

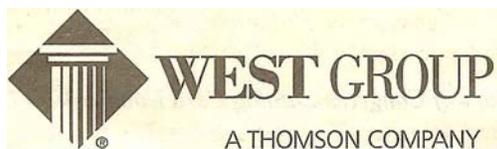
*Electronic*  
**EVIDENCE**

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**Cumulative Supplement  
by The Publisher's Editorial Staff**

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*Issued August 2001*



## B. VIDEO RECORDINGS

## § 16:6 Uses of Video Recordings During Trial

During the course of a lawsuit, video evidence can be used during the following phases and in the following ways.<sup>15</sup>

- . Pretrial settlement conferences
- . Pretrial motion practice, motions in limine
  - Opening statement
- . In chambers motion practice during trial
- . Direct examination of the witness
- . Cross-examination of the witness
- . Redirect examination of the witness
- . Rehabilitation of the witness
- . Visual support for an expert or other witness' testimony
- . During closing argument
- . During jury deliberations

## § 16:7 Advantages and Disadvantages of Using Video Evidence

When deciding whether to use or create video evidence, the proponent of such evidence should consider the following advantages and disadvantages.<sup>16</sup>

*Advantages*

- . Extremely powerful, persuasive, and potentially stimulating nature of video evidence
- . Can be one of the most important items of evidence in a case
- . Has positive effect on most jurors' attention span, retention capabilities, and comprehension
- . Greatly improves means by which accuracy and bandwidth

15. See, generally, Chapter 3.

16. See, generally, Chapter 3.

of detailed visual and aural information can be directly communicated to the trier of fact

- . Can communicate evidentiary information that cannot be communicated in any other way
- . In the case of contemporaneous video recordings, can show the trier of fact the actual events and circumstances in controversy
- . Fulfills expectation by finder-of-fact, whether justified or not, that video evidence is appropriate or expected in a particular case
- . In case of video stills, enables fast, organized access to a virtually unlimited number of imaged documents
- . In the case of video stills, increasingly enables "treatment" of virtually unlimited number of imaged documents
- . Enables framework around which each item of supporting evidence can be organized, whether photographic, computer-generated, still, or motion

#### *Disadvantages*

- . Time and financial costs in preparing video evidence
- . Time and money spent in presenting video evidence
- . Overly polished, "slick" video evidence can have negative impact on jury (though this is unlikely in large civil cases)
- . Poorly produced, poor-quality video evidence can have negative impact on jury
  - . On an individual basis, individual jurors may simply dislike video evidence

#### § 16:8 Foundation Requirements for Admission of Video Recordings as Evidence

The following facts and circumstances, among others, tend to establish a sufficient foundation for the admission of contemporaneous video evidence into evidence.<sup>17</sup> The following five elements are essential in all cases.

17. See, generally, Chapter 8.

- . Materiality
- . Relevance to a material issue
  - Formal offer of proof by counsel if necessary
- . Competency and qualifications of foundational witness
- . Identification of subject matter
- . Accuracy and authenticity of the representation
  - Under "pictorial communication" theory, testimony by a percipient witness, not necessarily the videographer, that the video recording is a "fair and accurate portrayal" of what it is purported to represent
  - Under "silent witness" theory, testimony, establishing authenticity, integrity, and competency of video recording
    - Photographic expert's determination that video recording was not altered in any way, built-up, or faked
    - Continuous chain of custody established
    - Video camera or camcorder was checked and properly operating
    - Video recording is same as what witness saw on playback immediately after recording
  - No material alterations, surreptitious editing, or fabrications have taken place

The following elements may be necessary in some cases and are at least helpful in others.

- . Continuous chain of custody
- . Accuracy of processes used to duplicate video recording, and number of generations from original "camera master" to actual video exhibit
- . Presence of timecode or time I date window dub
- . Appropriateness of, and disclosure of, all editing
- . Appropriateness of titles or narration, if any
- . Usefulness of video recording to trier of fact
- . Presence of witness to overcome hearsay objection

- . Qualifications, competency, and experience of videographer
- . Relationship of videographer to offering party, if any
- . Features, format, and type of video equipment used
- . Physical circumstances and conditions at time video recording was made

#### § 16:9 Checklist of Steps for Formal Admission into Evidence

The following steps are typically required to have a video recording admitted into evidence.<sup>18</sup>

1. Proffering party has a copy of the video storage unit (e.g., video cassette, CD-ROM, or laserdisc) marked for identification;
2. Opposing counsel is allowed to examine the video storage unit;
3. Proffering party requests court's permission to approach and show video storage unit to the foundational witness;
4. Proffering party lays foundation through foundational witness;
5. Proffering party formally moves to have video evidence admitted into evidence;
6. Proffering party inquires whether judge wishes to examine video storage unit;
7. Opposing counsel conducts voir dire examination of foundational witness (if desired);
8. Request ruling from court, if not yet given, and request item be marked in evidence, if not yet done (typically by crossing out words "for identification" on label).<sup>19</sup>

