Handling Video Evidence

Peter Halbach, Chief Hearing Officer
North Dakota Dept. of Transportation

NATIONAL ASSOCIATION OF HEARING OFFICIALS

Video evidence is not uncommon.

Videos can be used in many ways:

- Put video into a slide show
- Print still photos from it
- Identify person
- Corroborate eyewitness
- Impeach a witness
- Refresh witness memory

Some sources of video evidence:

- Security cameras in businesses, government buildings
- Traffic, toll booth, red light, & license plate cameras
- Some recordings can be triggered by gunshots
- Patrol car and body-worn cameras
- Law enforcement interviews of suspects, witnesses
- Forensic search from computers, phones, tablets
- Social media posts

But aren't my social media posts private? Wouldn't it be illegal to use that information?

- Anyone can gather information from public accounts.
- Even information on "private" or "restricted" social media accounts is admissible if the posts are relevant to the issues and found to be authentic.
- Includes anything you posted, shared, or liked.
- Never assume anything you share online (even in private messages) is fully confidential.

But aren't my social media posts private?

EEOC v. Simply Storage Management LLC,

270 FRD 430 (S.D. Ind. 2011)

Held: Privacy interests aren't violated when information in social media accounts become evidence. (Privacy was waived when information was posted that could be seen by friends—which can also be seen by friends of friends.) If privacy concerns are implicated, they can be addressed through the issuance of a protective order.

But aren't my social media posts private?

McMillan v. Hummingbird Speedway, Inc. (Pa. Dist. 2010)

"Facebook users are thus put on notice that regardless of their subjective intentions when sharing information, their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion."

When you accept the "Terms and Conditions" to go on Facebook, you're waiving your right to privacy.

Challenges of using video evidence:

- Ensuring all existing relevant video evidence is found.
- Handling requirements of all the different video formats (MP4, MOV, AVI, etc.)
- Handling the large file sizes of video evidence (often too big to email)

Challenges of using video evidence:

Transferring video from original source to use for hearing

- Cloud transfer: Dropbox, Google Drive, iCloud, etc.
- Physical transfer through discs flash drives

Challenges of using video evidence:

- Having adequate storage for video files & backup files
- Preparation of videos for evidentiary purposes
  - Redacting video for privacy (*e.g.* blurring faces)
  - Rendering: If a video is edited, it must be rendered.
  - Having audio portions transcribed for use as exhibits
  - Allocating sufficient time in discovery process for redaction, rendering, and copying videos
- Establishing evidentiary foundation for admission

Video Evidence Admissibility

Did you know that Windows 11 has a built-in video editor…and there are video tutorials on how to use it.

Video Evidence Admissibility

- Video quality must be apparent so contents are indisputable
- If the video is scratch, blurry, or omissions are apparent:
  - This hints at tempering or intentionally omitted information; both can render the video inadmissible
  - Poor quality of video can indicate improper preservation—improper care of memory cards or other storage devices which could alter the value of the evidence.

Video Evidence Admissibility

- No hard and fast rule regarding admissibility of video evidence in administrative hearings in most jurisdictions.
- Admissibility must be determined on case-by-case basis.
- Interruptions in the video or sound, in and of itself, doesn't call for exclusion.
- Exclusion is not *required* when some parts are out of focus or inaudible.
- Must determine, if video is imperfect, whether truth would be better served by admitting or excluding.

Video Evidence Admissibility

- No alteration of or tampering with video, especially no apparent changes or deletions:
- No reasonable possibility for deletion or alteration based on:
    - Recording device or means or recording;
    - Where the device or video were stored prior to the hearing; and
    - Whether anyone could have gained access to it to tamper with or alter it?

Video Evidence Admissibility

- Video must be authenticated by the person offering it or the offering party may call a witness to testify to:
  - Is the video in its original state?
  - Has it been altered or enhanced? If so, what was done?
  - Establish chain of custody.
  - If it's old, establish proper storage and preservation.
  - Reliable time and date stamp is helpful to authenticity.
- If there's a legitimate question of tampering, an expert witness required to make that determination.

Video Evidence Admissibility

- Video must be relevant!
- Video must tend to make the existence of a fact of consequence to the determination of the action either more or less probable than it would be without the video.

Video Evidence Admissibility

- Video must be reliable!
- Video must be the type of evidence that a reasonable person would rely upon in the conduct of their serious affairs.

Video Evidence & Language Interpretation

Using videos in which persons are speaking audibly in a language other than English as evidence:

- Do not ask or expect an onsite interpreter to interpret a Non-English recording site-unseen in the hearing.
- Explain to participants why interpreting is inappropriate.
- Party offering the evidence should report the video's existence and intent to offer it as evidence and have it transcribed and translated by a certified interpreter and court reporter prior to the hearing.

Your Analysis of Video Evidence

- Have you ever watched a movie you've seen several times and noticed something you hadn't noticed in previous viewings?

- Have you ever watched a movie and had a different reaction to it or perceived a different meaning from it than someone else who had watched it with you?

Your Analysis of Video Evidence

- Witnesses who see the same event often offer differing testimony of the event, depending on their interest in the outcome or their implicit biases.

- Our video analysis involves our personal interpretation of what we see and may be affected by testimony and evidence offered prior to the video, by our implicit biases (such as Confirmation Bias), and based on our culture.

Your Analysis of Video Evidence

- Particularly when context is missing, or when the video involves a process with which was have limited familiarity, the narration of the video by a witness who has no interest in the outcome of the hearing can be helpful.

- Beware of the attempts of person who do have an interest in the outcome of the hearing to reframe the video in a way that favors the outcome they desire.

- Consider **all** the evidence in the record in deciding the case.

Helpful Tools

- You may find the Checklist for Self-Represented Litigants Who Wish to Offer Video Evidence (in the supplemental PDF document) useful.

- You may find the Glossary of Terms (in the supplemental PDF document) useful.

Questions?