

ENHANCING VALUE BY USING DVD MEDIA IN A TBI CASE

By Tim Titolo, Esq. and Dave Fulton

INTRODUCTION

The use of media at trial is certainly more the norm than the exception. In fact, jury surveys indicate that plaintiff's use of media does not offend, as one might think, or make jurors believe plaintiff's attorney is being excessive. Rather jurors expect the use of technology and view it as responsible when used by either side.

The same can be said for preempting the need for a trial altogether by putting together the strongest possible presentation for ADR and mediation, with the goal of prompting a settlement.

What does a video bring to the table? Simply, there is no other medium that will effectively communicate the non-economic damages of your case like the emotional sledgehammer of a well-produced DVD documentary. While the rule of thumb for evaluating a case may be a multiple of 3.5 of the economic damages, a documentary can boost this value as much as tenfold or more by clearly communicating the contrast in the plaintiff's life. By tapping into the non-economic damages with a thoughtful DVD documentary, you will find yourself leaping closer to recovering the elusive full value of your TBI cases.

Remember, at ADR the goal is not to bring the adjuster to tears, but to convince the adjuster that you can bring a jury to tears. The use of video is your best opportunity to accomplish this.

Videotape has traditionally been the media of choice in presenting brochures or Day-In-The-Life. Today, however, DVD is becoming widely used. A few years ago, one ran into compatibility issues with CD versus DVD and CD-R, DVD-R versus CD-RW and DVD-RW. Even when a disc was used to record, playback became an issue as some formats work on computers and others on home DVD players. The maze certainly brought many would-be users back to the

safety of traditional videotape, along with its fast-forward and rewind delays and snafus.

The TBI case, complex by nature, is conducive to presentation by DVD at trial and mediation (or other ADR). This article attempts to unravel the mystery of using DVD. Additionally, we will offer simple solutions and methods for producing the TBI case DVD. Rather than focusing on admissibility issues at trial, we will focus on the actual afthought that might accompany a production for Mediation. The effort will assist you significantly for trial. Finally, we will explore how to make damages more compelling with digital media.

FORMATS AND TECHNOLOGY

For years, videotape came in every imaginable shape and size – BetaMax, BetaCam, U-Matic ¾”, 1-inch, BetaCamSP, VHS, VHS-C, SVHS, 8mm, Hi8, Digital8 – and that’s just the tip of the iceberg.

The next step in the digital revolution was CD-ROMs. While this storage format was simple enough, the confusion arose when a dozen or more video file formats started competing, led by MPG, AVI, and MOV. Each required its own player application on the computer to replay the file.

Then DVD started to catch on. It provided far superior audio (better than an audio CD) and video. A demand was created to burn small quantities of the discs, so the manufacturers went into overdrive as they smelled the profits JVC had reaped on the VHS format. The requirements of the file system of the DVD was the same throughout, but the nature of the actual storage disk characteristics changed. We had DVD-R, DVD+R, DVD-RAM, DVD-ROM, plus the “RW” versions. Even the nerdish of techies were running into the streets screaming.

Sadly, it’s not over, not by a long shot. With the upcoming High Definition (HD-DVD) formats of Blu-Ray and AOD (Advanced Optical Disk) we will all soon have a whole new vocabulary of alphabet soup on our hands.

Here is all you need to know about DVD formats:

- 1) Use DVD-R for everything. The disks are only about fifty cents each and it’s the most universal format around. You should find

that it plays back on just about any tabletop player or computer drive.

- 2) Ignore HD-DVD formats for the time being. Honestly, if you want higher quality, just invest in a DVD player that “upconverts” to a component, HDMI or DVI output. The picture from a contemporary store-bought DVD disk is beautiful on a high-def TV with one of these players. Let the dust settle for a couple of years before you take the plunge in this new format.

DECIDING IF YOUR CASE IS RIGHT FOR DVD PREPARATION

Before you ever contact a digital media production company, you must conduct a thorough investigation of the case. It is both a waste of a client’s money and the attorney’s time to invest in such a project without having made the appropriate considerations, not to mention the embarrassment of presenting your project if it is inaccurate or premature.

One way to approach the decision is to ask yourself if investing \$5,000 to \$10,000, or more, is likely to increase the settlement value by several times that amount. If the answer is “yes” then you are doing a service to your client and the case to move forward. Likewise if you believe the value of the case can increase by \$100,000 to several hundred thousand, the investment is very modest.

Some cases are very suited to digital production and the decision is easy. Other times cases are not so well suited but can still be candidates for production. An otherwise mediocre case can get a better than mediocre result if presented dynamically. If the liability is weak, digital media can assist in clarifying the defendant’s presumptions and misconceptions. If damages are questionable, digital media is an opportunity to present your client and the physicians. Ultimately the production should *explain* the case clearly.

