YOU – TUBEPHORIA:

MUSINGS ON THE TACTICAL AND CREATIVE USE OF VIDEOTAPE DEPOSITION DEMONSTRATIONS

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BY
PAUL N. GOLD[1]

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1. INTRODUCTION

Over the course of thirty years of practice in the area of personal injury law in Texas, I have taken literally hundreds of depositions. These depositions have been in both state cases and federal cases. Many of these depositions have

[1] I want to acknowledge the contribution of Frank L. Branson in the formulation and development of this concept. Frank, who unquestionably is a pioneering innovator in the area of demonstrative evidence, was my mentor and law partner for the first fifteen years of my practice. He provided me the inspiration, encouragement and resources to experiment with the ideas discussed in this paper, supported my failures and helped celebrate the triumphs. I am very appreciative of the experience and his friendship.

been useful at trial. Other depositions, however, were never played in a courtroom, but were instrumental in getting a case settled. Most of the effective depositions were videotaped.

Videotaped depositions already were being employed when I started practice, but they really did not come into vogue until the early 80's when certain federal courts began extolling the virtues and benefits of the videotape medium and encouraged the bar to experiment.

I embraced the invitation to experiment. At the time, I was partners with a prominent plaintiff's attorney in Dallas who was known for his creative use of demonstrative evidence. Our firm was a pioneer in Texas in the development of re-creations and animations. These projects, while eye-catching and persuasive, were labor intensive and quite expensive. Not every case could justify hiring stunt men to re-create the occurrence, or hiring animators to bring the damages to life. I decided to pursue the use of demonstrative aids on a different, more pragmatic plane; videotaped depositions.

The inspiration for this tactical model was the decision in ***Roberts v. Homelite Division of Textron, Inc.***, 117, F.R.D. 637(N.D.Ind.1987), which actually was the product of a case decided fifteen years earlier, ***Carson v. Burlington Northern, Inc.,*** *52 F.R.D.492(D.Neb. 1971).* These are the two seminal cases that favorably discuss using videotaped depositions to conduct

and record demonstrations and re-enactments. The strategic use of depositions to record demonstrations and re-enactments is the subject of this paper.

I have been writing on the subjects of discovery and depositions for nearly twenty five years. A number of the papers are heavily annotated and are more academic than practical. My goal with this paper is to provide more of a practical rather than an academic or technical perspective. What I am going to write about is what I actually have done, sometimes successfully and sometimes not. While success has not always been the reward, the creative process always has been rewarding and successful. I hope to share the creative process with my readers.

There are some preliminary caveats. There are relatively few cases discussing this issue. As pointed out by one author, the reason for this fact is that in most jurisdictions (Texas is an exception), discovery rulings are interlocutory and there is no appeal until the end of the case. By the end of the case, the issue of whether a videotaped deposition was or was not allowed is rarely a significant issue on appeal. Additionally, there are vagaries in the laws among the various state jurisdictions. What is condoned in one jurisdiction may not be condoned in another. My experience is based on my practice in Texas state courts. This paper is not a survey of all the rules and practices of the fifty various state jurisdictions and federal courts. So beware, what can be done in Texas may not necessarily translate the same in another state and vice versa.

Lastly, as will be discussed later in the paper, there is a big difference between discoverability and admissibility at trial.

While the federal courts have encouraged litigants to experiment in discovery with non-stenographic recordings, they have not been as liberal when it comes to the admissibility of the demonstrations and re-enactments at trial. In these regards, the courts tend to adhere more to orthodoxy. While a demonstration during a videotaped deposition might enable the parties to better evaluate the case for trial or settlement, the court at trial must still weigh whether the potential prejudicial value of the demonstration outweighs its probative value. This is particularly true for all demonstrative evidence. However, as I will discuss in more detail below, conducting a demonstration during a deposition, where all parties have the right to cross examine, may actually increase the odds of the demonstration being admissible at trial. The operative word here is "increase," which does not equate with "assure."

