

questions the objection. Party 2 qualifies her objection. And an argument ensues with both parties raising their voices to be heard over the other.

Back when we were first endowed with fight or flight survival, we were hunting to stay alive. This marvelous gift slammed all these wonderful hormones into our system to bypass our rational mind and to jump-start us into survival mode to escape the saber-toothed tiger. This heightened state of alert causes people to see almost everyone and everything as a possible enemy. Fear is exaggerated, thinking is distorted, and everything is seen through the filter of possible danger. Thus, behavioral manifestations arise, such as overreaction to even the most benign of comments — for example, “We are off the record.”

Taking charge of the situation is your ethical duty. Understanding what is going on between all the parties can help you avoid your own fight or flight response.

Remember, once hormones are released the rational mind goes. (Hmmm, attorney and rational? Isn't that an oxymoron?) Don't give up your rational mind! Be confident knowing that the

parties do want an accurate record; that is why they hired you. When you jump into their world of fight or flight, you have become a possible enemy because of chemicals that cause their brains to bypass judgment and go to survival. At that moment, they are not thinking from a completely rational point of view. They have to win to survive. You are engaging in split-second decisions, and you are ethically bound to “ensure the security of information” and to not back down from the situation.

By going off the record, you have thrown cold water into their faces. Once they have time to process the information, they will get back to work. It is in those few moments of stopping the current situation — possibly having them yell at you — and when they finally come up for air, that you must hold on to the knowledge of what has just happened. You cannot internalize their anger as being directed toward you, thereby causing you to go into fight or flight mode.

Knowledge is power. Knowing that we are hardwired for this reaction and understanding the effects on the body and mind should give you confidence that you are not part of the ongoing situ-

ation and can stand up for the record. The rational mind has been bypassed by those involved, and they need your help more than ever in preserving the record. You are ethically bound to preserve the record, and ethical attorneys — no matter how angry they may seem — will want the record preserved.

Next time this issue or something similar comes up — such as passing around exhibits that bypass the court reporter for immediate marking — come off the record. You must state it loud enough for all to hear. Be prepared to state your ethical obligation to “be fair and impartial to each participant, to provide comparable services, ... [and] to ensure the security of information.” When you cannot accurately report the proceedings, then you cannot be fair and impartial, and you cannot ensure the security of the information. Any attorney should understand that obligation.

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CLVS

Due Diligence

BY MICHAEL G. GAY

My first acquaintance with the term “due diligence” occurred while I was attending my first Certified Legal Video Specialist seminar in Los Angeles. One of the presenters, a charismatic speaker named Darryl Monteleone, kept alluding to “due diligence.” At the time, I did not fully grasp its significance. However, as my career in legal video progressed, it became clearer to me just how relevant the concept of due diligence is and how it plays a crucial role in the court reporting and legal video industry.

Due diligence is an abstract phrase that defines a concept. By definition, the first word “due” is used here to mean “that which is due or owed.” The second word “diligence” can be defined as “the attention and care required of a person in a given situation.” Combined, due diligence can be defined as “the degree of care or caution that is properly to be expected from, and ordinarily exercised



by, a reasonable and prudent person under the particular circumstances; not measured by any absolute standard but depends on the relative facts of the situation." In my words, due diligence is a general idea that typically specifies a concept of obligation and is intended to imply an assumed responsibility. Why is due diligence such an important concept to comprehend? In the world of modern litigation, due diligence is used as a legally relevant standard for establishing liability.

When starting out in the legal video business, most videographers do not understand the dynamics of the deposition process. Although some may have a vague idea of what a deposition is, most do not recognize its legal relevance. Depositions are one of the most important devices used in litigation and are the nucleus of pretrial discovery. Because they are a behind-the-scenes part of modern litigation, the process has a secretive aura to it. For that reason, unless one has prior experience in the legal industry or has

actually been deposed, it's hard to "get the big picture." Depositions are not public proceedings; law dictates who can attend depositions. Only participating parties in a lawsuit and those involved in the litigation process are actually entitled to attend. Court reporters, legal videographers, and deposition interpreters are typically the only other participants privileged to attend depositions. Therefore, when initially attending depositions, you may find the experience quite intimidating.

