

PRESENTATION OF VIDEO EVIDENCE, GETTING IT IN

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PUBLICATIONS & TALKS

“Nuts & Bolts: Drafting Premarital Agreements”, Co-Presenter with Philip J. Monahan, Esq. MCLE for Beverly Hills Bar Association, April 19, 2017

“[Who Will Pay?](#)”, Co-Authored with Brian I. Friedman, Esq. for the October 2018 issue of Los Angeles Lawyer Magazine [Article discusses tort obligations in dissolution actions]

“[The Mistake in IRMO Binette: The New Grounds to Set Aside a Family Law Judgment Based on a Failure to Fulfill Financial Disclosure Requirements](#)”, Authored for the California Lawyers Association Family Law News (Vol. 41, No. 2) (July 2019) [Article discusses financial disclosure requirements and bases for setting aside family law judgments]

“[The Complete Prenuptial Agreement – 2020 Edition](#)”, Co-Presenter with Fahri Takesh Hallin, Esq. MCLE for the California Lawyers Association, April 30, 2020

“[Ethical Attorney Advertising: Rules for Third-Party Websites](#)”, Authored for California Young Lawyers Association (May 2020)

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QUESTIONS YOU GOTTA ASK

1. Is this relevant and admissible?

[Answer: *See* Evidence Code]

2. Can it be authenticated?

[Answer: *See* Evidence Code]

3. What do I have to do before the Trial?

[Answer: *See* Code of Civil Procedure and Rules of Court]

4. How do I prepare for presentation?

[Answer: *See* Code of Civil Procedure and Rules of Court]

5. How do I actually show it?

[Answer: Consult local rules, Court website, Court Clerk, and vendors]

6. When do I show it?

[Answer: Not just a question of strategy]

THRESHOLD ISSUE – RELEVANCE

- Only relevant evidence is admissible. (Evid. Code, § 350.)
- To be "relevant," evidence must have atendency to prove or disprove any disputed fact, including credibility. (Evid. Code, § 210.)
- All relevant evidence is admissible, except as provided by statute. (Evid. Code, § 351.)

AUTHENTICATION

- To "authenticate" evidence, you must introduce sufficient evidence to sustain a finding that the writing is what you say it is. (Evid. Code, § 1400 (a).)

- You need not prove the genuineness of the evidence, but to authenticate it, you must have a witness lay basic foundations for it. In most cases you do this by showing the writing to the witness and asking, "what is this?" and "how do you know that?" It is important to note that the originator of the document is not required to testify.

(Evid. Code, § 1411.)

- The proponent should present evidence of as many of the grounds below as possible. However, no one basis is required. Additionally, authentication does not involve the truth of the document's content, rather only whether the document is what it is claimed to be.

(City of Vista v. Sutro & Co. (1997) 52 Cal.App.4th 401, 411-412; 2 | Introducing Digital Evidence in California State Courts)



PART 1 – CIVIL MATTERS

Authority – Civil Proceedings –

- Rule 2.1040. Electronic recordings presented or offered into evidence



VIDEO EVIDENCE FROM DEPOSITION

SUBMITTING TO THE COURT

Rule 2.1040. Electronic recordings presented or offered into evidence

(b) Other electronic recordings

- (1) Except as provided in (2) and (3), before a party may present or offer into evidence any electronic sound or sound-and-video recording not covered under (a), **the party must provide to the court and to opposing parties a transcript of the electronic recording and provide opposing parties with a duplicate of the electronic recording, as defined in Evidence Code section 260.** The transcript may be prepared by the party presenting or offering the recording into evidence; a certified transcript is not required.
- (2) For good cause, the trial judge may permit the party to provide the transcript or the duplicate recording at the time the presentation of evidence closes or within five days after the recording is presented or offered into evidence, whichever is later.
- (3) No transcript is required to be provided under (1):
 - (A) In proceedings that are uncontested or in which the responding party does not appear, unless otherwise ordered by the trial judge;
 - (B) If the parties stipulate in writing or on the record that the sound portion of a sound-and-video recording does not contain any words that are relevant to the issues in the case; or
 - (C) If, for good cause, the trial judge orders that a transcript is not required.