The reader should keep in mind that the primary purpose of the paper is to encourage litigants to engage in and record demonstrations during videotaped depositions to aid in preparation for trial and settlement. A secondary purpose of the paper is to discuss considerations for potentially getting such demonstrations before the jury or admitted into evidence.

2. AN INVITATION TO EXPERIMENT

It took a long time for the federal courts to embrace the liberal use of videotaped depositions. By 1980, however, the Advisory Committee was encouraging litigants to agree to use the non-stenographic media for taking depositions so that their efficacy could be better determined and federal courts soon began taking a more liberal view toward the discovery device,[2] and even extolling the discovery tool's benefits.[3]

The 1993 amendments to the Federal Rules of Civil procedure created a seismic shift in liberalizing the rules regarding the taking of video depositions. Before the rule change, such depositions could be obtained only by court order or by stipulation. Stipulations required agreeing to a list of accommodations that often made the process more burdensome than beneficial. New Fed. R. Civ. P. 30(b)(4) allows a party seeking a videotaped deposition the right to unilaterally to select the method (i.e. non-stenographic) by which the deposition will be recorded. As pointed out in ***Rice's Toyota World v. Southeast Toyota Distributors***, 114 F.R.D. 647,648(M.D.N.C. 1987), the rule embodies an "invitation to experiment."[4]

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[2] *See*, ***Rice's Toyota World, Inc. v. S.E. Toyota Distrib., Inc.,*** 114 F.R.D. 647, 650 (M.D.N.C. 1987)

[3] *See*, ***Sandidge v. Salem Ref. Co.,*** 764 F.2d 252, 260, at fn. 6 (5th Cir. 1985);

[4] *See also,* ***Lucas v. Curran*****,** 62 F.R.D. 336, 338 (E.D. Pa. 1974)

3. CASE LAW ON DEMONSTRATIONS DURING VIDEOTAPED DEPOSITIONS

A. BROADENING THE USE OF DEPOSITIONS

While the case that first drew my attention to this intriguing area is ***Roberts v. Homelite Div. of Textron, Inc.***, *supra,* one of the first cases to address the issue of demonstrations during videotaped depositions was ***Carson v. Burlington Northern, Inc***., 52, F.R.D. 492 (D. Neb. 1971), fifteen years earlier, so we should start our discussion there.

In ***Carson***, the defendant already had taken the plaintiff's stenographic deposition, but moved to take a Rule 30 deposition by videotape having the plaintiff demonstrate how he was injured. The plaintiff had suffered a partial amputation of his right hand when a steel press at the defendant's blacksmith shop came down on the hand reportedly as a result of defendant's negligence. The plaintiff objected that the video would appear staged and thus unduly prejudice the jury toward a finding of contributory negligence. While the court conceded that plaintiff's argument might have validity in certain circumstances, the court believed safeguards could be implemented to avoid this complaint. The court ordered that the deposition be taken by videotape at the blacksmith shop where the incident occurred to show the manner in which the plaintiff approached and operated the machine immediately prior to and at the time of the alleged

accident. The safeguard the court imposed was that the plaintiff was not to be requested to actually touch or operate the machine, but merely use a pointer to assist in making the demonstration or some other means agreed to by counsel.

A similar approach to that adopted in ***Carson*** was followed in ***Roberts***. The device reportedly causing injury in **Roberts** was a lawn mower. The plaintiff, a lawn mower dealer, lost a portion of his left hand while starting a lawn mower prior to sale. When the mower was first unpacked, it would not start or turn over. The plaintiff put the mower on a workbench to start it, which was successful, but when the mower started it "lurched" forward and the blades struck the plaintiff's hand resulting in injury. The defendant filed a motion to take the deposition of the plaintiff by videotape at the place where the incident occurred to re-enact the incident. The plaintiff objected on several grounds worth noting:

1. The defendant failed to demonstrate that the plaintiff would be unavailable at trial;
2. The defendant failed to demonstrate that the use of videotape would reduce the cost of the deposition;
3. There were inadequate safeguards proposed; and
4. A re-enactment is an improper discovery procedure.

