

# Using Settlement Documentaries Videotaped Testimony May Avoid Trials

By Michael Downey

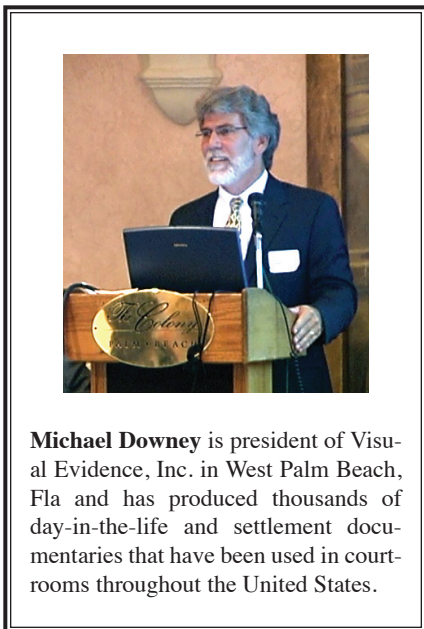
It is Monday morning at 10 am. Present on one side of the conference table are two attorneys and an insurance adjuster. Seated opposite them are two plaintiff's attorneys and a 45-year old widow. Positioned at the head of the table is a mediator discussing the purpose of this assemblage. As these attendees are probably already aware, this gathering is intended to allow each side to "tell their story" to persuade the mediator and/or arbitrator and, more important, to persuade opposing counsel. Both sides should be equally prepared to present their case in as compelling a manner as possible. However, both sides are far from equal.

In this setting, the most compelling evidence is presented by way of several mediums intended to recreate testimony and facts. These could be presented in a variety of ways. Testimonial evidence could be read from deposition transcripts and experts' reports. documentary evidence such as legal or official documents, reports, writings or business records may be read or presented to this group for consideration.

However, all of this evidence is either second-hand or presented at the discretion and with the interpretation of presenting counsel. Everyone attending this meeting is aware of this. Are these typical methods really the most effective way to present a story or case? Are the parties getting a clear depiction of the realities of this case through second-hand testimony and by viewing and discussing papers and documents?

Experience and research show that the most effective way to convey a story is through the perception of the actual figures who live the events of the story. In the legal environment described above, the people directly

involved in this situation can tell their part of the story directly to the assemblage. The widow, witnesses, and experts can present themselves directly and in the first person to the mediator and, more important, the representative of the opposing party who has the authority to offer a satisfactory and substantial settlement.



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Following this, a friend of the family whose children are longtime friends of the surviving children in this case tells, emotional, heart-wrenching stories of the decline she has seen in these children since they lost their father.

Interspersed throughout the story are photographs, home movies, newspaper articles, x-rays, excerpts from medical records and graphics emphasizing certain points and the credentials of any involved party or agency.

## Common Elements

Although the scenes described above may appear to be a story segment from a news program or magazine show, they are actually from a settlement documentary.

A settlement documentary is a presentation

on videotape designed to communicate accurately and effectively the damages and liability of an incident. This communication occurs through the use of various narrative techniques designed to present the pertinent testimonial, documentary and real evidence in a case. These elements, combined with voiceover narration where necessary, and judicious editing, result in a documentary that presents the case in a compelling and concise manner. Numerous elements can be used and the possibilities are endless depending upon each specific case or "story."

The following is a list of the most commonly used elements:

- Videotaped interviews, before and after witnesses, care providers, experts
- Preexisting testimony, depositions, videotaped or transcribed
- Archival material, personal photos, films and videotapes, achievements, awards, certificates and diplomas
- Documentary or demonstrative evidence, charts, graphs, reports and photos
- Videotaped footage of real evidence, "day in the life," sites and location, objects, products or property applicable to the story

## Advantages

This type of documentary is designed to reveal to opposing counsel an overwhelming body of high-impact evidence in order to reach settlement. If settlement is not reached before trial, opposing counsel can see the significance of the damages and liability and advise the client to authorize the necessary funds for potential award. The advantages of this type of presentation are numerous. For instance, no evidentiary standards need to be met. There are no judges present during settlement conference or mediation to rule upon evidentiary matters. Thus, attorneys have much more freedom to use their creativity. This is also a unique opportunity to talk directly to the

opposition and let them see with their own eyes the types of witnesses and evidence they will see at trial.

The witness must be interviewed in such a way as to make their testimony as credible and forceful as possible. Opposing counsel should leave the viewing hoping never to see these witnesses again, especially during trial. Effective settlement documentaries persuade opposing counsel to make substantial offers of settlement in order to avoid the risk and cost of protracted litigation and trial.

Because this is a relatively new tool for attorneys, producing and using a settlement documentary may initially be difficult. As with any service provider in the legal environment, a call to a seasoned user of that type of service is a vital step. A respected attorney who has experience in using settlement documentaries should be consulted regarding the effective production and use of these documentaries.

A recommended producer or video production company is crucial. Ask to see demonstration tapes and discuss anticipated time for project completion and budget parameters. This enables the producer to know what type of documentary the attorney wants to produce and how to approach the project. Equally important is hiring a producer with knowledge of the law and environment which this project is to apply.