NOTICING THE DEPOSITION

CCP § 2025.010 – Authority for Oral Deposition

CCP § 2025.220 - Requirements of Notice re Deposition

Notice re Intent to Video Record the Deposition

“Any intention by the party noticing the deposition to record the testimony by audio or video technology, in addition to recording the testimony by the stenographic method as required by Section 2025.330 and any intention to record the testimony by stenographic method through the instant visual display of the testimony.”

Notice re Intent to Use Video Evidence at Trial

[SPECIAL PROVISION FOR EXPERTS]

“Any intention to reserve the right to use at trial a video recording of the deposition testimony of a treating or consulting physician or of an expert witness under subdivision (d) of Section 2025.620. In this event, the operator of the video camera shall be a person who is authorized to administer an oath, and shall not be financially interested in the action or be a relative or employee of any attorney of any of the parties.”



NOTICING A REMOTE DEPOSITION

See

- **CRC Rule 3.1010. Oral depositions by telephone, videoconference, or other remote electronic means**
- **CCP § 2025.310**
- **Emergency Rules of Court during COVID**

VIDEO DEPOSITIONS OF DOCTOR OR EXPERT WITNESS AT TRIAL

3 NOTICE REQUIREMENTS BEFORE TRIAL

- 1. Inform opposing counsel that you plan to video tape the depo in the notice**
(CCP 2025.220)
- 2. Inform opposing counsel that you plan on using the video recording at trial, also in the notice**
(CCP 2025.620)
- 3. Send a notice of intent to introduce videotaped testimony to opposing counsel before trial**
(CCP 2025.340(m))

BENEFITS?



- **Doctors are busy**
 - hard to coordinate their schedule w/ trial schedule
- Treating doctor more receptive if he/she knows they only
 - have to testify once
- **Save time and \$\$. Testimony from doctors is very costly**

VIDEO CLIPS ARE NOT JUST FOR IMPEACHMENT

- *See CCP 2025.620 (a) &(b)*
 - (a) Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for **any other purpose** permitted by the Evidence Code.
 - (b) An adverse party may use for **any purpose**, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under Section 2025.230 of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

Cal Code Civ Proc §2025.620

At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under [Section 2025.410](#), so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:

(a) Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code.

(b) An adverse party may use for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under [Section 2025.230](#) of a party. It is not ground for objection to the use of a deposition of a party under this subdivision by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

(c) Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following:

(1) The deponent resides more than 150 miles from the place of the trial or other hearing.

(2) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is any of the following:

(A) Exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant.

(B) Disqualified from testifying.

(C) Dead or unable to attend or testify because of existing physical or mental illness or infirmity.

(D) Absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process.

(E) Absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process.

(3) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

(d) Any party may use a video recording of the deposition testimony of a treating or consulting physician or of any expert witness even though the deponent is available to testify if the deposition notice under [Section 2025.220](#) reserved the right to use the deposition at trial, and if that party has complied with subdivision (m) of [Section 2025.340](#).

QUESTION: Can I present Video Evidence at Trial?

ANSWER: See CCP §2025.620

(e) Subject to the requirements of this chapter, a party may offer in evidence all or any part of a deposition, and if the party introduces only part of the deposition, any other party may introduce any other parts that are relevant to the parts introduced.

(f) Substitution of parties does not affect the right to use depositions previously taken.

(g) When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code.

← [Special Provision re Experts!]

SPECIAL RULE RE PRESENTATION OF VIDEO RECORDING OF DEPOSITION AT TRIAL

California Code of Civil Procedure 2025.340(m)

(m) A party intending to offer an audio or video recording of a deposition in evidence under Section 2025.620 shall notify the court and all parties in writing of that intent and of the parts of the deposition to be offered.

That notice shall be given within *sufficient* time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording.

