

Client Alert

Latham & Watkins
Litigation Department

Was That a Yes or a No?: Depositions in the YouTube Era

"The publication of a deposition video on a video-sharing website is not only potentially embarrassing to a deponent; it can also lead to the publication of confidential or otherwise sensitive information."

The Internet has created a bevy of new concerns for civil litigators. One such concern is the online availability of materials obtained and created during litigation. For instance, while court filings have always been available to the public, acquiring these materials once required a trip to the courthouse. Now obtaining a document from a court's file is as easy as clicking a mouse — with one more click the same document can be e-mailed, posted on social media sites, shared with peer-to-peer software or otherwise quickly distributed around the world.¹ Thus, it is increasingly important for civil litigators to ensure that their clients' private, confidential or otherwise sensitive material is protected.

A similar concern is found with materials obtained during discovery. It is often inevitable that personal or potentially embarrassing information will be produced during discovery. If not protected appropriately, this information can be quickly and widely disseminated. Discovery is rarely more personal (and sometimes embarrassing) than testimony given by a deponent. In part because of the deposition's inherent intimacy, the dissemination of deposition videos on video-sharing websites has become widespread.

A May 2010 search of the popular video-sharing website YouTube for

the term "deposition" turned up more than 2,700 videos. Many of these video clips are taken from actual depositions of high profile litigants, or litigants in high profile cases. For example, the first page of hits displays excerpts of the depositions of Bill Gates, Michael Jackson, Rudy Giluiani, Archbishop Weakland, and George and Cindy Anthony. Other video clips show deposition bloopers — when deposition questioning has devolved into name calling, threats and even fights. Perhaps the most infamous viral deposition video, a three-minute clip of a rowdy deposition taken by Texas "King of Torts" Joe Jamail, has been viewed over 400,000 times.² Another viral favorite, a one-minute clip demonstrating "How to Handle a Tough Deposition Question," has been viewed over 200,000 times.³

The right to post deposition material on YouTube has been litigated in at least one court. In late 2008, Texas plaintiff's attorney Jeffrey Weinstein, motivated by a desire to expose what he considered to be gross misconduct by the defendant and seeing a potential advertising opportunity, posted an excerpt of the defendant's video deposition on YouTube. The YouTube posting, titled "It's Not a Kickback — It's a Fee," showed an edited six-minute clip of the deposition of the defendant

car dealership's chief financial officer.⁴ After the defendant sought a protective order, the judge ordered Weinstein to remove the video from YouTube because the deposition had not been filed with the court and was therefore not a public record.⁵ Plaintiff's counsel subsequently posted the video back on YouTube after filing a transcript of the deposition excerpt with the court (although the judge later ruled that Weinstein violated the court order by not first filing the entire transcript).⁶ Shortly thereafter, defendants in related cases sought and obtained confidentiality orders proscribing the opposing parties' abilities to publicize deposition videos taken in those matters.⁷

This *Client Alert* gives practical advice about how to keep deposition videos from being publicly disseminated and posted on video-sharing websites.

It includes a discussion of the ownership and right to access depositions, general rules of discovery, ethical rules regarding advertising and the regulations of video-sharing websites.

Applicable Laws/Regulations

Ownership of Deposition

Rules of civil procedure regulate procedures for taking depositions.⁸ While these rules explain in great detail how depositions must be noticed, conducted and how they may be used, they do not directly address who owns the deposition. Potentially, the court reporter, the deponent, the party paying for the deposition, the attorney taking the deposition and the court have ownership interests in the deposition.

The Federal Rules of Civil Procedure (the "Federal Rules") do little to clarify this issue. Under the Federal Rules, the court reporter is required to retain stenographic notes of the deposition.⁹ The court reporter must also send a copy of the deposition transcript to the attorney taking the deposition,

and provide a copy to any party or the deponent upon the payment of reasonable charges. The court has authority to alter these statutory arrangements by issuing an order.¹⁰

The Second Circuit addressed the ownership of court transcripts in *Lipman v. Massachusetts*.¹¹ In *Lipman*, freelance court reporter Sidney Lipman was hired by a Massachusetts district judge to record and transcribe the testimony taken at the inquest of the drowning of Mary Jo Kopechne, who died in a car driven by the late Senator Edward Kennedy. The court reporter provided two copies of the transcript to the judge daily, along with his notes. Because of public interest in the proceedings, the court clerk decided to make copies of the transcripts and sell those copies to the public. Lipman sought an injunction blocking the sale, claiming a property right and common law copyright in the transcript.