As trials become more expensive and uncertain, plaintiffs should be willing to consider utilizing ADR and specifically mediation. Defendants are also facing uncertain trials and are willing to sit through a presentation. The best time, ideally, would be before litigation costs mount. However, reality is that

cases resolve much closer to trial and hence the timing of mediation usually coincides with the impending trial. Preparing for the mediation with a DVD presentation can be an excellent trial preparation effort if done properly. Additionally, depending on the content of the production, parts of the production can be used for trial depending on the jurisdiction.

PREPARING THE CASE FOR DVD

DEPOSITIONS

Preparation starts at the beginning. If you are planning on creating a DVD, or even thinking you might, you must capture moments in video (preferably digitally). As you plan discovery, plan to have depositions videotaped.

- Do not be afraid to videotape defense experts or witnesses. It is amazing what you will memorialize on tape to watch later and use to make your case.
- Be sure to video your own experts since they will be very effective in explaining your client's injury or the defendant's liability.
- Videotape your witnesses, including before and after witnesses.
- And finally, videotape officers, paramedics and other officials and be sure to have them attend in uniform.

The cost of videotaping a one-hour deposition varies but often is around \$250. This is in addition to the court reporter, and any expert fees. But the effort is only one part of a bigger end. Consider that many videographers' charges include the setting up and bringing digital equipment to the deposition. Three considerations:

- Have the videographers arrive early enough to set up, especially when you are taking a defense expert's deposition and paying a fee;
- Try to schedule multiple depositions at one set up;
- Always hold any demonstrative evidence up for the camera to see;
- And be sure to use a digital video camera.

Since you will be on video, be sure to specifically prepare the questions and plan the sequencing of information you wish to elicit. Court reporting technology like *Livenote* allows for the immediate flagging of portions of a deposition and can be useful to bookmark “golden nuggets” that come out during the deposition. Do not let defense counsel rattle you; maintain your composure. This is your show, literally.

In many jurisdictions, and under the Federal Rules, videotaping depositions is a matter of right. Check local rules to see if you are required to give notice to opposing party (see FRCP 30).¹

EXPERTS

Opposing experts do not like to be videotaped. It is easier to push a deception in a transcript than it is on video. No doubt the expert will have moments, many of them, when she looks impenetrable. But that is how they will look at trial. You can capitalize on the moments of vulnerability. Remember the whole videotape will not be used in the final product, just golden nuggets from it.

The defense expert has probably written a report that, if believed, requires that most of what plaintiff's experts have said be completely wrong. A video deposition will help to reveal the error in that thinking. Using the simple approaches that work look great on video. Getting the expert to admit she has not reviewed or been provided with a complete file or specific information is powerful. Typically the expert will attempt to dismiss the unreviewed information as unimportant and those attempts look better on video than on paper.

You should videotape your own expert. Insurance adjusters are typically told about plaintiff's experts in letters from defense counsel. Now they can see them on the big screen. Let the adjuster assess the impact of the expert. Sending the videotape to defense counsel with a second copy and a letter directing that it be sent to the insurance company sends a message. The cost of the extra videotape is nominal. Sending it says “here, look at my case for yourself.”

Another reason to videotape your own expert is to tempt the defense lawyer to drone on with annoying questions. If, at trial, the defense attempts to

use the deposition to discredit plaintiff's expert, taking the opportunity to let the jury view the entire deposition, regardless of length, and hearing the droning defense lawyer is almost comical. The video deposition of plaintiff's expert will also give video to the presentation of plaintiff's case in the DVD. This is a vast improvement over using voiceovers while showing a deposition transcript or report.

WITNESSES

Do not be afraid to videotape defense or eye witnesses. Again the golden nugget you may miss is worth more than the cost of video. Witnesses for the defense are not professional witnesses, like experts, and can reveal facial expressions and tonal qualities that do not make it into the written transcript. These are hugely powerful for the final compilation.

Witnesses are not familiar with being asked questions under oath, let alone, while being videotaped. Capitalize on their vulnerability. The truth comes out nicely when a witness is honest, deceit doesn't.

OFFICIALS

Having a uniformed police officer videotaped is huge. In cases where there are multiple officers, each one appearing in the final compilation will lend a great deal of impact to the viewer. Police officers tend to be very rigid on videotape but that plays out perfectly for our purposes. Let their stoic, skeptical personality radiate. This, in turn, can come across to a viewer like a very independent opinion. Do not miss the opportunity.

Similarly, paramedics should be deposed in uniform. This lends credibility to the level of their knowledge and experience in such matters and builds confidence in what they say.

MORE IS MORE

Never think that you have too much video or that you have videotaped enough witnesses. Again, when the camera is not on and a golden nugget moment occurs, you will know it. You'll literally feel it and you will not be happy.

You may have a lot of material when you begin compiling the presentation according to your case theme as it has developed, but, as they say, you can always cut more hair off, but you can't glue it back on. So have more than enough. Know that you will not use the vast majority of what you have. And know that a lot of work must go into edit and finding the many golden nuggets you found along the way.