Objections to all or part of the deposition shall be made in writing. The court may permit further designations of testimony and objections as justice may require.

With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version of the deposition recording be prepared for use at the trial or hearing.

The original audio or video record of the deposition shall be preserved unaltered. If no stenographic record of the deposition testimony has previously been made, the party offering an audio or video recording of that testimony under Section 2025.620 shall accompany that offer with a stenographic transcript prepared from that recording.



SUBMITTING TO THE COURT (DEPOS)

Rule 2.1040. Electronic recordings presented or offered into evidence

(a) Electronic recordings of deposition or other prior testimony

- (1) Before a party may present or offer into evidence an electronic sound or sound-and-video recording of deposition or other prior testimony, the party must lodge a transcript of the deposition or prior testimony with the court. At the time the recording is played, the party must identify on the record the page and line numbers where the testimony presented or offered appears in the transcript.
- (2) Except as provided in (3), at the time the presentation of evidence closes or within five days after the recording in (1) is presented or offered into evidence, whichever is later, the party presenting or offering the recording into evidence must serve and file a copy of the transcript cover showing the witness name and a copy of the pages of the transcript where the testimony presented or offered appears. The transcript pages must be marked to identify the testimony that was presented or offered into evidence.
- (3) If the court reporter takes down the content of all portions of the recording in (1) that were presented or offered into evidence, the party offering or presenting the recording is not required to provide a transcript of that recording under (2).

PRACTICE TIPS

- Know your Judge and your courtroom
- Know the value of the video evidence and plan accordingly
 - there will be downtime before and after you put on the evidence, it will be a cliff hanger
 - Be careful if you are getting “fancy”, this is highly procedural
- Transcripts are well organized as Exhibit #_b and situated within your trial binder under the predesignated tab for the video evidence
- Be prepared to argue
- Impeachment Gamble?
- Have a backup plan
 - Extra flash drive, Remote connectivity, Batteries, Charge Laptop
 - Hire a vendor, but do not rely 100% on them



PART 2 – CRIMINAL MATTERS

QUESTIONS YOU NEED TO ASK

1. Is this relevant and admissible?

[Answer: *See Evidence Code*]

2. Can it be authenticated?

[Answer: *See Evidence Code*]

3. Is this subject to the hearsay rule?

[Answer: *See Evidence Code*]

4. What do I have to do before the Trial?

[Answer: *See Code of Civil Procedure and Rules of Court*]

5. How do I prepare for presentation?

[Answer: *See Code of Civil Procedure and Rules of Court*]

6. How do I actually show it?

[Answer: Consult local rules, Court website, Court Clerk, and vendors]

Authority – Criminal Proceedings –

- Rule 2.1040(b). Electronic recordings presented or offered into evidence (not in civil trials)
- (1)... the party must provide to the court and to opposing parties a transcript of the electronic recording and provide opposing parties with a duplicate of the electronic recording, as defined in Evidence Code section 260.
- (2) For good cause, the trial judge may permit the party to provide the transcript or the duplicate recording at the time the presentation of evidence closes or within five days after the recording is presented or offered into evidence, whichever is later.

THRESHOLD ISSUE – RELEVANCE

- Only relevant evidence is admissible. (Evid. Code, § 350.)
- To be "relevant," evidence must have a tendency to prove or disprove any disputed fact, including credibility. (Evid. Code, § 210.)
- All relevant evidence is admissible, except as provided by statute. (Evid. Code, § 351.)