The Second Circuit quickly disposed of Lipman's copyright claim; the court reasoned that "[s]ince transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product."¹² The court also rejected Lipman's property right claim. Without any express agreement, Lipman relied solely on custom to argue that only court reporters could sell court transcripts. While the court recognized that custom allowed a court reporter to sell transcripts for their normal wage, it refused to permit the court reporter to reap "a bonanza at [the public's] expense."¹³

A Massachusetts state court considering a similar issue expanded on *Lipman's* ruling. In *Linnen v. A.H. Robins Co., Inc.*, the court observed that both federal and local rules required the court reporter to furnish deposition transcripts to the parties upon the receipt of appropriate compensation, but that these statutes did not specify whether third parties could only obtain copies of

deposition transcripts from the reporter.¹⁴ The court reasoned that court reporters contract with parties or legal counsel to produce a deposition transcript for a certain fee. Then, “[o]nce a party or its counsel provides compensation to the court reporter, the party or the lawyer becomes owner of the transcript.”¹⁵ As long as the party or lawyer does not make copies for other parties in the lawsuit or profit from distributing the deposition, she can do as she pleases with the transcript.

Right to Access Depositions

Judicial proceedings and court filings are generally available to the public. However, under modern statutes, discovery is generally conducted between the parties with limited court supervision, although deposition transcripts are often later filed with the court.¹⁶ Once filed, the transcript is available to the public for viewing and copying unless it is subject to a protective or confidentiality order.¹⁷ Presumably, if a deposition video is filed with the court, this presumption of public availability would also apply.

This issue becomes more complicated when a deposition transcript has not been filed with the court. While not addressing depositions particularly, courts have created different tests to determine whether the public has the right to access materials obtained or created during litigation that were not filed with the court.

The Third Circuit decided that the public only has a right to access “judicial records.”¹⁸ To decide whether a document is a judicial record, the court “focused on the technical question of whether a document is physically on file with the court.”¹⁹ Finding that the document in question was “briefly perused” by the trial court, but never filed, the court concluded that the document in question was not a judicial record, and that third parties did not have a right to access the document.²⁰

Indeed, in the Third Circuit the public has no right to access documents that were once part of the judicial record but, after the case’s completion, were returned to the parties.²¹

The First Circuit has taken a slightly different approach. Instead of looking at whether the documents in question were physically on file at the court, the court concentrated on whether “the material is important and the decision to which it is relevant amounts to an adjudication of an important substantive right[.]”²² If the court relies on the materials in determining a litigant’s substantive rights, the public has a right to inspect the materials.²³ Subsequent case law has clarified that documents “used only in discovery” play no role in the adjudication process.²⁴

This line of reasoning could lead a court to find that deposition transcripts, but not deposition videos, should be made available to the public. For example, if a court reviewed deposition transcripts to rule on a motion for summary judgment, those transcripts would be central to the court’s adjudication of the issue, but a video of the same deposition would not.

The Second Circuit has taken an approach similar to the First Circuit. While acknowledging a presumption of public access, the court found that “[w]here testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low[.]”²⁵

Indeed, because “deposition discovery . . . are ‘documents that play no role in the performance of [the court’s] Article III functions,’” the presumption of access is inapplicable.²⁶ Of course, once those discovery materials are “presented to the court to invoke its powers or affect its decisions,” the equation is drastically changed and the presumption again applies.²⁷ The court must then balance competing considerations against this presumption, including the privacy interests of those resisting disclosure.²⁸ As with the First Circuit’s analysis, this

rule could lead to deposition transcripts being made available to the public, but not videos of the same depositions.

Advertising

Sometimes an attorney will post a video clip of a deposition video in order to advertise her practice.²⁹ In these cases, rules regulating the advertisement of legal services would apply. Because these web-based advertisements can be accessed in different jurisdictions, an attorney should make sure that the advertisement complies with the professional responsibility rules in all jurisdictions.

