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Use of Law Enforcement Video in Civil Litigation

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Use of Law Enforcement Video in Civil Litigation

Across the entire United States, law enforcement agencies are increasing their reliance on video cameras to investigate crimes. We have progressed from cameras being mounted on patrol cars to (much better quality) cameras being strapped to peace officers themselves. The perceived benefits of these body-worn cameras include: increased transparency and accountability, improved police and civilian behavior, evidence being gathered for prosecution or expedited resolution of lawsuits, and opportunities for police training.[1] However, there are also privacy concerns and the collection and storage of law enforcement video is often dependent individual department's policies, which may not have been written by parties with the necessary technological or legal expertise.

Most of the major questions involving law enforcement video should be addressed by a public and official policy, statute, ordinance, or rule. These include: **Who and what should be recorded? How will video be stored? How long will it be stored? Who can access the video? When and how will videos be released to the public? What other privacy issues are involved?** The answers to these questions will vary by jurisdiction, but generally courts have been relaxing the rules in favor of admitting video evidence. No longer is it required to present an expert to testify about the inner-workings of a camcorder or to testify to the chain of custody of videotapes.

This article will first address some of the basics for effectively using video evidence in civil litigation. Then it will address technological advancements and government grants which have led to the proliferation of law enforcement video. Finally, this article will address challenges with video evidence in discovery and describe best practices for presenting video to the trier of fact.

A. Video Evidence Basics

Historically, the law has preferred live testimony as the only means by which the finder of fact could observe the demeanor of the witness, and substitutes for live testimony were only rarely permitted. However, we have now come a long way from the introduction of the "camcorder" in the 1980s, and the current state of ubiquitous video recording devices has led to vastly expanding the role of video evidence in litigation. Cameras are continuously becoming cheaper and recording better quality video; and the capability of video to demonstrate "facts" objectively has led to increasing adoption by courts and law enforcement agencies. This staggering abundance of video brings with it both opportunities and challenges.[2] This section will first provide a framework for classifying video evidence, and then basic evidentiary foundations for getting the video admitted into a legal proceeding.

In American Jurisprudence, video evidence can be classified into nine different categories based on two different structural dimensions: (1) the temporal relationship between the recording and the actual event; and (2) the level of control the proponent of the video had in its creation, production and content.[3] Temporal relationship can be everything from contemporaneous recordings, to

[1] *See* Michael D. White, PhD, U.S. Dep't of Justice, *Police Officer Body-Worn Cameras: Assessing the Evidence* (2014).
[2] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Video Evidence: A Primer for Prosecutors* (October 2016).
[3] *See* Videotape Evidence, 44 Am. Jur. Trials 171, § 5-7 (August 2018).

immediately subsequent recordings, to retrospective recordings or reconstructions used as demonstrative evidence. Similarly, level of control can be further broken down from spontaneous recordings, to anticipated recordings, to staged recordings. The chart below demonstrates the two dimensions and nine classifications for video evidence:

	Contemporaneous	**Immediately Subsequent**	**Retrospective**
Spontaneous	▪ Live cell-phone videos ▪ Body-worn cameras ▪ Dash-cameras from police cruisers	▪ News station footage of a crime scene ▪ Video of a confession or admission taped by a civilian	▪ Admissions or conduct recorded by passerby or accidentally by a family member ▪ Social Media Posts
Anticipated	▪ Surveillance or sting operations ▪ Automatic surveillance equipment or security cameras	▪ Post-arrest video of a crime scene ▪ Confessions recorded during an arrest or interrogation	▪ Video Depositions
Staged	▪ Video of last will and testament ▪ Televised live events	▪ Informal statements or conduct recorded after a staged event	▪ Reconstructions ▪ Reenactments ▪ "Day-in-the-life" or "how-to" videos

The videos most-impactful on litigation are contemporaneous recordings, or those which captured the actual facts or events and occurrences in controversy. In civil litigation, these videos become a powerful tool to rebut alleged "disputes" over material facts, because rather than view evidence in the light most favorable to the non-moving party, courts will view the facts in the light depicted by the videotape at summary judgment.[4] Surely, other forms of video evidence can impact litigation and staged videos can be very effective at trial, but the proliferation of video recording devices leads to more contemporaneous videos being taken, and law enforcement videos recorded pursuant to official department policies are treated favorably by the Rules of Evidence and generally have a high degree of relevancy, fairness and accuracy.

