 436 (hereafter *Jones*), an action arising from an automobile accident that rendered the plaintiff a paraplegic, the defendant made a 352 objection to a videotape of the plaintiff's daily activities after the accident (a 'day in the life' video). The trial judge ruled it admissible. The Court of Appeal affirmed the lower court's ruling. (*Jones* at p. 446.)

Use video animations and simulations

Crash simulations or animations of body movement can also be powerful evidence in your case. Simulations based on relevant and reliable data can be admitted into evidence at trial – or at least used as demonstrative evidence – when such evidence will assist a jury in understanding expert testimony or other substantive evidence. (*People v. Duenas* (2012) 55 Cal.4th 1, 20-21; *People v. Kelly* (1976) 17 Cal.3d 24, 30; *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548-550, disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.)

Keep in mind that courts treat animations and simulations differently. In *People v. Duenas* (2012) 55 Cal. 4th 1, the California Supreme Court addressed the

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difference between a computer animation and simulation of an incident:

> Animation is merely used to illustrate an expert's testimony while simulations contain scientific or physical principles requiring validation. [Citation.] Animations do not draw conclusions; they attempt to recreate a scene or process, thus they are treated like demonstrative aids. [Citation.] Computer simulations are created by entering data into computer models which analyze the data and reach a conclusion. *(Harris v. State* (Okla.Crim. App.2000) 13 P.3d 489, 494, fn. 6, citing *Clark v. Cantrell* (2000) 339 S.C. 369, 529 S.E.2d 528, 537.) In other words, a computer animation is demonstrative evidence offered to help a jury understand expert testimony or other substantive evidence *(People v. Hood* (1997) 53 Cal.App.4th 965,969, 62 Cal.Rptr.2d 137 *(Hood));* a computer simulation, by contrast, is itself substantive evidence**.** *(Commonwealth v. Serge* (2006) 586 Pa. 671, 896 A.2d 1170, 1176- 177 & fn. 3; *State v. Stewart* (Minn.2002) 643 N.W.2d 281, 292-293.

(*Duenas*, *supra* at p. 20.)

In some instances, technology has already brought evidence into existence. For example, the National Highway Transportation Safety Authority has performed crash tests for many years involving various collision conditions. These NHTSA crash tests are recorded on video and the scientific data gathered in the testing is recorded as well. Those videos and data can be persuasive evidence that may be admitted in your case or at the very least be used demonstratively to illustrate an expert's opinions. California law recognizes that scientific experiments and testing, conducted under substantially similar conditions to the events at issue, are admissible. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548-550, disapproved on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574.) Videos and data from scientific testing depicting forces and physics involved in a collision are admissible where the reconstruction is performed under "substantially similar conditions" to the incident.

With conditions substantially similar, the testing does not need to perfectly replicate *all* accident conditions. "(T)he physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time the [videotape] is taken." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1114; see also, *DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1231 [filmed re-creation of auto accident admissible despite some dissimilarities].)

For those reasons, try to establish substantial similarity before trial. Work closely with your experts to make sure they can lay sufficient foundation for substantial similarity. Confirm they have what they need to lay the foundation, and if they don't, identify what you need to still obtain.

If you have a case involving a surgery and wish to use an animation of the surgery, work with a retained expert or even a treating physician to make sure the animation is accurate. Then use the animation in the treating physician's deposition as an exhibit and ask the foundational questions that you need to use the animation at trial. Then, you can boot-strap this testimony with that of your expert who, one would assume, would adopt the opinion of the treater who actually did the surgery that the animation fairly and accurately depicts your client's procedure. If appropriate, then later ask the opposing party's expert in deposition the same foundational question.

More often than not, the opposing expert will have to agree with treater's testimony or risk seeming unreasonable. This often results in unanimous agreement – all experts agree the surgical animation is substantially similar and/or a true and accurate representation of the surgery that was performed. But a word of caution: If the defense expert has the reputation of a contrarian, even in the face of irrefutable facts, consider *not* showing it to that person. If your goal is to have the animation played in your opening, then the testimony of the treater and your expert should be sufficient to allow that to occur.

