

Before You Push Play – Important Considerations When Using Videotaped Depositions at Trial

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Videotaped depositions can be an effective trial tool. When using video at trial, however, attorneys must remain mindful of the court record. Often, especially for long excerpts, court reporters at trial do not see the need to “re-transcribe” previously-recorded deposition testimony, and some judges do not allow it. Instead, the trial transcript may read as follows:

- “(Whereupon excerpts from the videotaped deposition of [WITNESS] were played to the jury.);” or
- “(A portion of videotape was played for the jury.)”

In such circumstances, the record does not show what was played and what was not, and thus the appellate court does not have a proper record of the testimony at trial.

Preservation Issue :

How best to preserve the record of videotaped deposition excerpts played at trial.

Tips:

While pretrial transcript designations may help, they are often insufficient. This is because designations only reflect what a party intends to introduce, not what is ultimately presented to the jury. Cooperation among the parties will aid in preserving a clear record in many instances. For example, the parties can agree, in advance, about which excerpts each side will play and get that agreement blessed by the court. In the absence of advance agreement, the parties can submit after-the-fact stipulations confirming the excerpts presented to the jury. Unfortunately, opposing parties do not always cooperate, and there may be honest disagreement about what was actually played.

Care, diligence, and planning are required to properly address this preservation issue. Make sure that complete, original transcripts are in the court record (along with copies of the video, if allowed). Each transcript should include any associated signature pages, errata sheets, or similar documents. Make sure that exhibits utilized in the deposition excerpt are admitted at trial and included in the trial record as necessary. Prior to presenting testimony by deposition, speak with the court reporter about his or her preferences, as well as the judge’s, and plan accordingly. Also, consider documenting in the court record some convention for labeling each deposition excerpt (e.g., “Excerpt 001”). Then, before pressing play, where practical, announce either the reference number or the transcript cite (page and line) for the beginning and end of the excerpt.

In circumstances where the videotaped testimony is re-transcribed by the court reporter at trial, it is important, on an ongoing basis, to compare the trial transcript to the deposition transcript and resolve any material discrepancies. Finally, seek leave to filing a disc containing the utilized video excerpts, preferably with synchronized deposition text displayed on the screen.