In virtually every American jurisdiction there are four key elements governing the admissibility of video evidence: (1) relevance (2) fairness and accuracy (3) whether probative value outweighs prejudice or possible confusion, and (4) issues of competence such as hearsay objections or violations of other exclusionary rules. In considering these elements it is best practice to consider video evidence as two separate components, visual and audio, where one may be excluded to allow the admission of the other. While video evidence still requires foundation in order to be admissible, courts have relaxed their requirements, and typically the testimony of a witness who saw the events in question, and who can verify that what was recorded is a fair and accurate representation of what occurred, will be sufficient. More tactics about using video in litigation will be discussed *infra* in section C.

[4] *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007).

B. Technological Advancements and Proliferation of Law Enforcement Video

"Today, juries expect video to be presented to them in every case, whether it exists or not."[5] We have come a long way since the 1960s when *Popular Science* magazine first attempted to mount a camera and recording equipment in a Connecticut State Police patrol car.[6] In 1989, *Cops*, premiered on Fox TV, with a camera crew accompanying police officers on their responses while out on patrol. In-car cameras or "dash-cams" became an effective tool for convicting drunk drivers or documenting drug-interdiction stops, but it was not until the early 2000s when the Office of Community Oriented Policing Services disbursed over $21,000,000 in grants for dash-cams when this type of video evidence became a norm.[7] Now, body-worn cameras (BWCs) are documenting peace officer interactions at another level of intimacy, and police agencies are receiving grants for remote-controlled video-enabled robots, such as drones.[8] Additionally, civilians and community activists are more-frequently recording peace officers' conduct through their video-enabled cellular phones and social media applications.

Federal, state and municipal funding for police agencies obviously drives their adoption of video-enabling technology, and President Trump has "commit[ted] to expand funding, training and evidentiary gathering tools to law enforcement agencies and justice communities."[9] When looking at BWCs alone, the federal government provided over $58,000,000 in grants to local and tribal law enforcement organizations between 2015 to 2017.[10] Large police agencies with 500 or more sworn officers have the highest rates of BWC adoption, but recent grant awards show that smaller and medium-sized agencies are becoming faster adopters of this technology. The Bureau of Justice Assistance even created a "Body-Worn Camera Toolkit" online, which assists smaller departments in adoption through model policies and procedures, research materials, and lessons learned from implementation across the country.[11] This is analogous (except more-developed) to the International Association of Police Chief ("IACP") In-car Camera Model Policy.

A national survey conducted in 2015 by the Police Executive Research Forum ("PERF"), found that more than eight out of ten agencies either are using BWCs or are planning to do so.[12] This is because "[m]ore than 85% of agencies that have adopted BWCs said they would "recommend" (19.3%) or "strongly recommend" (65.9%) that other agencies adopt BWCs." Additionally, "[n]early 92% of respondents indicated that their primary reason for deploying BWCs was to promote [officers'] accountability, transparency, and legitimacy."[13] The PERF survey sought to

[5] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Video Evidence: A Primer for Prosecutors*, 2 (October 2016).
[6] *See* U.S. Dep't of Justice, Office of Community Oriented Policing Services, *The Impact of Video Evidence on Modern Policing*, 5 (2005).
[7] *Id.*
[8] *See* PoliceOne, *2018 Police Video Guide*, Vol. 1, No. 3 (Winter 2017).
[9] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *BWC Program Update* (Fiscal Year 2017).
[10] *See* id.
[11] *See https://www.bja.gov/bwc/*.
[12] *See* PERF, *Costs and Benefits of Body-Worn Camera Deployments*, Final Report, (April 2018).
[13] Id. at 157.

evaluate whether the amount of money paid out in civil lawsuits declines after BWCs are introduced; however, their results were inconclusive.