At the time **Roberts** was decided, Fed. R. Civ.P.30(b)(4) did not allow a deposition to be videotaped as a matter of right. The court observed that at the

time there was a conflict among the federal courts over how much discretion a court had in granting such a motion. The court chose to follow the more flexible scope of discretion,[5] noting that the 1980 Advisory Committee Notes emphasized "free experimentation and the benefits to be derived from technological advancements in the recording field." The court made the following observations pertinent to plaintiff's objections:

> Videotaped depositions are advantageous in that the finder of fact at trial often will gain greater insight from the manner in which an answer is delivered and recorded by audio-visual devices. Moreover, a recording, a videotape, or a motion picture of a deposition will avoid the tedium that is produced when counsel read lengthy depositions into evidence at trial. Quoting from *Wright and Miller*, ***8 Federal Practice and Procedure*** §2115 at 426 (1985 Supp.) [6]

While the **Roberts** court found that with proper safeguards (the plaintiff could touch the lawnmower, however, the safety of the parties was not to be jeopardized), the motion to take the deposition by videotape should be granted. The court made clear that by granting of the discovery motion "it does not

[5] *See,* ***Perry v. Mohawk Rubber Co.*** 63 F.R.D., 603, 604 (D.S.C. 1974) and ***Jarowsiewicz v. Conlisk***, 60 F.R.D. 121, 125 (N.D. Ill. 1973)
[6] ***Roberts v. Homelite Div. of Textron, Inc.***, 109 F.R.D. supra at 667

automatically follow that the videotaped depositions taken for discovery purposes are admissible into evidence at trial."[7]

Kiraly v. Berkel, Inc.,[8] is another case in which the defendant sought a videotaped deposition of a plaintiff in a product liability case. In this instance, the plaintiff had injured her hand while using the defendant's meat slicer. The court was not persuaded by plaintiff's argument that she would be available at trial finding that the court was not making a ruling on admissibility but only discoverability. The court qualifiedly granted the motion. The defendant had to produce the injury causing machine, but it did not have to conduct the deposition at the place of the incident since there was no reason why the deposition needed to be conducted at that location.

Emerson Electric Co. v. Superior Court of Los Angeles County is a noteworthy case because it actually confronts the issue of whether a party can force a deponent to do anything more than give a verbal answer during a deposition.[9] This is an issue almost all of us have dealt with at one time or another in our practice. Typically, the issue involves the creation of a diagram or drawing by the deponent. In ***Emerson***, the plaintiff refused to draw a diagram or demonstrate how the accident occurred. ***Emerson*** deals with California law. An

[7] ***Id***, at 668.
[8] 112 F.R.D. 186 (E.D. Pa. 1988)
[9] 56 Cal. Rptr. 2d 897 (1997)

earlier decision out of California, ***Stermer v. Superior Court,***[10] had held that a trial court has no authority to order a party to perform a physical re-enactment of an event at a videotaped deposition. The Court of Appeals for the Second District, Div. 1, in ***Emerson*** held that such authority exists. The California Supreme Court affirmed the Appellate Court decision, holding that to answer in discovery includes responding non-verbally.[11] The primary basis for the ***Emerson*** decision is the court's finding that a deposition is to be conducted the same as if the testimony were being given at trial. At trial, demonstrations and reconstructions are permitted, so likewise they should be permitted during depositions.[12]

In ***Gillen v. Nissan Motor Corporation in USA***,[13] the plaintiff claimed injuries because of a defective seat belt. The automotive manufacturer sought to have the plaintiff demonstrate the use of the seat belt during the plaintiff's videotaped deposition. The court held in allowing the deposition demonstration that the demonstration was relevant to the issues in the case and would probably assist in the development of the case. However, the court made clear that the decision on discoverability was not a decision on admissibility at trial.