However, as you gain more experience by videotaping depositions, you will develop more technical competence and will eventually acquire more confidence in your production technique. Your efforts in both achieving technical competence and becoming a more confident videographer should include a comprehensive practice of due diligence. Adherence to the conscious practice of due diligence will, ultimately, elevate your sense of professionalism.

Understanding the relevance of depo-

sitions in the litigation process is essential to understanding why legal videographers should practice due diligence. Depositions remain the centerpiece of virtually all pretrial discovery efforts, and they are the most powerful discovery device available to litigators. The cost of taking depositions undoubtedly makes them the most *expensive* discovery technique in litigation. Depositions may, in effect, actually be a trial. Why? Because the majority of lawsuits are usually settled or dismissed as the result of evidence obtained through deposition testimony. So, from a legal videographer's standpoint, why is this relevant? Read on, and I will attempt to explain the concept of due diligence and how it applies to those in the court reporting industry.

In the legal world, due diligence is usually applied in fiduciary relationships. For example, it is commonly used in the securities industry in matters dealing with disclosure in broker and investor relationships, and it has become viewed as a standard practice associated

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with investigating the public offering of equity investments (stocks). So, due diligence is used for credibility assessments and to confirm integrity.

Due diligence can also be applied to other types of situations. The following will illustrate another interpretation of due diligence and the essence of my article. Those of us who are involved in recording or reporting depositions have probably heard the term "standard of care" mentioned frequently in medical malpractice, product liability, and other types of tort litigation. Questions pertaining to the standard of care are gener-

ally used as a predicate for establishing negligence. Proven violations of a standard of care are used in legal proceedings to prove that someone did not perform his or her job in accordance with acceptable standards and, consequently, did not perform with due diligence. In legal terms, this lack of performance can be classified as an unintentional tort. Ultimately, one can be held financially liable for not performing due diligence as it pertains to issues relating to standards of care.

Depositions are official legal proceedings; as previously mentioned, they

are very expensive to conduct. To avoid costly mistakes, videographers who videotape depositions should be thoroughly trained and should recognize that working in the legal arena is a serious matter. Furthermore, videographers should understand that there is the potential for detrimental financial ramifications for not exercising due diligence during job performance. With the prevailing litigious nature of modern-day society, the importance of due diligence *must* be recognized.

In most professions, the journey to becoming a professional involves mastering certain fundamental skills. In the legal video profession, it is absolutely essential that videographers be technically competent. Knowing the technical aspects of audiovisual field recording is paramount. Technical proficiency includes the ability to troubleshoot technical problems. A legal videographer should know how to promptly isolate technical glitches and to resolve them when they occur during the recording process. When recording a deposition, there are no second takes. *You must get it right the first time!* Possessing the knowledge to handle abrupt, unanticipated technical problems while recording a deposition is certainly a characteristic of due diligence. Technical competence, diplomacy, prudence, a keen sense of responsibility, and a constant desire to learn new technical innovations that will undoubtedly occur in the field of video are all fundamental characteristics of practicing due diligence.

The remainder of this article will focus on other factors associated with practicing due diligence, along with some of the principal ways legal videographers can cultivate their professionalism.

Video is an important resource in the legal industry. As an integral part of the litigation process, video was integrated into the discovery phase during the early 1980s. Originally, VHS analog technology was used to videotape depositions, and then it was replaced by digital video technology. Today, digital video technology is unquestionably the preferred recording format used throughout the legal industry. Digital videotaped depositions are a more complex production. The complexities of digital video have required videographers to possess a

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higher level of competence and to have a heightened level of due diligence. The responsibilities associated with being a competent legal videographer require more than the rudimentary skills of a utility videographer. Producing legal video depositions requires not only special technical skills, but also a thorough understanding of relevant state rules and *Federal Rules of Civil Procedure*. Furthermore, videographers need tactful diplomatic communication skills.