However, the rapid proliferation of BWCs and law enforcement video has caused problems. A frequent issue involves officer discretion to activate (or deactivate) their BWC for certain situations. Department policies across the country vary greatly: some mandate the BWC to be activated at all times, others only mandate recording when responding to calls, while others may leave the entire matter up to officer discretion or make no recommendations. This problem is amplified, because 85% of officers receive less than two hours of BWC training, and untrained officers can easily forget to activate their BWC when responding to volatile or dangerous situations.[14]

A distinct form of law enforcement video is not captured by any agent or instrumentality of the government, but rather by civilians recording police officers with their cellular phones. Videotaping peace officers is nothing new, but following the officer-involved shooting of Philando Castile in 2016, where his girlfriend live-broadcasted a video of the incident over Facebook, videotaping the police has risen to the level of cultural phenomenon. While the Supreme Court has never directly ruled on videotaping the police, "[e]very Circuit Court of Appeals to address this issue (First, [Third], Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public."[15]

A bystander's video may capture relevant evidence, but if the bystander is not a fan of police, problems can arise in obtaining the video without violating their constitutional rights. We know from *Riley v. California* that an officer may not arrest the bystander and search their phone for video incident-to-arrest; and that generally, a warrant is required to search a cell phone.[16] It is a very fact-dependent inquiry whether an officer may seize the cell phone of a bystander, and under no circumstances may the officer delete a video or order someone to do so.[17] The inquiry ultimately turns on whether the officer believes the recording might contain evidence of a crime, and exigent circumstances require the phone to be seized to prevent destruction or spoliation of evidence. Best practice is to simply ask for the video or download it off the internet/social media post.

C. Using Video Evidence in Litigation and Discovery

Actually using all of this new law enforcement video throughout the various stages of litigation presents many complex and novel issues for attorneys. First off, most attorneys are not great technologists, and many get squeamish at the mention of terms like codec, rendering, metadata, or cloud storage. Nevertheless, virtually all modern discovery involves electronically stored information (ESI), and this prevalence is reflected by the December 2015 amendments to the Federal Rules of Civil Procedure, and August 2012 amendments to the ABA Model Rules of

[14] *See* PoliceOne, *2018 Police Video Guide*, Vol. 1, No. 3 (Winter 2017).
[15] *Fields v. City of Philadelphia*, 862 F.3d 353, 355-56 (3rd Cir. 2017) (citing *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995)).
[16] *Riley v. California*, 134 S.Ct. 2473 (2014).
[17] *See* PoliceOne, *2018 Police Video Guide*, Vol. 1, No. 3 (Winter 2017).

Professional Conduct which direct lawyers to "keep abreast of *changes* in the law and its practice, including the benefits and risks associated with *relevant technology*."[18] Video ESI presents many unique challenges for electronic discovery, and the nuts-and-bolts of these challenges will be discussed, followed by tips for effectively leveraging law enforcement video to win cases or reach settlements.

Law enforcement video, whether taken by a dash-camera, BWC, surveillance camera or otherwise, will typically be discoverable in most lawsuits.[19] When there are claims against individual police officers, or vicariously against the municipality which employs them, these videos are often fundamental to immunity defenses.[20] It is a well-known mantra that "police officers do not have to be right, but they do have to be reasonable," and video is better than nearly all other forms of evidence at depicting all the facts and circumstances known to the officer as well as the exigency of the situation.[21] In civil actions for deprivations of rights under 42 U.S.C. § 1983 or tort claims based on vicarious liability, a central question is whether the defendant(s) was acting under color of law or within the scope of their employment. Thus, where video is relevant and taken pursuant to an official public policy, litigants will almost always request its production if not already produced during initial disclosures.

A significant problem with electronic discovery involves the formatting and sharing of law enforcement videos. Most law enforcement agencies adopt proprietary video software when implementing dash-cameras or BWCs, and these video formats often require a special player in order to view the files.[22] Further, video files can become extremely large, which makes it difficult to transfer the videos through traditional means. Many proprietary video software programs have features which grant the user added abilities to index the footage, jump between multiple cameras, or otherwise make edits and enhancements to the video. Federal Rule of Civil Procedure 34(b)(2)(E) states: "[i]f a request does not specify a form for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms," but a party need not produce the same ESI in more than one form.