One applicable ethical rule is ABA Model Rule of Professional Responsibility 7.3(c). This rule requires all electronic communications to include the words "Advertising Material" at the beginning and ending of the communications. Thus, a deposition video clip posted online, technically an electronic communication, would need to include this disclaimer.

Using YouTube to Harass an Opponent

The codes of civil procedure in most jurisdictions proscribe discovery methods employed to harass an adversary. For example, California Code of Civil Procedure Section 2030.010(c) states that it is a misuse of the discovery process to "[e]mploy[] a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense."

A deposition clip posted on YouTube that unnecessarily includes personal or embarrassing information, or is edited in a misleading fashion may very well violate this code section. Indeed, one motion for sanctions related to the posting of a video deposition excerpt on YouTube argued that the Texas variation of this code justified sanctions against the posting attorney, although the judge disagreed.³⁰

Video-sharing Site Regulations

The guidelines of Internet video-sharing websites severely restrict what can be shared online. For example, the YouTube Community Guidelines allow "people who are readily identifiable and who haven't consented to being filmed" to file a complaint seeking a video's removal.³¹ Arguably this provision would apply to a person compelled to undergo a video deposition — while that person sat for a deposition, she still may argue that she was not filmed voluntarily, as being filmed was legally compelled. Moreover, YouTube will remove any videos that contain personal information, including addresses, phone numbers, government identification numbers and credit card information.³²

Protecting the Video Deponent Before the Deposition

Before the deposition, a deponent's counsel has many options to ensure that the video deposition, or sensitive parts of that video, cannot be posted on YouTube. First, counsel can seek a stipulation from the other parties in the case agreeing not to use the deposition outside of the litigation. While this stipulation will not bar third parties from attempting to acquire and use the deposition, it will prevent the parties most familiar with the case from later using the deposition outside of the litigation, including posting it on YouTube.

Counsel may alternatively seek a stipulation proscribing the distribution or use of the video outside of the proceeding. A broad stipulation will not only prevent videos from being posted on websites; it will also stop videos from being distributed over peer-to-peer sharing applications, as well as through more traditional means.

Second, deponent's counsel should seek a protective order from the court permitting the deponent's counsel

to mark deposition testimony and exhibits “confidential.” Under standard protective orders, material marked “confidential” cannot be shared with third parties and may be lodged, but not publicly filed with the court. Thus, portions of the deposition video containing confidential information cannot be posted without violating the court’s order.

Protecting the Video Deponent After the Deposition

Obtaining a protective order does not guarantee that opposing counsel will respect it. If a client is deposed in a high profile case, it would be prudent to search Google and YouTube for your client’s name or other identifying keywords. If you discover that someone has posted the deposition video, you can then quickly alert the video hosting website to take the video down, inform the party who posted the video of their violation of the court order and petition the court to enforce the protective order.

Conclusion

The publication of a deposition video on a video-sharing website is not only potentially embarrassing to a deponent; it can also lead to the publication of confidential or otherwise sensitive information. However, by understanding the relevant law and regulations, and taking appropriate steps before and after the deposition, these risks can be significantly reduced.

Endnotes

¹ For example, Colorado attorney Alison Maynard filed a Motion for Extension to Respond to Bill of Costs on March 4, 2007. This pleading, which cited the consumption of wine at a birthday dinner as grounds for the extension (“inebriation constituting excusable neglect”) and made use of emoticons, appeared on the website abovethelaw.com four days later. See David Lat, This Is Way Better Than ‘The Dog Ate My Pleading’, Mar. 8, 2007, <http://abovethelaw.com/2007/03/this-is-way-better-than-the-dog-ate-my-pleading/>; David Lat, Lawyer of the Day: Alison Maynard, Mar. 8, 2007, <http://abovethelaw.com/2007/03/lawyer-of-the-day-alison-maynard/>.

In another seemingly routine court filing, an order resolving where a deposition would be held, United States District Judge Gregory A. Presnell ordered counsel to play a game of rock, paper, scissors to determine the deposition location. This order was filed on June 6, 2006 and a day later was posted on CNN.com. See *Avista Mgmt. v. Wausau Underwriters Ins. Co.*, No. 6:05-cv-1430-Orl-31JGG, (M.D. Fla. Jun. 6, 2006), available at http://money.cnn.com/2006/06/07/magazines/fortune/judgerps_fortune/index.htm.