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[10] 24 Cal. Rptr. 2d 577 (1993) (Court of Appeals, Second District, Division 6)
[11] 68 Cal. Rptr. 2d 883 (1997)
[12] ***Emerson Electric Co. v. The Superior Court of Los Angeles County***, 56 Cal. Rprt. supra at 900.
[13] 156 F.R. D. 120 (E.D. Pa. 1994)

The Southern District of New York addressed the issue in 1995 in ***Brown v. General Instrument Corp.,***[14] holding that defendants were entitled to have plaintiffs demonstrate at their videotaped depositions hand and arm movements in operating betting ticket machinery that plaintiffs claimed resulted in repetitive physical injuries. Plaintiffs complained that the videotape depositions might not accurately reflect the duration and intensity of the activity resulting in their injuries. The court made clear that it was addressing only the issue of discoverability and not the issue of admissibility at trial.

B. CAVEATS

1. OPPONENT NOT REQUIRED TO CREATE EVIDENCE

It is important to note that the above cases all discuss ***depositions*** during which demonstrations or re-enactments were conducted. There is a difference between requesting a demonstration during a deposition and requesting leave to enter a party or third party's premises merely for the purpose of creating a re-enactment *sans* deposition. This point was driven home in ***Amis v. Ashworth***, a Texas state court decision.[15] The case arose from an altercation and subsequent shooting that left the defendant a quadriplegic. Defendant moved for permission to access the premises where the alleged assault occurred for the purpose of creating a re-enactment:

[14] 1995 WL 244946 (S.D.N.Y.) (unreported)
[15] 802 S.W.2d 374 (Tex. App.-Tyler, 1990,orig.proceeding[leave denied]).

> Brown's attorney told the Respondent that to "perform a video" would require a film crew, actors and witnesses, totaling about twenty people, and that the performance and filming would take "six hours at the outside. . . depending on how many times you have to re-shoot. They need to get in and set up and get the lighting." Subsequently, counsel told the Respondent that it would take eight hours instead of six.

One of the themes of this paper is that just because a little is good does not mean a lot is better. Going overboard oftentimes, particularly in trial practice, can result in the denial of the relief requested from the court and the thwarting of an entire strategy. That is one of the lessons of ***Ashworth***. The appellate court observed that the core issue was whether what Defendant sought was "discovery." The discovery process is to gather information in the possession of the respective parties. There is no requirement that one party create or allow the creation of evidence for another.[16] Defendant did not seek just to photograph existing circumstances, but to videotape a stage performance of actors using the premises merely as a backdrop.[17]

[16] Id at 376.
[17] Id at 376.

Around the same time ***Ashworth*** was being decided, a provocative scenario was playing out in the Northern District of Illinois in ***In re Air Crash Disaster at Sioux City, Iowa on July 19, 1989.***[18] The plaintiffs noticed the depositions of three United Airlines employees who were crew members of Flight 232 to take place in the "DC-10 Simulator or adjacent to DC-10 Simulator with the DC-10 Simulator operation for use during the deposition." The Court in quashing the notice found that requiring the crew members to re-create the crash while operating the flight simulator was oppressive and unduly burdensome. However, the primary reason for denying the deposition appears to have been because plaintiffs cited no case in which a flight simulator was used in the course of a deposition or at trial and that research disclosed no such case.

What the federal court apparently did not know and that no parties brought to its attention was that in 1989, in connection with litigation arising out of the crash of Delta 1141 at DFW airport, this writer had noticed successfully the deposition of the flight instructor for Delta airlines to input the data from the Delta 1141 data recorder into the Delta flight simulator and re-enact on the flight simulator the crash of Delta 1141. Delta raised many of the same arguments raised by United in the Sioux City case; however, the trial judge in the Delta case overruled the motion to quash. Plaintiffs were allowed several hours to depose the flight instructor in the flight simulator in Atlanta beginning at 2:00 a.m. The deposition required an extraordinary amount of logistics and the actual taking of

[18] 131 F.R.D. 127 (N.D. Ill. 1990)

the deposition was a tight squeeze. Ultimately, the deposition was accomplished flawlessly and was instrumental in getting the case settled because it confirmed not only with words but with actual visualization that the crew had indeed wrongly taken off with the flaps up which was a charge that Delta previously had denied.