Best practice is to produce video in a non-proprietary format (such as MP4, WMV, AVI, MPEG, etc.) which is not encumbered by any restrictions and may be used for any purpose. Cloud transfer is generally accepted for large videos which would be cumbersome to copy on a physical disc or drive.[23] Where the "native format" requires a non-transferable software license to view the video,

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[18] *See* Fed. R. Civ. P. 34(b)(2)(B) and Rule 37(e); *see also* ABA Model Rule 1.1, cmt. 8 (emphasis added).
[19] Usually, whether videotapes are discoverable will depend on: (1) what they contain, and (2) how they are prepared. Normal discovery rules apply, so if a video can be classified as work product or protected by attorney-client privilege it may not have to be produced. *See* 23 Am. Jur. Trials 95, § 104 (August 2018).
[20] Qualified immunity, statutory immunity, official or common law immunity, etc.
[21] Many Fourth Amendment claims against peace officers (excessive force, unlawful arrest, unreasonable search, etc.) require the court to objectively consider all the facts and circumstances known to the officer.
[22] Proprietary video means a video file format that is unique to a specific manufacturer or product that contains data that can *only* be encoded/decoded by a particular software the specific manufacturer has developed. *See also* U.S. Dep't of Justice, Bureau of Justice Assistance, *Video Evidence: A Primer for Prosecutors*, 9 (October 2016).
[23] *See* U.S. Dep't of Justice, Bureau of Justice Assistance, *Public Safety Primer on Cloud Technology* (October 2016).

courts still have ruled the video must be produced in a readily viewable format.[24] Comments to the 2006 Amendments to Fed. R. Civ. P. 34, state "[u]nder some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information." Almost all video files are compressed and encoded to accommodate their large size, but they may be rendered (converted) into another format for easier viewing. Two problems which may arise in rendering are (1) loss of certain metadata,[25] and (2) lower quality playback in the new format. Therefore, the native or original file should always be preserved, and issues with video transfer and formatting should be addressed in discovery conferences under Fed. R. Civ. P. 26(f).

Another significant issue with using video evidence involves editing or otherwise making alterations and privacy redactions for the court. Many surveillance or dash-camera videos can be hours in length, and there may only be several minutes or even split-seconds of relevant data pertaining to the case. Digital editing has made it very easy to cut portions from videos or combine multiple videos into one cohesive piece, however, digital editing has also become so advanced as to allow easy fabrication or alteration of videos. Generally, an unedited copy of the video should be produced to opposing counsel, and when editing video for a finder-of-fact, the type and extent of editing should be agreed to by the court or discussed at pretrial conference. A trial judge has broad discretion in admitting evidence, and oftentimes, an otherwise inadmissible video may be edited to offset its prejudicial effects or to exclude hearsay statements within.

The proliferation of law enforcement video presents many opportunities as well as challenges for litigators. Contemporaneous law enforcement video is almost-always admissible substantively, or "offered to help establish a fact in issue, as opposed to evidence directed to impeach or support a witness's credibility."[26] Immediately subsequent recordings can also come in substantively, or be used to impeach witnesses who confess or otherwise make prior inconsistent statements on camera. Video evidence often must be treated uniquely in discovery, as it does not meet the mold of most ESI which can be obtained through keyword searching, technology-assisted review, or other metadata searches. Many large law enforcement agencies have adopted special litigation technology units to deal with the increased role of managing video evidence. When these units are not available, it is up to the attorneys to manage the data. Any chain of custody issues involved with producing the videos should go to their weight and not affect admissibility. Ultimately, law enforcement video provides the most utility to defending claims, because courts are mandated to consider such video at the summary judgment stage even if it conflicts with construing the facts in the light most favorably to the non-moving party.

[24] *See Pero v. Norfolk Southern Ry., Co.*, 2014 WL 6772619 (E.D. Tenn. Dec. 1, 2014); *see also BNSF Ry. Co. v. C.A.T. Construction, Inc.*, 2015 WL 11237614 (W.D. Okla. Nov. 9, 2015).
[25] Metadata can be defined rather simply as "data about the data."
[26] *See* Substantive Evidence, Black's Law Dictionary (10th Ed. 2014).