² See <http://www.youtube.com/watch?v=td-KKmcYtrM>; <http://www.youtube.com/watch?v=ZlxmrvbMeKc>.

³ See <http://www.youtube.com/watch?v=RjtnRmyOH-U>.

⁴ Brenda Sapino Jeffreys, *Judge Orders Counsel to Remove Deposition Excerpt From YouTube*, Dec. 9, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202426579607>.

⁵ *Id.*

⁶ Brenda Sapino Jeffreys, *Judge Issues Ruling in YouTube Deposition Dispute*, Feb. 12, 2009, http://texaslawyer.typepad.com/texas_lawyer_blog/2009/02/judge-issues-ruling-in-youtube-deposition-dispute-.html; see also Hearing of Def.’s Mot. To Enforce Protective Order & Mot. for Sanctions, *Harper v. Mac Haik Ford, Ltd.* (No. 910,257) (County Civil Court at Law No. 4, Harris County, TX) (Feb. 11, 2009), available at <http://www.longhornlawyer.com/blog/wp-content/uploads/2009/04/transcript-hearing-mac-haik-february-11-2009.pdf>; Hearing of Def.’s Mot. To Enforce Protective Order & Mot. for Sanctions, *Harper v. Mac Haik Ford, Ltd.* (No. 910,257) (County Civil Court at Law No. 4, Harris County, TX) (Feb. 12, 2009), available at <http://www.longhornlawyer.com/blog/wp-content/uploads/2009/04/transcript-hearing-mac-haik-february-12-2009.pdf>.

- ⁷ Middlekauff Ford I, L.P.'s Mot. for Entry of Confidentiality Order, *Curry v. MiddleKauff Ford I, LLP*, (No. 006-02005-2008) (County Court at Law No. 6, Collin County, TX), available at http://www.lawyeredge.com/weinstein_jeff/blog/wp-content/uploads/2008/12/d-motion-for-entry-of-confidentiality-order-121808.pdf; Hearing on Motions to Consolidate and for Protective Order (CC2-2007-405) (County Court at Law No. 2, Henderson, TX), available at <http://www.longhornlawyer.com/blog/wp-content/uploads/2009/04/reporters-record-hrng-on-mtn-to-consolidate-hrng-on-mtn-for-prot-order-0402091.pdf>.
- ⁸ See, e.g., Fed. R. Civ. Pro. 28, 30, 31, 32; Cal. Code Civ. Pro. § 2025, *et seq.*
- ⁹ Fed. R. Civ. Pro 30(f)(3).
- ¹⁰ Fed. R. Civ. Pro 30(f)(1), (3).
- ¹¹ *Lipman v. Mass.*, 475 F.2d 565 (1st Cir. 1973).
- ¹² *Id.* at 568.
- ¹³ *Id.* at 569.
- ¹⁴ *Linnen v. A.H. Robins Co., Inc.*, 10 Mass. L. Rep. 45 (1999).
- ¹⁵ *Id.*
- ¹⁶ See Fed. R. Civ. Pro. 30(f)(4).
- ¹⁷ Still, this right is not absolute. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978).
- ¹⁸ *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 780-81 (3d Cir. 1994).
- ¹⁹ *Id.* at 782.
- ²⁰ *Id.* at 783.
- ²¹ *Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir. 1988).
- ²² *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11 (1st Cir. 1986).
- ²³ *Id.* at 13.
- ²⁴ *Fed. Trade Comm'n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987).
- ²⁵ *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).
- ²⁶ *Sec. & Exch. Comm'n v. TheStreet.com*, 273 F.3d 222, 234 (2d Cir. 2001) (quoting *Amodeo*, 71 F.3d at 1050).
- ²⁷ *Amodeo*, 71 F.3d at 1050.
- ²⁸ *Id.*
- ²⁹ See Brenda Sapino Jeffreys, *Judge Orders Counsel to Remove Deposition Excerpt From YouTube*, Dec. 9, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202426579607>.
- ³⁰ See Brenda Sapino Jeffreys, *Judge Orders Counsel to Remove Deposition Excerpt From YouTube*, Dec. 9, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202426579607>.
- ³¹ YouTube Community Guidelines, http://www.youtube.com/t/community_guidelines#tips.
- ³² *Id.*

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