2. USE AT TRIAL

The case law cited above talks about the expansive use of depositions for videotaped demonstrations during discovery and for use in case evaluation. Indeed, the holding in ***Roberts v. Homelite,*** *supra,* reserves the issue of whether the videotaped deposition will be admissible as evidence to time of trial. The courts have acknowledged that the discovery of a videotaped demonstration may assist in the preparation (i.e. showing an expert how the opponent contends the product was used) or the evaluation of the case for trial (i.e. being able to show the demonstration to a client or adjuster rather than merely reporting narratively). While the courts have gradually embraced allowing this type of discovery, they still generally adhere to orthodoxy with regard to such demonstrations at trial.[19] Therefore, it is a difficult task for attorneys to get videotaped deposition demonstrations into evidence. The party attempting to admit a videotaped deposition demonstration into evidence must establish relevancy and also that the probative value of the demonstration outweighs the potential for prejudice.

[19] *See****, Windsor Shirt Company v. New Jersey National Bank***, 793 F.Supp. 589 (E.D. Pa. 1992).

Therefore, the simpler the demonstration and the closer it is to the actual facts the greater the likelihood of being able to get it in front of a jury.

4. STRATEGIC AND TACTICAL CONSIDERATIONS:

Just because it may be difficult to get a videotaped deposition demonstration admitted into evidence does not mean that one should not try. Furthermore, it does not mean that if one tries and lays a meticulous groundwork, it cannot be accomplished. The benefits of a compelling demonstration can be invaluable to a successful outcome at trial.

Think of all the depositions that have been taken in the United States since depositions were first allowed. The two that stand out in most people's memory are the videotaped deposition of Bill Gates in the Microsoft litigation and President Bill Clinton's videotaped deposition testimony regarding the Monica Lewinsky case. The impact of the videotaped testimony was colossal. Just as videotaped testimony can be memorable and impacting so may be videotaped deposition demonstrations.

The inclinations of each jurisdiction and each judge need to be researched. In Texas, the state in which this writer practices, the law is very liberal both with regard to obtaining demonstrations during depositions and with regard to admitting deposition testimony and demonstrations into evidence. This

discussion, however, begs the larger question of what should be the strategic considerations in conducting a videotaped deposition demonstration. Should the strategy be designed solely to get the demonstration into evidence? Or are there more pragmatic strategies that might be of equal or superior value?

The videotaped deposition demonstration may be a particularly effective and efficient way to obtain expert evaluation and opinions regarding your claim. The demonstration is something that the expert may testify that he relies upon and this reliance may allow the demonstration to be shown to the jury as a demonstrative aid, even if it is not admitted into evidence.

As we all know, most cases, particularly in the tort reform era, are resolved by settlement prior to trial. The videotaped deposition demonstration may be extremely useful in conveying a particular point during a mediation or settlement conference. In many instances, the litigants have only received narrative reports from their attorneys regarding their opponent's contentions. Seeing a demonstration may be particularly more persuasive and effective.

The demonstration is additionally very helpful in presenting the case to a focus group evaluation. Not only will the attorneys get insights into the impact the demonstration will have on a jury, assuming the demonstration can be presented to the jury, but it will provide additional insights into how a jury

responds to the substance of the demonstration. Once again, a visual impact has much more impact than a narrative recreation of what occurred.

5. TYPES OF DEMONSTRATIONS

Over the years I have conducted a wide array of videotaped deposition demonstrations. While there have been some missteps from time to time, the vast majority of the demonstrations have been successful and beneficial. I have used demonstrations in car wrecks, air crashes, product liability cases, railroad crossing cases, medical malpractice cases, and premises cases. It is a technique that I commend highly provided the economics and the circumstances are right.