Counsel can now request permission to play back the video recording for the jury, and can thereafter use it as evidence. Either during the fifth or eighth steps, the proponent should make sure to request that the video recording be admitted as substantive evidence so that it can be played back by the jury during deliberations.<sup>20</sup> An important, yet frequently forgotten, step is the fifth step, where the proffering party formally requests that the video evidence be admitted into evidence. The necessary language can

18. When the video evidence consists of an imaged document, a hard copy version of the document must also be admitted into evidence. See § 8:33.

Trial Techniques, 2d ed., 156-59 (Little, Brown & Company, 1988); J. McElhaney, Trial Notebook, 2d ed., 193-197 (American Bar Association, 1987).

19. See T. Mauet, Fundamentals Of

20. See, generally, Chapter 8.

be as simple as, "Your Honor, I offer into evidence this videocassette marked as plaintiff's Exhibit for identification, the contents of which I request be seen and heard by the jury."<sup>21</sup> It is important to make this formal offer to ensure a complete trial record and to avoid uncertainty at the appellate review stage.<sup>22</sup> There is some authority that once a proper foundation has been laid, if a video recording is played back for the finder of fact, it then becomes evidence in the case even if it has not been formally offered and admitted. The lack of a formal offer in this situation amounts to no more than a technical error.<sup>23</sup> It is still recommended, however, that the video evidence be formally offered into evidence before it is shown to the trier of fact.<sup>24</sup>

As with audio recordings, in some jurisdictions, for purposes of efficiency, it is customary to have all exhibits formally offered into evidence at the same time. The difficulty with this is that, technically, the jury should not be allowed to review any video recording until it has been formally admitted into evidence. The recommended practice, therefore, is to make the formal offer either directly after the foundation has been laid or after opposing counsel has had an opportunity to conduct its voir dire examination of the foundational witness.<sup>25</sup>

#### § 16:10 Chronological Checklist of Defense Considerations

In addition to disputing, when possible, the various foundation elements and admission steps listed in §§ 16:8 and 16:9, the party against whom video evidence may be offered should keep in mind the following specific practical and evidentiary considerations (which are presented in roughly the order that they will arise).<sup>26</sup>

- . During discovery, inquire into possible existence of adverse video evidence, and if existence of such video evidence is

21. Heller, *Day-In-The-Life Video*, 40 Am Jur Trials 281 (1990).

22. See G. Lilly, *An Introduction to The Law Of Evidence* 2d ed., 517 (West Publishing Co., 1987).

23. *People v Legel* (1974, 2d Dist) 24 III App 3d 554, 321 NE2d 164.

24. 3 C. Scott, *Photographic Evi*

dence § 1299 2d ed. (West Publishing Company, 1969, 1991 Supp.).

25. J. McElhaney, *Trial Notebook*, 2d ed., 196 (American Bar Association, 1987). See § 8:34 as to the effect of classifying video evidence as substantive upon its use.

26. These considerations are derived from Chapters 8, 11, and 12.

known or admitted, then inquire into details thereof, as described later in this chapter

- . Consider conducting deposition discovery of person(s) likely to be foundational witness
- . Obtain duplicate of video evidence as early as possible
- . Obtain outtakes of video evidence, or duplicate of original "camera master," if allowed, as early as possible
- . Provide adequate time for thorough review of video recording(s) for:
  - lack of materiality and relevance
  - inaccurate portrayal, in consultation with client or others who were present
  - unfair prejudice
  - hearsay
  - misleading or technically deficient production values likely to confuse finder of fact
  - signs of material alteration, surreptitious editing, or fabrication
  - signs of destruction of sequence or chronology
- . If alteration, surreptitious editing, or fabrication is seriously suspected, locate qualified forensic video expert; consider inquiring into likely effect of playing back video recording for jurors during voir dire
- . Explicitly raise existence of serious questions as to accuracy, surreptitious editing, or material alteration with trial court through motion in limine, or during in camera review or when foundation is being laid
  - Oppose admission of video evidence as substantive evidence, in accordance with controlling law, if possible
  - Allow sufficient time to properly prepare for voir dire examination or cross-examination of foundational witness
- . Object as to cumulativeness, hearsay, or other incompetencies, if appropriate

- Request opportunity to present to trier of fact copy of original unedited "camera master," or outtakes, if advantageous
- Request cautionary instruction as to issue(s) video evidence is admittedly relevant to, and as to inference(s) that can be permissibly drawn from video evidence
- All objections to video evidence on any grounds should be formally made and preserved in record on appeal.