Doing at least the initial step with a treater before a mediation yields a powerful weapon at that mediation as you can credibly say the surgical animation will be shown at trial.

Before trial, take steps to present your multimedia story in opening statements

As you collect your evidence, consider strategically securing through discovery and depositions admissions of authenticity and of appropriate foundation to establish a good-faith belief that your evidence will be admitted at trial. The reason for doing that is that you may be able to show evidence during the opening statement when you have a good-faith belief that it will be admitted or shown to the jury.

The purpose of the opening statement "is to prepare the minds of the jury to follow the evidence and to more readily discern its materiality, force and effect." (*People v. Arnold* (1926) 199 Cal. 471, 486.) Evidence can be referred to in opening statement where "there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence." (*Hawk v. Sup. Ct. (People)* (1974) 42 Cal.App.3d 108, 121.) The use of matters which are admissible in evidence, and which counsel has a good-faith belief will subsequently in fact be received in evidence, may aid this purpose. (*People v. Green* (1956) 47 Cal.2d 209, 215.) "Nothing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors and ties the facts and governing law together in an understandable way." (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) Indeed, counsel must be given some latitude in stating the case in opening. "Aggressive advocacy is not only proper, but

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desirable." (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 393.)

Even demonstrative evidence that is not yet independently admissible may be used in opening statement. In *People v. Green*, demonstrative evidence, even that not yet independently admissible, was noted to be allowable in opening statement. "Even where a map or sketch is not independently admissible in evidence it may, within the discretion of the trial court, if it fairly serves a proper purpose, be used as an aid to the opening statement." (*People v. Green*, (1956) 47 Cal.2d at 215.) Foundation for "demonstrative evidence" is established by testimony or other evidence establishing that it is a fair representation of the underlying witness testimony or other direct evidence. (*People v. Ham* (1970) 7 Cal.App.3d 768, 780 (disapproved on other grounds in *People v. Compton* (1971) 6 C3d 55, 60, fn. 3).)

Referring back to the example of the surgical animation, a treating physician's deposition testimony can lay the foundation for establishing that the demonstrative evidence is a fair representation of the witness's testimony or the surgery that was performed. Counsel may then advise the Court that the you have a reasonable, good faith belief that the animation will be coming into evidence. With that, you have another important piece of the new age story that you can present out of the gates in opening statement.

Other pictures and videos may also be used in opening statement. It is "within the discretion of the trial court to permit the use, in connection with the opening statement, of the pictures which were subsequently received in evidence." (*People v. Green* (1956) 47 Cal.2d 209, 215.) The use of photographs and tape recordings, intended later to be admitted in evidence, as visual or auditory aids is appropriate. (*Ibid; People v. Kirk* (1974) 43 Cal.App.3d 921, 929.)

Keep key deposition video clips short and to the point

Videotaping depositions is very important. Video depositions should be an even easier task in the COVID-19 era where the vast majority of depositions appear to be occurring remotely. Take the time early to clip key admissions and testimony. Sound bites can be integrated into a case and become a separate piece of evidence.

When deciding when to end your depo clip, think about TikTok's limits of 60 seconds – keep your clip short. Society is in a cycle of processing video clips in short segments. Shorter segments can maximize the effectiveness of a clip, making it memorable.

Should a case not resolve before trial, then begin the work to make sure that separate deposition clips are available in telling your multimedia story. The first step in doing that is to review the deposition and designate the testimony that you want to play. Then, send the designations to initiate the meet and confer process with defense. Once defense's objections and counter-designations are obtained, you can then object to their designations and make further counter-designations. The goal of the back-and-forth is to present the designations to the court well before opening statements – perhaps at the time of pre-trial motions or even earlier on a separately noticed motion. Once the court's rulings on the designations are secured, you will know what testimony is coming into evidence. Knowing certain testimony is admissible means that you can have a good-faith belief the testimony will be presented to the jury and therefore you should be able to include your deposition clips in your opening statement. Some pertinent statutes to bear in mind are Code of Civil Procedure sections 2025.620, subdivsion (a), 2025.620, subdivsion (c)(l)-(3) and 2025.340, subdivsion (m).