Some of those skills can be learned from others. However, certain elements can be learned only from hands-on experience, such as going out and actually videotaping depositions. Those who desire to advance their technical skills more quickly can do so by actively pursuing continuing education. Videographers can enroll in audiovisual technical training programs at community colleges or in professionally-sponsored certification programs, such as NCRA's CLVS program. This program offers the most comprehensive professional legal video training program available. It is a certification process which endeavors to teach not only the technical aspects of videotaping depositions but also teaches the applicable procedural requirements of both state rules and Federal Rules of Civil Procedure regarding the videotaping of depositions. This credentialing program is designed to ensure that its practitioners meet minimum standards of competence. Seasoned legal videographers who essentially provide mentoring to those who desire to learn the unique aspects of the video deposition process teach the CLVS program. Their teachings are based on years of accumulated field experience. By sharing their knowledge, they provide a quicker way for aspiring videographers to learn some of the ambiguous aspects of legal videography. Their ultimate goal is to cultivate a higher sense of professionalism within the legal video industry.

The evolution of video technology has brought significant change to the realm of legal video and, indeed, has necessitated the need for legal videographers to possess advanced technical skills. As digital video continues to evolve, legal videographers will need to be endowed with advanced technical aptitude. If you are committed to being a professional

videographer, you need to be willing to embrace new technology.

Videotaping depositions might appear to be quite simple at first, but don't be fooled by misconceived simplicity. If you look beyond the obvious, you will find that certain variables of the process are not intuitively conspicuous. Making a conscious effort to learn those intricacies is an essential responsibility of anyone who aspires to be a successful legal videographer. It should also be a part of every legal videographer's due diligence strategy.

As part of the litigation process, legal videographers must understand their responsibilities and obligations. The concept of due diligence and its fundamental role in the legal video industry should not be ignored. It should be part of every legal videographer's repertoire. Embracing the concept of due diligence will, ultimately, elevate both your competence and your confidence.

I hope this article will help demystify the concept of due diligence and will encourage adherence to its principles. In addition, I hope it will embed a deeper sense of responsibility in those who aspire to become competent professional legal videographers.

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FOOD FOR THOUGHT

The Economy through the Eyes of a Collector

BY CYNTHIA DUSENBERY

This year, taxpayers will each receive \$600 to \$1,200 or more depending on previous tax payments — to help stimulate the economy. Have you decided what you will do with this windfall? It is not really a sudden good fortune, as the word *windfall* implies, because each year we have dug in our pockets hard and heavy to pay taxes. We are given this tax break with pleadings to take the money and spend it. I, for one, was thinking

that it could be used toward a very much needed wrinkle filler injection, which, of course, would make my dermatologist quite happy.

Then I started to imagine how that money would be spent by the masses. Some people might use it to pay bills, and some might save it for a rainy day. But the government hopes many will spend it and have a good time.

This scenario got me thinking from the collection manager's perspective about my daily pulling of teeth to get attorneys, law firms, and other debtors to pay their bills. What if, in a perfect world, everyone paid their bills on time, all the time. Just think about the money that would flood into court reporter firms and freelancers' offices. When the money came in, they could upgrade their computers and buy office supplies. They could even take more out of the company profits to spend on a luxury or two. Raises could be given to employees regularly, and they too could share the new wealth in the malls. We would not need any kind of stimulus package; the stimulus of paying bills spreads the wealth. Instead of cutting used fax transmission sheets into little squares for notetaking (okay, I confess to this one), you could actually buy notepads and Post-its. Oh, the joy of it all!

I know I hear grumblings daily from my clients. Instead of paying outstanding reporting bills, attorneys are taking their money out of the firm to pay for BMWs, vacations, and other toys in the playground. Let's use a little "trickle down" economics here to see what can be stimulated in the economy if reporters could actually bill out and get their payments before 30 days are up. Both office and home life would thrive for people in the reporting industry, and a few more toys could be purchased by reporters, too. If they had the money, they would spend it.

I don't know how many times I have tried to connect with attorneys who owe reporters quite a bit of money, only to hear that they have been on "vacation." Meanwhile the reporting firm owner has been biting her nails because she has contractors to pay and payroll taxes due. If people pay their bills, then everyone can share in the economic wealth.

In fact, fewer payments would probably go on credit, because the cash would