THRESHOLD ISSUE – PREJUDICE

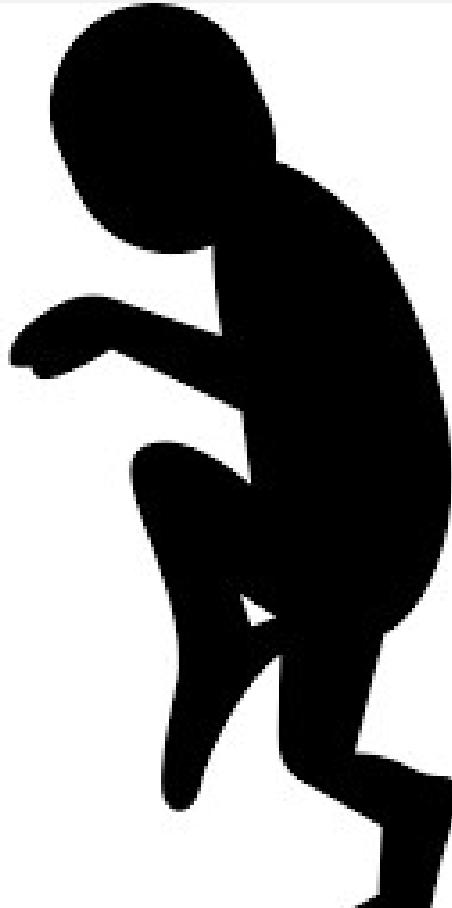
The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Evid. Code § 352

GETTING PAST HEARSAY

- (a) “Hearsay evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
- (b) Except as provided by law, hearsay evidence is inadmissible.
- (c) This section shall be known and may be cited as the hearsay rule.

Evid. Code § 1200



GETTING PAST HEARSAY

Relevant Exceptions

1. Confessions and Admissions (Evid. Code §1220-1228.1)
2. Declarations Against Interest (Evid. Code §1230)
3. Sworn Statements Regarding Gang-Related Crimes (Evid. Code §1231-1231.4)
4. Prior Witness Statements (Evid. Code §1235-1238)
5. Spontaneous, Contemporaneous and Dying Declarations (Evid. Code §1240-1242)
6. Statements of Present Physical or Mental State (Evid. Code §1250-1253)
7. Former Testimony (Evid. Code §1290-1294)

WHAT DO DO BEFORE TRIAL

- 1. Disclosure
- 2. Provide a Transcript
- 3. Provide evidence book
- 4. Prepare your evidence list



WHAT DO DO BEFORE TRIAL

1. Disclosure

The names and addresses of persons, *other than the defendant*, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

and...

Any real evidence which the defendant intends to offer in evidence at the trial.

Penal Code § 1054.3, et seq.

WHAT TO DO BEFORE TRIAL

2. Provide a Transcript

Revisiting Rule 2.1040(b):

- Rule 2.1040(b). Electronic recordings presented or offered into evidence (not in civil trials)
- (1)... the party must provide to the court and to opposing parties a transcript of the electronic recording and provide opposing parties with a duplicate of the electronic recording, as defined in Evidence Code section 260.
- (2) For good cause, the trial judge may permit the party to provide the transcript or the duplicate recording at the time the presentation of evidence closes or within five days after the recording is presented or offered into evidence, whichever is later

WHAT TO DO BEFORE TRIAL

2. Provide a Transcript

MAKE SURE YOU PROVIDE A TRANSCRIPT TO YOUR

JUDGE PRIOR TO TRIAL!

- Your transcript is YOUR representation of the audio, if any,

in the video.

- Your transcript will be given to the jury to use in

deliberation along with any transcript provided by opposing

counsel. Make sure the document is legible, easy to follow,

and free from errors!

WHAT IF YOU FAIL TO PROVIDE A TRANSCRIPT?



WHAT DO DO BEFORE TRIAL



3. Prepare and provide your evidence book to opposing counsel and to the court.

- Prior to Trial make sure you leave a reserved space in your Evidence Book for the video evidence.**
- Provide a copy to the Prosecution and to the Court well in advance of trial.**

PREPARING FOR PRESENTATION

- Can I Overcome Prejudice and Relevancy Challenges (“402” Challenges)?
- Can the Video Evidence Be Authenticated by a witness?
- Is My Witness Prepared to Authenticate the Video Evidence?
- Have I fulfilled Pre-trial Disclosure Obligations to Opposing Counsel Prior to Trial?

OVERCOMING PRETRIAL CHALLENGES TO EVIDENCE

If your evidence is particularly helpful to your case, expect to defend it against evidentiary challenges as to its relevance, prejudice, or hearsay prior to trial.

