

PERSONAL INJURY



Salvatore J. Zambri

Settlement Videos Are Powerful Mediation Tools

It's important to choose a videographer who is adept story teller

By SALVATORE J. ZAMBRI

My firm uses a settlement video in virtually every case that involves significant damages. I'm convinced that when a lawyer decides not to use one, he is also deciding at the same time to reduce the amount the defendant will ultimately offer to resolve the case. Settlement videos are powerful. Far more comprehensive than descriptive words or still photographs, videos let the mediator, opposing counsel, the defendant, and the insurer see, hear, and feel the whole story of a case in a compelling and accurate manner.

A photographer, Bill Jay, may have stated it best in an article in the *Washington Journalism Review* (1990), in which he described images as "directly entering the blood stream, bypassing the brain." Words can fail us sometimes. A settlement video, however, can accurately present critical evidence to those involved in the settlement process, maximizing not only the likelihood of a resolution, but also the amount of the settlement.

What Is Settlement Video?

Settlement videos are different from day-in-the-life videos. Often, the former includes the latter. Day-in-the-life videos depict the harsh consequences of an array of physical impairments (i.e., the wound-care ritual needed to treat a "de-gloving" injury). I think it is impor-

tant –necessary, actually – to include day-in-the-life activities in settlement videos to be sure the other side appreciates the plaintiff's harms and losses. But the settlement video must include much more. Settlement videos are designed to convince the opposing parties that they should pay fair compensation now, before trial and perhaps before any further discovery. It is therefore necessary to address all issues of liability – duty, breach, causation, and damages. The extent to which you focus on each issue is determined on a case-by-case basis.

When Production Begins

When I recognize a case as one that lends itself to a settlement video, I start producing it immediately. For instance, rather than taking written statements from witnesses to a terrible automobile collision, I will routinely videotape their testimony. The scene of the incident is often full of compelling evidence worth videotaping, whether it is the building that caught fire, the skid-marked road that was peppered with debris, or the vehicle itself that was involved in the collision. And don't forget, we're being watched. Cameras are popping up all around us in automobiles, at street corners, and on and within buildings. Some of the most powerful video evidence I've ever used was initially shot by someone else. I just obtained it and then incorporated it in my settlement video.

It is also important to obtain from the client or her family, old videos depicting the plaintiff's prior activity level, including hobbies, work activities, etc. Post-injury video of the plaintiff is critical, especially when making a day-in-the-life video. But you should not always wait until the plaintiff reaches maximum medical improvement to video-document the plaintiff's condition. Video of the recovery itself can be extremely effective.

In addition to the plaintiff and independent witnesses, consider videotaping family members, friends, employer representatives, co-workers, teachers, coaches, EMT personnel, treating physicians, experts and others. Your subjects should be excellent communicators and credible.

Settlement videos can sometimes catalyze extremely favorable resolutions before a lawsuit is ever filed. But for a variety of reasons, not all cases settle pre-litigation. In those instances when discovery is required, I take video depositions. I invariably find that the video testimony of a defendant, for instance, can be used far more effectively in a settlement video and, if necessary, at trial.

Choosing A Videographer

Who should do the videotaping? I recommend you hire someone with real movie-making experience. I've found that independent filmmakers are more likely to be roundly skilled in audio, lighting and video techniques. Filmmakers also have training in effective, clear and economical story development and are more likely to focus on the subtleties of the case. Remember, the more effective a settlement video is, the greater chance there is that the case will resolve for fair value. Broadcast journalists and wedding videographers are popular choices, but they often lack the narrative skills and patience of a long-form filmmaker.

Also, be sure the person you use has significant training in behavior coaching. Acting coaches are excellent for helping your client get over their interview anxiety so they can move on to an honest interview. You should rely on your production team to not only film and light, but also help create a comfortable and relaxed room so that your clients can express their deepest feel-

ings about their case. An excellent videographer who lacks inter-personal skills will produce a sub-optimal settlement video.

Preparing The Participants

Meddle when necessary. Don't meddle for the sake of meddling.

If the videographer is sufficiently prepared by you and has the credentials I outlined above, then he or she will be in the best position to elicit the testimony you want from your client in the manner in which the testimony should be conveyed.

A patient interviewer will let your subject open up and personalize the case. A patient approach is always better than trying to elicit an overly specific response. Of course, the video should be accurately emotional, not staged.

Experts on Camera

Settlement videos often include testimony from experts. In choosing who to videotape, consider the expert's education, experience, and reputation and weigh them against the expert's ability to communicate. Sometimes, the most qualified experts are not the best communicators. Seek compelling over sterile testimony.

Cost Of Settlement Video

Understand that the preparation of such a video will range from a few thousand dollars to perhaps \$30,000. Consequently, be sure that the potential damages warrant the expense. Communicate with your client about this before spending the money.