An additional advantage to a good documentary is that it should require a relatively small amount of the attorney's time. During an initial and lengthy meeting with the producer, close attention should be paid to how well that producer is processing the necessary fact and information regarding the case. Good notes should be taken and, preferably, an audiocassette made of the meeting for later reference. The attorney should be prepared to explain his case in detail with the production team, and show any pertinent files or exhibits which will be available and applicable to the final piece.

### **The Script**

Development of cost parameters and a budget should take place at this time. Length of the final production and the number of witnesses to be interviewed should also be decided. Limiting the length of the video and the number of witnesses will assist the producer in focusing on the content

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of the video instead of tracking down unnecessary information. Knowing that the producer is working within certain parameters will yield a highly polished finished product. After the initial meeting, the attorney's involvement is minimal until the review of the first draft of the script. Here the attorney's input is critical for purposes of checking the presentation for fact errors, logical flow and areas that can be cut to keep a most effective final length. One of the best ways to ensure that the production will not be effective to trial to cooperate with the producer in providing necessary documentation. Outlines and scripts need to be reviewed so that ideas are organized and time is not wasted on ineffectual areas. The attorney should review these for content and organization and make sure they send the intended message.

There has been much debate about the appropriate time to use a settlement documentary. The time to present this produc-

tion could be before filing or before or at mediation. The opportunities for presentation are limited only by the attorney's strategy decision. This decision should be made, however, before beginning production because it will determine some of the techniques and content to be included in the final piece.

Settlement documentaries are stories. Thus, in order to maintain the interest of the audience, they should follow certain guidelines. The story should start with a strong damages "hook." This should be a high-impact statement that summarizes how the incident has affected the life of the client and stresses the compassion the jury will feel towards the client. Once the audience is "hooked", let individual witnesses explain in detail what the client was like fore the incident, what happened and what has occurred since that time.

Next, experts can lend their credibility to these witness statements. This is done by formulation experts' interviews to reinforce what the individual witness has testified to. From their professional standpoint, the experts can describe what happened to the subject of the piece and how the subject's life has changed. The experts can then give their opinion of what should have happened, describing how the appropriate action would have resulted in a different outcome.

Now is the time to show the devastation that has occurred to the client and his or her family. Each of these individuals can tell how this has affected them and their spouse, children and extended family members. Excerpts from interviews with spouses, children, parents, neighbors, friends, co-workers and bosses can be tied in here with this reinforced testimony.

These interview are often enhanced by footage from a "day in the life" or archival photos and video, scenes from the accident site, or shots of the product which may be involved. This presentation, followed by

a summation of the experts' statements, provides a strong conclusion to the documentary.

If proper guidelines are followed and interviews are conducted to maximize the impact of the statements while limiting their length, the result should be a documentary that is forceful and compelling. This formula will undoubtedly move opposing counsel to rethink their stance in the case.

Proper development of the right team and clear communication of the facts with the production professionals and a producer that is knowledgeable of the targeted audience will provide a documentary that will present a case in a "best-foot-forward" fashion and in a medium that is easily communicated to audiences of our time, both in and out of the legal environment. In addition to these considerations, the effectiveness of this type of documentary production depends upon the length of the completed piece, the persuasiveness of the presentation and the quality of the interviews.

Presentations should be limited to 20 to 25 minutes, preferably less. Working hard in the initial stages of production will allow for the most effective length of the final piece. If the viewers cannot find time to sit and watch the completed documentary from start to finish or the audience's attention is drawn away during viewing, it is probably too long.

Closely related to the length is the persuasiveness of the presentation. The best parts of the case should be presented with as much impact as possible. Weaknesses in the case should be recognized and their lack of impact on the case should be explained. Again, during initial production planning, these elements and their role in the action should be clearly outlined.

Finally the single component which has the most direct effect on the persuasive power of a settlement documentary is the quality of interviews. Potentially, a jury will see these videotaped witnesses. Experienced technique is needed during the interview process to make sure the witnesses' answers are complete and concise and worded in such a fashion that the interviewer's questioning need not be heard. This masks the appearance of witness coaching, and the potential impact of the testimony will not be compromised.

Qualified documentary producers should consult with the attorney regarding an outline of questions for each witness. An experienced producer will need little direction from the attorney in order to provide the most forceful interviews for the case.

The time needed to complete a settlement documentary is important. The producer should be given a deadline one to two weeks before the anticipated use. This allows ample time or a "safety zone" for changes or corrections to take place. Producing a quality settlement documentary is

a lengthy and often tedious process. An entire case must be consumed, digested and re-created in the most communicable and concise fashion.

Be aware of several factors which can knock production off schedule. Difficulty with scheduling witnesses and especially professional witnesses can turn into costly budget and time overruns. Waiting for law offices to provide necessary input, transcripts, exhibits, etc. is the second most common problem which halts the production process. The key is to start early in gathering information and providing it to the production team.

### **The Script**

Clear communication of vital information is a much needed skill for attorneys, using mediums which will easily communicate to audiences of legal professionals, lay persons and potential jurors is key to representing clients successfully in today's legal environment. Settlement documentaries provide such a medium in a most cost-effective and forceful manner.

The possibilities of these documentaries are endless. Most often used by plaintiff's counsel in medical malpractice, personal injury, wrongful death or product liability cases, successful productions are increasingly being completed in areas of commercial, corporate and real estate law, and are highly applicable to defense counsel presentation as well.

