

APPELLATE TIP: VIDEO DEPOSITIONS

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Trial lawyers take video depositions because showing video testimony to a jury enables the jurors to view the witness's demeanor, and thus better assess the deponent's credibility. Understandably, then, during video depositions, trial lawyers are very focused on the presentation to the jury. They often ask questions and converse with the deponent as though the jury is actually watching. This is a good thing! Don't forget, though, that the transcripts of video depositions are used for summary judgment motions also. Therefore, it's important to still describe for the written record what the jury can see – i.e., what the deponent might be drawing or pointing to or gesturing. Even though the jury can see what the deponent is doing, the judge reading a summary judgment transcript along with a summary judgment motion cannot.

Here is an example:

1. Now, without writing on the exhibit, if you would show me, where you went after you got your soda. Hold it up for the camera, if you would. Thank you.
2. I walked to right there (indicating).
3. Okay. Now, if you wouldn't mind, can you draw with the red pen the route you took after you got your soda?
4. (Indicating.)
5. And then, if you would, mark an X as to where you sat.
6. (Indicating.)
7. All right. And can you hold that up for the camera, please? Thank you.
8. (Indicating.)
9. Okay.

The judge reading the summary judgment motion will have the exhibit attached to the deposition transcript, so certainly will be able to figure out where the deponent was indicating, especially if the questioner has had the deponent mark each spot clearly on the exhibit, as occurred in this case. But in terms of best practices, it makes it easier for the judge to follow along if the questioner describes what the deponent just marked (without making it too tedious for the jury). If the deponent has made a gesture or used his or her hand to show something's size, the questioner can describe what the deponent is doing quickly and easily at the time. If the deponent has marked something on an exhibit, the questioner can describe what the deponent did when the deponent is simply showing the exhibit to the jury. For example, "I see you've drawn a line from the table you circled at the bottom, or south end, of the diagram, up to the counter on the left side" or whatever.