High Impact

Time and again, I have been thanked for taking the time to submit settlement videos. Opposing counsel use the videos to justify their settlement position. The same is true for adjusters. And mediators use them as tools to get high-level insurance representatives and corporate executives to recognize the need to resolve cases at fair levels.

If a picture is worth a thousand words, then a settlement video is worth . . . well, use one and you'll see. ■

Salvatore J. Zambri is past president of the Trial Lawyers Association of Metropolitan Washington, D.C., and a founding member and senior partner in the firm Regan Zambri & Long, where he litigates medical malpractice, automobile accident, product liability, and other catastrophic personal injury claims.



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PERSONAL INJURY



Eric P. Smith

The Thin Line Between 'Ministerial' And 'Discretionary'

Negligence lawsuits against municipalities hinge on difficult legal distinction

By ERIC P. SMITH

Connecticut General Statutes §52-557n codifies the law of municipal tort liability in Connecticut. Simply stated, municipalities are liable in tort for the negligent acts or omissions of its employees although, subject to certain exceptions, this liability does not extend to "negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law."

In other words, municipalities (and their employees) are liable for negligent acts and omissions associated with "ministerial" conduct, but immune from liability (subject to certain exceptions) for negligent acts and omissions associated with "discretionary" conduct.

One question that often arises in municipal tort liability cases is what "ministerial" duties, if any, are owed by municipal actors? A common response is that the ministerial duties are found in and determined by the municipality's own directives, policies and procedures. But that response may be somewhat unsatisfying (particularly if there are no

written directives or policies on point) and somewhat incomplete.

First, rules or standards limiting discretion and creating ministerial duties have been found by Connecticut courts to arise from a

number of sources, including a building code, the Americans With Disabilities Act, the Connecticut police pursuit policy, local rules concerning the provision of custodial services at school facilities, standards of care generally

applicable to the operation of motor vehicles, a local directive to custodians concerning snow and ice removal, a legal standard of care

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applicable to fire departments, the standard of care applicable to real estate attorneys serving as a foreclosure committee, and even from sheer obviousness. So a claim, for example, that ministerial duties may derive from a recognized national or regional standard of care (perhaps one that is introduced by qualified expert opinion) would seem to be a colorable one given this body of law.

Flawed Distinction

Second, the line between ministerial and discretionary conduct is hardly bright, and often nuanced and fact-driven. This is an important consideration because although the issue of whether a governmental act or omission is ministerial or discretionary has been treated as a question of law in some cases, it is most often treated as a question of fact.

It is also important because it could be said that the conduct of virtually all govern-

mental actors involves both discretionary and ministerial aspects. As the Supreme Court observed in the 2006 case of *Violano v. Fernandez*, the distinction between discretionary and ministerial actions is "not without flaws. One commentator has noted that 'the difference between discretionary and ministerial is artificial'....Indeed, it has been observed that 'it would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in its per-

formance, even if it involved only the driving of a nail."

Just as there are elements of discretion involved even in clearly ministerial actions, there are ministerial aspects to many actions which, on balance, might ultimately be regarded as discretionary. It is ultimately the job of the fact finder to assess the balance between the discretionary and ministerial components of particular governmental activity and, on that basis, to characterize that activity as one or the other.

Consider, for example, the classic government function of police work. While it is undeniable that many aspects of police operations involve the exercise of judgment or discretion, it is equally undeniable that the exercising of judgment and discretion is not evenly distributed across the organizational hierarchy of a police department. Senior officers making decisions concerning the allocation of departmental resources, how patrols and investigations should be conducted and similar matters clearly exercise a broader realm of discretion than lower ranking personnel at the operational level.

Yet, even at the highest levels of a police department, discretion is constrained by ministerial rules. A police department and its ranking officers are not free, for example,

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to exercise discretion by hiring uncertified police officers or by discriminating against actual or potential police officers on the basis of race or gender.

Other members of police departments, such as patrol officers, while possessing a narrower range of discretion than their departmental superiors, also exercise considerable discretion, e.g., to overlook or take action with respect to an observed violation of the law. Their discretion, however, is constrained in many respects by standards of conduct which can be regarded as ministerial. In addition to being constrained by departmental rules, protocols and directives, these officers are not generally free, for example, to search without a warrant, to arrest without probable cause, to employ excessive force, to engage in racial profiling or to operate their patrol vehicles in violation of generally applicable motor vehicle laws except to the limited extent they are exempted by C.G.S. §14-283.

In summary, while the answer to the question of what ministerial duties are owed by municipal actors certainly begins with a study of the municipality's own policies and procedures, it also requires consideration of other sources and an appreciation for the reality that not all municipal conduct can be easily and summarily parsed into a legally distinct category. ■

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