Highlight witness testimony in your opening

When excerpts of witnesses' prior testimony are used in opening statement, it may be highlighted, emphasized, and commented upon by counsel, including by visual means. In *People v. Fauber* (1992) 2 Cal.4th 792 (hereafter *Fauber*), a prosecuting attorney was presenting the prior testimony of a third-party witness during his opening statement. While reading aloud this portion of the witness's testimony, the prosecuting attorney "displayed a poster containing an enlarged page from the transcript of [the witness's testimony] containing incriminating statements the defendant made." (*Id.* at p. 826-27.) The poster highlighted some portions of the testimony. (*Ibid.*) The defendant contended that the poster and the highlighting of the transcript was prejudicial because (1) it took testimony out of context, (2) it preconditioned the jury to believe those portions of the witness's testimony over others because of its appearance. The *Fauber* court rejected these arguments, allowing counsel to recite the relevant portions of testimony during opening with the visual aid highlighting portions of the testimony. (*Ibid.*) The court found no prejudice to the defendant. (*Ibid.*)

Putting the multimedia story together into an electronic presentation

There are many presentation programs available these days. The two most well-known programs are Microsoft's PowerPoint and Apple's Keynote. Both programs have user-friendly basics. A presentation can easily be prepared that organizes your multimedia evidence and acts as an outline when you tell your client's story.

Though the basics can result in an effective presentation, many programs offer robust advanced techniques that can greatly improve the quality of the presentation. Though advanced, many of those techniques are not hard to learn and something anyone can explore thanks to websites like YouTube. If you search "Apple Keynote Tutorial" on YouTube, you will find countless how-to videos – how to make a timeline, how to use 'magic move' transitions, or how to play two videos concurrently on a slide. As good practice, I try to spend time

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every several months watching new tutorial videos. High view counts or well-produced videos tend to be reliable sources for good information. Just like any other lawyering skill, the more you practice, the better you will (hopefully) be at using the techniques.

Using electronic "slides" in opening statement is the 21st century version of the highlighted poster in *Fauber*. Using electronic slides to emphasize evidence is not inherently prejudicial. Rather, using electronic slides is merely a modern means of organizing the digital evidence that we expect to hear in the case, thereby preparing the minds of the jury to follow the evidence.

Getting comfortable with the various tools and possibilities of the presentation programs out there like Keynote can also help you generate imagery that correlates to important facts. A few years ago, we created a simple motion graphic to communicate part of a damages story where we otherwise had no photos or video. In that case, our client had a severely injured leg after being dragged underneath a truck. With greatly impaired mobility, he could still walk, but he would never run again. He certainly would not be able to sprint after a child in danger. One of the damages vignettes that we presented at trial was an experience that he and his wife had post-injury at a local park. They were at the park when a man suddenly yelled and began sprinting after the man's young daughter. She was rolling downhill on her tricycle, heading for a large metal gate. The man ran after his daughter, caught her, and stopped the bike before it hit the gate.

Our client and his wife watched the event unfold. Each of them thought about how our client would never be able to do something like that. They were planning on starting a family soon, so the park story was both memorable and a troubling representation of the future.

At trial, they each provided powerful testimony about that subject – the future as a father. Their testimony included the story of the park. In preparing the closing argument, we wanted an image to pair with the story. We were able to create a simple slide on Keynote using the silhouette of girl on a bicycle moving quickly across the bottom of the slide before abruptly stopping. That image reminded the jury of the testimony in a way that was more than just words.

Summary

As a society, we exchange so many photos and short videos as part of communicating a story now. All of that is digital, thanks to technology. That has never been truer than now, in the COVID-19 age where we are socially distant but stay somewhat connected through technology. Technology allows us to share multimedia stories, and as story tellers we as trial lawyers can use technology to tell a multimedia story.

The famous American landscape photographer Ansel Adams said "you don't take a photograph, you make it." Identify the stories behind the photographs and videos, analyze and propagate incident video to generate multiple pieces of evidence, utilize simulations and animations, and make clips of video deposition testimony. If you do that, you will harness the power of technology to gather a collection of multimedia evidence to use in the presentation of your client's 21st-century story.

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