Unlike motions in limine filed in California Civil Court, pretrial evidentiary challenges (“402s”) are often brought orally. However, despite the informality of criminal courts, it is good practice to brief particularly complex issues beforehand and to oppose a written challenge in kind.

Pro Tip: Expect to field one or more of these challenges from the prosecution, particularly if your transcripts of any proposed video evidence differ from the transcript produced by the prosecution. “402” challenges may not be limited to your video evidence, but any evidence you intend on producing.

OVERCOMING PRETRIAL CHALLENGES TO EVIDENCE

- “The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.”

Evid. Code §402(b)

AUTHENTICATION OF THE VIDEO

How do you propose to get your video into evidence?

- Who will testify to the authenticity of the video?

- Can that person authenticate the video?



AUTHENTICATION

To "authenticate" evidence, you must introduce sufficient evidence to sustain a finding that the writing is what you say it is. (Evid. Code, § 1400 (a).) You need not prove the genuineness of the evidence, but to authenticate it, you must have a witness lay basic foundations for it. In most cases you do this by showing the writing to the witness and asking, "what is this?" and "how do you know that?" It is important to note that the originator of the document is not required to testify. (Evid. Code, § 1411.)

The proponent should present evidence of as many of the grounds below as possible. However, no one basis is required. Additionally, authentication does not involve the truth of the document's content, rather only whether the document is what it is claimed to be.
(*City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 411-412; 2 | Introducing Digital Evidence in California State Courts)

AUTHENTICATION

If you intend to introduce the evidence via a friendly witness (or client) *prepare* your witness.

If you plan on introducing your evidence through a friendly witness, ensure that the witness is can discuss the evidence for the purpose of admissibility. As your ability to lead on direct is limited, review the evidence with that witness and discuss how you intend to enter the evidence. You may also want to review any relevant lines of questioning with that witness to avoid mistakes.

An unprepared friendly witness or client who fails to authenticate a crucial piece of evidence can destroy a defense, preclude an argument, and may compromise the credibility of both the witness and the attorney.

For an unfriendly or adversarial witness, ensure you have a contingency if the video cannot be authenticated. Contingencies can include finding (and preparing) another witness to authenticate the evidence, pursuing alternate lines of questioning, or proceeding without the evidence altogether.

PRE-TRIAL DISCLOSURE OBLIGATIONS

“The defendant and his or her attorney shall disclose to the prosecuting attorney:

... The names and addresses of persons, *other than the defendant*, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons... any reports or statements of experts made in connection with the case... the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

... Any real evidence which the defendant intends to offer in evidence at the trial.”

Penal Code §§1054.3(a)(1), (2)

PRE-TRIAL DISCLOSURE OBLIGATIONS

Disclosures must be made *at least* thirty calendar days before trial, or, if the information was obtained within that window, it must be disclosed as soon as possible:

“The disclosures... shall be made *at least 30 days prior to the trial*, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. “Good cause” is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.”

Penal Code §§1054.7

WHAT IF YOU FAIL TO DISCLOSE PRIOR TO TRIAL?



PRE-TRIAL DISCLOSURE OBLIGATIONS

Failure to disclose evidence at trial in violation of Penal Code §1054.3, et seq., may render the evidence or testimony inadmissible.

“...Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.”

Penal Code §1054.5(b)

...The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted.

Penal Code §1054.5(c)

HOW DO I ACTUALLY SHOW MY EVIDENCE?

- Set a hearing *at least* ten calendar days before the statutory deadline (0/10; 50/60).
- Each courthouse is different
- Each judge and courtroom may have different rules or technology and space limitations
- Consult individual courtroom rules and policies, if applicable
- Discuss your presentation with your judge, clerk, or judicial assistant prior to trial
- If none of the above are helpful, consult another attorney familiar with that courtroom
- Test your presentation sometime before the trial
- Be prepared for tech problems and malfunctions (bring a backup)