

## RESOLUTION 11-08-2012

### DIGEST

#### Use of Video Recorded Depositions for Any Purpose at Trial

Amends Code of Civil Procedure section 2025.620 to allow the video recording of a deposition and the deposition transcript to be used in the same manner during trial.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Code of Civil Procedure section 2025.620 to allow the video recording of a deposition and the deposition transcript to be used in the same manner during trial. This resolution should be approved in principle because it clarifies that, in certain situations, the video recording of a deposition can be used for the same purposes at trial as the written transcript.

Presently, section 2025.620 allows a video recording of a deposition to be used at trial for any purpose only when the deposition recorded is of an expert or treating or consulting physician. Although other sections of the statute allow for the use of a deposition in certain circumstances – i.e., for impeachment or the deposition of a party for any purpose by an adverse party – the statute is unclear as to whether such use includes a video recording, or is limited to the written transcript. Given that video recordings are useful for a jury, certainly more so than someone reading from a transcript, this resolution allows that, whenever a party can use a deposition at trial for one of the purposes permitted by the statute, the party can use the video recording of the deposition or the written transcript.

It should be noted that the proponent of this resolution clarified in subdivisions (a) and (b) of the statute that the term “deposition” includes both the transcript and video recording. However, the proponent did not make the same clarification with respect to subdivision (c), which is applicable to using the deposition of a witness who resides more than 150 miles from the courthouse where the action is venued. Given that the use of video recordings of depositions, as opposed to the written transcript, may be most useful in situations where the witness will not physically be present for trial, it is unclear whether the proponent intentionally omitted this clarification from subdivision (c), or whether this was an oversight.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2025.62 to read as follows:

- 1 § 2025.620
- 2           At the trial or any other hearing in the action, any part or all of a deposition may be
- 3 used against any party who was present or represented at the taking of the deposition, or who had

4 due notice of the deposition and did not serve a valid objection under Section 2025.410, so far as  
5 admissible under the rules of evidence applied as though the deponent were then present and  
6 testifying as a witness, in accordance with the following provisions:

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

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

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

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

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

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

24 (B) Disqualified from testifying.

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

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

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

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

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

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

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

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

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of Northern San Diego County

### **STATEMENT OF REASONS**

Existing Law: The current wording of Code of Civil Procedure section 2025.620, subdivision (b), does not reference “video recording.” In contrast, Code of Civil Procedure section 2025.620, subdivision (d), refers to “video recording.”

The Problem: Parties can currently argue that the difference in wording in Code of Civil Procedure section 2025.620 subdivisions (b) and (d) reflects a legislative intent that a party may use a video recording of an expert during trial (per section 2025.620, subdivision (d)) but may not use a video recording of a party (per section 2025.620, subdivision (b)). We do not believe that this is what the legislature intended when it enacted section 2025.620. Alternatively, if this is what the legislature intended when these sections were enacted, the legislature should revisit this issue. The use of video recordings during jury trials is especially helpful to the jury, almost always more helpful than the reading of a transcript by someone other than the deponent.

This Resolution: This revision would clarify that the video recording of a party’s deposition could be used for any purpose during a proceeding, just like the written transcript of the deposition can be used for any purpose during a proceeding.

### **IMPACT STATEMENT**

This resolution does not affect any other law, statute, or rule.

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