

Lights, Camera, Mediation!

Creating a Video Settlement Documentary That Gets Results

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Adapted from an NJA Litigator Lunch presentation

Tell me a story.

That was the mantra of television giant Don Hewitt. If you don't know the name, you know his work. Hewitt created and produced CBS News' *60 Minutes* for four decades. He credits those four words — “tell me a story” — with the show's unprecedented success. Hewitt passed away this summer, but his legacy lives on in the show he created and dozens of successful television newsmagazines since.

Hewitt's legacy also lives on in the legal world in the form of the settlement documentary. Settlement documentaries, sometimes called video settlement brochures, aren't new. But they are gaining in popularity. Just as attorneys are embracing presentation technology inside courtrooms, more attorneys are taking advantage of presentation technology— including video— for settlement and mediation. Over the past two decades, the settlement documentary has been honed by plaintiff's attorneys working with production companies into an indispensable tool for pre-trial negotiation.

Today's technology makes video production easier than ever. It's now within the reach of nearly every attorney, even possible on most home computers. But without storytelling, video production and television become— in the words of another TV giant, Edward R. Murrow— “merely wires and lights in a box.”

If you haven't seen a settlement documentary, imagine a *60 Minutes* feature about your case complete with a reporter's narration and interviews with key witnesses and experts. It is your trial story in newsmagazine format, produced to educate your mediator, impress defense counsel and motivate your insurance carrier.

Anatomy of a documentary

A settlement documentary is much different than a day-in-the-life video. Settlement documentaries are created specifically for mediation and are therefore not bound by the rules of evidence. Nevada Revised Statute (NRS) 48.109 provides that the proceedings of a mediation are typically regarded as settlement negotiations, and so “no admission, representation or statement made during the session, not otherwise discoverable or obtainable, is admissible as evidence or subject to discovery.” Mediation Rule 11(A) provides as follows:

(A) Each party involved in a mediation proceeding pursuant to these rules has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during the proceeding. All oral or written communications in a mediation proceeding, other than an executed settlement agreement, shall be confidential and inadmissible as evidence in any subsequent legal proceeding, unless all parties agree otherwise.

Further, many mediators require that all participants sign a confidentiality agreement before the proceedings can begin. Regardless, court and statutory rules cloak the entire process in confidence. Assuming counsel does not wish to make some or all of the video otherwise admissible, counsel should be careful to produce settlement documentaries within the context of the mediation process.

At Pasadena, California-based Juris Productions, the company begins every interview with, "You understand we are talking for mediation purposes about the [Doe] case..." Every videotape shot is labeled "for mediation purposes." The script is labeled "for mediation purposes." And the final DVD product is clearly labeled "for mediation purposes."

Documentary vs. Day-in-the-life Video

Day-in-the-life videos, on the other hand, are generally created for trial and are subject to evidence rules. A typical day-in-the-life video is a faithfully-documented videotaping of a plaintiff's daily activities edited to a manageable length for presentation to a jury. Judges will generally not allow interviews, music, or narration in a day-in-the-life video. A settlement documentary, however, is limited only by the creativity of the attorney and production company. There is no magic formula for a settlement documentary. For most cases, 15 to 30 minutes is a good length. An extremely complicated liability case may run as long as an hour. Beware of video companies that charge by the running time of the completed piece. This has the potential to create a conflict of interest for a video company that wants to create a longer, more profitable piece and an attorney who wants a concise, impactful documentary. In general, experience dictates that it is much more difficult to produce a shorter, impactful presentation than a long diluted one.

There are two schools of thought on the best way to present a settlement documentary. Some attorneys prefer to play their documentary at mediation. But lately, more attorneys seem to be opting to send the documentary to the opposing side about two weeks in advance of the mediation. This assures the proper signing authority will be present and sets up a more productive mediation. The information contained within the documentary can be considered, analyzed and assigned a monetary value ahead of time, since so often producing new information the day of mediation will prove ineffective. The attending adjuster's authority may not allow on-the-fly readjustment. The plaintiff's attorney now has a means of communicating directly with the decision makers without the filter of the lower-level representative at mediation.