I am not an advocate of using videotaped depositions extensively at trial or of putting on long segments of depositions by videotape. A little technology is a good thing. Multi-media is even better; however, if you overuse a medium or a technique it will lose its uniqueness and its impact. This point can be seen with regard to the use of PowerPoint. It now seems that no speaker or trial attorney can communicate without the aid of a PowerPoint. The program is ubiquitous and, as a result of the public being supersaturated in PowerPoint presentations, the technique not only has lost its impact but sometimes has become counter productive. The same consideration needs to be heeded with the use of

videotaped depositions and demonstrations conducted during videotaped depositions. Don't overdo it.

As mentioned at the outset of the paper, I believe tort reform has forced a new paradigm upon most litigators. With caps on damages and fees, it is very important to handle cases cost/efficiently. There are lawyers who give seminars on how to create and use expensive demonstrative evidence, including re-enactments and computerized animations. The great majority of us practicing in the area of personal injury do not see a steady flow of a large number of cases that can justify the expense of hiring actors, directors, and stage props to recreate a catastrophe or hiring computer technicians to create a mind-blowing, three dimensional computerized animation. If we cannot spend hundreds of thousands of dollars on demonstrations, does that mean that anything less complicated or costly is not worth pursuing? Definitely not. Often, the more complicated (and expensive) the demonstration, the greater the burden of laying a predicate for its admissibility and for showing that its probative value outweighs its prejudicial value. Glitzy does not always equate with probative.

One of the important benefits in using videotaped demonstrations is that it provides a very efficacious way of focusing the jury's attention on the critical issue or critical piece of evidence. It is not required that a videotaped deposition remain fixed on the witness' face, particularly if the witness is demonstrating a

concept with a model or performing a demonstration. The video can zoom in on the particular model being used or on the particular demonstration.

I have used the above technique effectively in a number of ways. In one case in which I represented a young woman whose spine was broken and misshapen by the force of a lap belt during a front end collision, I had a bio-mechanical engineer demonstrate how the young woman submarined beneath the belt and how the belt consequently put incredible force directly on her spine rather than on her pelvis. He did this by using a standard spine model that we had in the office. I had him demonstrate with a sample seat belt how the belt moved from the pelvis to the young woman's abdomen thus making the belt a fulcrum over which the young woman's spine flexed during the collision. The demonstration was much more effective than a medical illustration and much less costly than an animation.

In another case I was suing an oxy-hood manufacturer for not having an adequate warning on the hood about the risks of not monitoring the flow of oxygen to the newborn adequately. The manufacturer claimed that such a label was impractical and infeasible because there was inadequate room on the oxy-hood. I took the videotaped deposition of the corporate representative on labeling and had him bring an oxy-hood. I pointed out to him that there was a marketing label on the oxy-hood identifying the manufacturer and its corporate logo. I then had him identify the important warning which was buried in the

manufacturer's operator's manual. I had him cut out the warning with a pair of scissors and place it on the oxy-hood where the manufacturer's logo sticker was affixed. The two labels were identical in size and a compelling point was communicated to the jury that the argument about impracticality and infeasibility was bogus and that the manufacturer merely had made a decision that marketing its name was more important than effectively communicating the risks of using the product.

One of my most memorable demonstrations occurred in a medical malpractice case. The heart of a young boy undergoing a surgery went into dysrythmia during the surgery and needed to be defibrillated. While the hospital had on hand a defibrillator, it took over twelve minutes for the nurses to exchange the adult paddles on the defibrillator with pediatric paddles. The resulting delay caused the young child to experience a hypoxic brain injury. The hospital contended that there was not a delay in exchanging the paddles. I filed a motion to have the head nurse bring to her deposition the defibrillator and two sets of paddles. We put the defibrillator and two sets of paddles on a table right below a large wall clock and asked the head nurse to demonstrate how the paddles would have been exchanged in the emergency. It took the head nurse almost twelve minutes to exchange the paddles, even after she had been prepped for the demonstration. As an added benefit we also got to hear on tape her respirations increase and her cursing under her breath.