BE CREATIVE

Video depositions are essential to the final product. But do not stop there. What else is there? Admissible at trial or not, can it help explain damages or liability, or, dare we mention, sympathy? Crash photos, coroner reports and photos, pre-injury awards, medical records and reports are some ideas. The use of B-roll: the hospital entrance, the wreck, the path of travel, anything that makes the message more compelling. The producer should be able to conduct additional interviews of people not deposed, or overlooked by the defense, and capture powerful Day-In-The-Life video, among other things.



Of course the lawyer should assist the producer as will be discussed below.

THE RIGHT PRODUCER TO BRING THE STORY TOGETHER

Obviously, it is critical that you team up with a video writer/producer who not only understands all the subtleties of video production, but also has vast knowledge and experience working with the unique needs of plaintiff attorneys.



Avoid trying to bring in your usual deposition videographer as she may not have experience beyond videotaping a deposition. Likewise, do not hire the crew who videotaped your last run of TV commercials. They may be able to craft flashy tidbits, but they don't know any of the mechanics of a plaintiff case.

Ask your colleagues who they like to use. When you find a video producer, ask to see examples of her work. Does the video communicate the story, and is the quality that with which you are comfortable? Remember, the editing and pacing of the final product should be comparable to what you would see on prime time television, but this time with a legal motif.

LAYERING THE ELEMENTS

The process of compiling the various elements you have collected into a polished presentation is a time consuming one. You didn't gather the materials overnight, and your producer will not be able to sort through them overnight.

The producer will begin by determining the needs of the audience, in this case the adjuster. What does the adjuster need to know in order to make an informed decision to resolve the case?

First, obviously, the liability must be communicated. The producer will bring all the disparate elements of your case together into a brief, easy to watch overview. Only the most compelling parts – the golden nuggets - of your documents, your experts, and the depositions you've so carefully thought to videotape will come into perfect alignment to explain why the defendant is responsible for causing your TBI case.

If the liability is relatively uncontested, be brief and move on to the damages. The adjuster needs to have a clear understanding of how you will present your case at trial: who the witnesses will be, how they come across, their testimony, and, if appropriate, the Day-In-The-Life (DITL) footage you will show the jury. On a moderate to severe TBI case, the DITL excerpts show your client in physical, occupational, and speech therapy. We see the morning routine, and why your client is likely to need care, perhaps 24-hours per day, for the remainder of his life. In a mild TBI case, we see everyday examples of problems your client has with balance, taste, smell, sight, short-term memory, personality, and the myriad of other symptoms with which he will be burdened permanently.

The final video will be a layering of information that serves as a microcosm of your trial presentation. Consider this:

- A) The video will begin with a tapestry of deposition excerpts and written reports which convincingly explain the defendant's role in the case;
- B) We continue with excerpts from the treating neuropsychologist's deposition or video statement explaining the severity and permanence of the TBI;
- C) Next, at the root level, we watch the DITL presentation you will show to the jury;
- D) While the adjuster is watching the DITL, he hears statements from family and friends we have weaved in about how the TBI has changed the plaintiff's life;
- E) After the DITL video, the family and friends clearly and concisely describe the plaintiff's pre-morbid condition – his activities, family life, breadwinner status, etc.;
- F) Snapshots and home videos then illustrate these points to further show the plaintiff's quality of life prior to the TBI, narrated in the words of those who know him best;
- G) Finally, the plaintiff's grim future, and how his life is not going to improve.

The producer will need to know if you will be showing the finished video on a standard TV monitor or a widescreen 16x9 display so that the video can be edited with the proper aspect ratio.

Keep in mind that professional DVD authoring allows for creative flexibility in additional soundtracks, subtitles, chapter points, and so forth.

You will need to decide if you will send the video to the adjuster two to four weeks in advance, or use it as part of your presentation at ADR. There are pros and cons to each. Arguably, forcing an adjuster or lawyer to watch the DVD with a mediator and in your presence is a successful approach. You may want to start negotiations before the viewing to get a feel for the opposition's valuation. Or, you may choose to view the DVD prior to negotiations to visually substantiate your client's offer to compromise.

If you decide to show it at mediation, you need to consider what equipment you will use for playback. Be certain you have tested the DVD in the player, and have successfully played it from beginning to end prior to the mediation.

CONCLUSION

DVD is the current technology that is stable and reliable. It is an excellent format for making the defense visually understand your case. The objective is not to bring the adjuster or defense lawyer to tears but to make them understand that the jury will be brought to tears. Finally, the extensive preparation during discovery will aid your theme and development of evidence for trial.

¹ FRCP 30(b)(2-3)...

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

Tim Titolo is a neurolawyer in Las Vegas, Nevada. *He represents people with mild, moderate and severe brain injury, spinal injury, other serious injury, and death cases.* **Titolo Law Office 10100 W. CHARLESTON BLVD. STE. 100 LAS VEGAS, NEVADA 89135 PHONE 702.869.5100 FAX 702.869.5111**
URL www.titololawoffice.com. email tim@titololawoffice.com.

Dave Fulton is Founder and President of Image Resources, Inc., a nationally recognized, full service video production company based outside Indianapolis, Indiana, which has specialized in producing settlement documentaries since 1994 -- www.i-r.com.