Types of cases

Nearly any type of case can benefit from a well-produced video presentation. But certain cases are more suited to a settlement documentary. In general, cases that warrant a settlement documentary are higher-damages cases of \$500,000 and above. Producing a documentary is either an extremely labor intensive process for a law firm or an expensive project to outsource to a video production company. Because television is inherently a visual medium, visual cases are best suited to the settlement documentary. Cases with severe, visible personal injuries tend to make outstanding subjects. Wrongful death cases and product defect cases also lend themselves well to the visual medium. But with a little creativity, nearly any case from sexual harassment to intellectual property disputes can become a powerful documentary.

Settlement Documentary Case Study

Alpert P. entered the Emergency Room of a Las Vegas Hospital with difficulty walking and numbness to his right side. Al was a sixty-plus year-old family man who had conquered adversity and achieved greatness. Losing his left arm to cancer as a high-school student, Al went to college, became a teacher, then a principal, and eventually achieved notoriety for effecting significant, life-changing results for the students in the Anaheim and La Habra California school districts. Al eventually had a library named after him. He did more with his right arm than most people did with two. That was an important theme of the case, and of the documentary.

A hospital medical student, under the supposed guidance and direction of a staff physician, performed a cursory exam and work up. The physician reviewed the chart and diagnosed Al with hyperventilation. Al was shown how to breathe in a bag to lower his respiration. No tests were performed. No medication was administered. The physician in charge discharged Al from the hospital. On the way home, Al suffered a massive stroke, leaving him with no use of his right arm. His only arm.

The video settlement documentary produced for Al's case told the story of his remarkable life of giving and what had been unfairly taken away from him. This line of narration from the documentary demonstrates how the central theme was conveyed:

For the man who helped so many others, help would fail *him* at the moment he needed it most.

The video started with an historical introduction by exploring this man's past, from his high-school football photos to his diagnosis of cancer, from his college graduation to his marriage, children and grandchildren, and to his awards and honors. The video next provided a detailed account of the day Al suffered a stroke. The camera panned over the hospital and walked its viewers through the hours while Al sought help at the hospital. Portions of the patient's chart and hospital policies and procedures were identified and discussed. Al and his son, Tito, who drove him from the hospital, were interviewed. They spoke of what happened when Al suddenly lost feeling in his right arm and leg, and how they sped to another hospital in hope of averting disaster.

The documentary included interviews of medical providers regarding the damages from which Al would never recover, as well as the cost to maintain his needs. Family and friends provided before and after descriptions. The video showed many shots of Al trying to adjust and live his new life, but it was not a plea for sympathy; rather, the video was a means of providing the defense with a true and accurate picture of the case.

Sometimes, probably more often than not, regular old discovery (e.g., responses to interrogatories, deposition testimony, etc.) falls short. Although an attorney can put forth a trial with many of these same items, there are obvious reasons for showing your cards at a time when your client, and not the jury, maintains control. The plan worked in this case. The case settled for an amount that might not otherwise have been achievable, without unnecessary delay and litigation costs.

How it's made

A well-produced settlement presentation is similar to a well-produced news report. Both have similar objectives. The television reporter aims to make his report as compelling and easily understandable as possible. The trial attorney's goal is the same, telling a persuasive story with maximum impact. The process to produce an effective settlement documentary therefore follows the same course as television newsmagazine production: It starts and ends with the story.

The attorney first needs to identify the points he or she is trying to convey. Must the injuries and disabilities be seen to be truly appreciated? Is the argument that the injury is so devastating that your client will never work or function again? Or, is the argument that expensive rehabilitation is needed for your client to make a recovery? Is this the story of someone who has lived a perfect life and given back to the community? Or is it the story of redemption by someone who has struggled with life's demons?

Supporting materials

Your production team will want to gather materials to help support the story. Nearly anything can be included that helps advance the story. Report cards, letters, email, drawings, photographs, diplomas, home video and awards are just some of the artifacts that will help tell your plaintiff's story. Sometimes families might say they don't have photos or home video. Generally that means they need to look harder. Remind them that their relatives may have the best material of their family at holidays and gatherings.

The gathering of these items will assist the attorney in two ways. First, the finished product is only as good as the material put in. Second, counsel is obtaining potentially invaluable and necessary demonstrative evidence should the mediation prove unsuccessful. Counsel should later identify and produce these materials prior to the trial exhibit disclosure deadline.