Videotaped deposition demonstrations may be particularly useful in having technical or complicated concepts explained. We had a case sometime ago in which computerized medical records were an issue. We believed it was particularly important to see how information was inputted into the computer, how it was stored on the computer, and how it was able to be accessed or manipulated. We noticed the deposition of the hospital's head of information technology to demonstrate these concepts during her videotaped deposition using the actual computer and computer program in question. Both sides (attorneys and litigants) were better able to appreciate what took place as a result of the demonstration.

Doing videotaped depositions at the scene of the occurrence can be particularly effective. I have done depositions at intersections, along highways, at construction sites, in hospital departments, and in factories. It can be very effective to have an eyewitness show where they were located at the intersection and explain what they saw. Similarly, it can be very useful for a witness to explain a piece of equipment in a factory and how it was being used or operated at the time of the occurrence. It's like reality T.V.! It is not nearly as expensive as an animation and therefore not nearly as risky in trying to get into evidence and it is much more compelling than a one dimensional drawing. This type of exercise, however, requires a considerable amount of advance planning and logistical consideration.

I have learned from experience that trying to do a deposition in a factory environment is nearly impossible because of the noise, notwithstanding having to work through the opponent's arguments about safety and inconvenience. In such circumstances, what I have done is taken the videotaped deposition and then gone into a conference room to continue the deposition showing the demonstration to the witness and having the witness narrate what was being demonstrated. I once used a similar technique with a medical burn physician. We obtained a copy of a burn therapy training tape from a hospital. We then had the physician testify to what treatments our client had received. Once we had that predicate, we showed the witness the burn therapy training tape and asked if what was depicted fairly and accurately depicted what our client had undergone and what he experienced. The witness effectively proved up the training tape while using it to demonstrate the agony our client had undergone. The videotaped deposition was so effective and compelling that we were able to use it as the only medical testimony at trial for which we obtained a multi-million dollar verdict.

It is very important that serious forethought be given to the costs and benefits of videotaping a demonstration at the scene. Early in my career when I began experimenting with this technique, I got the great idea that I would videotape a deposition at the scene of a railroad crossing accident. It just so happened that there was a woman's home that was no more than 75 to 100 yards from the railroad crossing. I noticed the woman's deposition for her home.

We got everything set up. I went up on the porch to begin taking the deposition and realized for the first time that looking West from her porch (the direction and about the point at which the railroad was saying my client should have started looking for the train) I could see almost to the next county! Not a good thing for me to demonstrate in a case in which I was claiming sight impairment. Admittedly, I made the mistake of letting my zeal for the concept override my good judgment about what I needed to prove in my case. Lesson learned: Don't enlist or use technology or devices just to be innovative or resourceful. Have a plan and make sure the plan advances the goal of your case.

Videotaped deposition demonstrations can be particularly effective in obtaining and presenting a day-in-the-life segment. Most attorneys who utilize day-in-the-life presentations have them done ex parte without the presence of the other side. They then have to overcome arguments at trial that the videotapes are staged and not a fair representation of what actually occurs on a daily basis. Additionally, the jury may be suspicious that the videotape has been staged, even if the attorney overcomes the objections about admissibility. I have experimented with conducting aspects of the day in the life during a videotape deposition so that the other side is present and has a opportunity to cross examine. This is particularly useful if there is a therapy regime that is very complicated to otherwise demonstrate or explain. Also, the day-in-the-life presents a good opportunity to use the technique of producing the videotape at the deposition and having the witness narrate what is taking place. While this

same technique may be used at trial, the videotaped deposition using this technique may be particularly useful and effective for presentation at a settlement conference or mediation. It has the added persuasive element that the testimony was obtained under oath with the opposing party having the opportunity to cross examine.

As the discussion above hopefully illustrates, one does not have to spend a lot of money on props to conduct an effective videotaped deposition demonstration. I have made use of some very inexpensive props to convey complicated ideas: cotton balls to illustrate the shearing of neurons in a concussive injury, a Dixie cup and a penny balloon to demonstrate engagement of the fetal head in the birth canal during delivery, a Popsicle stick and a pencil to display the fulcrum affect of a tilt trailer. I love post-it notes, especially the small multi-colored ones. They make excellent models of vehicles to depict how motor vehicle collision occurred. Modeling clay used in elementary school is also excellent for fashioning simple vehicles.

Demonstrations are not solely limited to personal injury cases. I also have used demonstrations in paper intensive cases. Before there were Elmos, I used to regularly make use of overhead projectors during depositions. The Elmo is simply a more efficient medium. I would have the deponent underline and circle what the witness considered important words or phrases in the document that would be projected on a screen behind the witness.

Overhead projectors and Elmos are excellent media for displaying diagnostic imaging films. Using the technique discussed above, I have the deponent highlight and underscore important features on the film. I also have used the post-it arrows to more clearly indicate breaks or tears revealed on the film.

The above technique is also especially effective with a fetal monitor strip in a labor/delivery medical malpractice case. Once you have the witness identify on the strip all the un-reassuring events, you then later can use the demonstration as a predicate for animation of the strip that you can run in real time.

Probably the most effective model I have ever used in a videotaped deposition demonstration is my client. I have done this in two instances with tremendous success. In one case, I represented an airline captain who had lost his leg as a result of medical malpractice. The captain had been playing soccer on a weekend and suffered a comminuted fracture of his right leg. The doctor who set the broken leg failed to assess for a torn artery and as a result the leg had to be amputated because of the development of compartment syndrome. We noticed the deposition of the captain's rehabilitation doctor and brought the captain to the deposition. Using the captain as a model, we had the rehabilitation doctor demonstrate how the compartment syndrome affected the circulation in the leg, where the amputation took place, and places on the leg where the

captain still had pain and phantom pain. We also had the rehabilitation doctor show us the prosthesis he had designed for the captain and had the captain demonstrate how he put on the prosthesis and how the prosthesis allowed him to walk and function with a great degree of normalcy. The defense attorney was so impressed with the video that he asked that a copy be sent to him immediately. A few days after it was received, the case was settled.

Possibly the most dramatic videotaped demonstration I ever conducted occurred serendipitously. I represented a child who was born with hydrocephalus. A permanent shunt was implanted to drain the fluid from building up in his brain. The child's pediatrician was supposed to monitor the shunt to make sure that protein did not build up in the shunt causing a blockage which would defeat the purpose of the shunt. The little boy developed the flu and a fever which resulted in protein buildup in the shunt which the doctor ignored. As a result, the little boy suffered permanent and irreparable brain damage. The little boy had to be sent to a long term facility for care. I noticed the deposition of the head nurse for the facility which was located in Louisiana. When I arrived at the facility, I learned that the head nurse was Sister Seraphina. She was incredibly kind and gracious. We set up the videotaped deposition in the cafeteria, which was a very pale green which showed up as a surrealistic color on the video screen. While I was deposing Sister Seraphina, we heard crying down the hall. Sister Seraphina told us that this was my little client who was crying. I asked her if it would help her to explain his injuries if he were in the

deposition with us and she testified that it would. We brought the little boy into the cafeteria in his wheelchair. He had to be restrained because he was virtually flaccid. Sister Seraphina unbuckled him and held him in her lap to explain his difficulty holding his head upright, breathing, and eating. She demonstrated how he had no control over his body. When we replayed the videotape, we realized for the first time that Sister Seraphina and our client were framed perfectly beneath a crucifix that hung in the cafeteria. The testimony was the most poignant I had ever heard or seen. The vision of it is as clear today as it was twenty five years ago when I obtained it, which I suppose is the compelling point of this paper.