Interviews

Next, the attorney and production team need to decide on the subjects to be interviewed. These will generally include family members, close friends and business colleagues. A life-care planner can be an excellent damages interview to discuss the injury and future needs. Economists tend to make uninspired documentary interviews. If liability is at issue, key expert witnesses may need to be interviewed to discuss their findings. An animation may be necessary to demonstrate an accident.

The next step is to conduct the interviews. The best place to interview a witness is at their home. Interviewing the witness at home puts them in a comfortable environment. Interviews at home tend to be much more heartfelt and emotional than interviews in an attorney's office. The home environment also helps to subtly put the witness in context. The background of the shot should be supportive but not distracting. Avoid sterile background sheets that make the interview look like a deposition. For experts, the best place to conduct interviews is at their office, surrounded by the tools of their trade.

If you have hired a production team, it is best not to be present during production and to let your team conduct the interviews. During these emotional interviews, the fewer people in the room, the better. Documentary interview questions are very different from deposition questions. Attorneys tend to jump into 'deposition mode' when interviewing. Closed-ended questions that begin with, "Isn't it true..." don't elicit good documentary answers. Documentary interviewers, on the other hand, ask open-ended questions designed to elicit emotional, heartfelt answers from subjects. Since the interviewer's questions will not be used in the documentary, they are not important. Only the witnesses' answers are important. Sometimes a subject needs only a gentle nudge to tell their story like, "tell me more about that." A skilled interviewer can help a subject open up to the camera in a way they couldn't on their own. Interviews for settlement documentary witnesses can last an hour or more. Usually only the best few minutes (or seconds) will be used in the final project. It's not unusual to shoot 20-hours of material for a 20-minute documentary.

After the interviews are concluded, all of the material must be reviewed. Creating transcripts of all of the interviews can be a time-consuming process but will also reap huge rewards when it's time to write the piece. The settlement documentary script will alternate between the "reporter's" narration and sound bites from witnesses. The producer starts with a paper script including all narration and sound bites as well as the video to be shown on the screen.

There is a caveat. Although mediation proceedings are confidential, as are generally the settlement documentaries, these witness interviews may arm the defense with information that may not be 100% helpful to your case. An example would be a rehabilitation specialist who comes across as a great damages' witness, but who provides a medical history that is contradictory from another medical witness or, worse yet, your client. Another example would be a physician in a multiple fracture, brain injury case who speaks eloquently of serious orthopedic damages while mentioning how fortunate your client was to have avoided a head

injury. The attorney will have to work closely with the documentary producer to steer clear of contradictions and any other potentially damaging material.

Writing for the ear

The language of the settlement documentary is written for the ear. It is a very different style than writing for the eye. Listen to how simple the writing is in the next newsmagazine program you watch. It's conversational. News stories are never written to impress with their language. Most news copy is written at about the sixth grade reading level. A broadcast audience has one opportunity to process what they hear. They do not have the luxury of rereading copy. The language is active and declarative. The sentences are short. The words are simple. When you copy edit your documentary script, read it out loud so that you can hear how the words will sound.

Once the attorney and producer are satisfied with the paper script, the editing process begins. Even a 20-minute documentary can take a week to edit. It is a highly-detailed, time-consuming process.

Tale of the tapes

Some attorneys voice concerns about the field tapes (raw interviews) used to create a settlement documentary being discoverable. At Juris Productions, in eight years of producing settlement documentaries, they have never seen a field tape successfully subpoenaed. In California, the tapes are protected by mediation privilege. In Nevada, the same should hold true, pursuant to the state's similar strong stance on confidentiality enveloping settlement negotiations. NRS 48.109 and Mediation Rule 11, *supra*, are two examples of the explicit privilege afforded to information, oral, written or otherwise, produced within the confines of mediation.

Choosing your team

When you hire your production team, be sure to watch samples of their work. Make sure they are experienced in legal video and have produced settlement documentaries. Ask them to show you a case similar to yours. If they have extensive experience, they should have a piece in their library like your case. Be sure to interview several companies and compare their work. You will notice big differences in style. You can then pick the one best suited to your case and your style. A professional production team should be independent and not require any supervision. But the more direction you can give your team, the better the result. A beautifully produced video is worthless if it doesn't tell a story. And there's only one story that matters: yours.