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Videotaping IMEs: a Corollary to Defense Surveillance

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In personal injury cases, the defense bar has long employed the use of covert video surveillance of plaintiffs engaged in daily activities to challenge claims of damages. These videos are used not only to impeach the credibility of the plaintiff, but also as substantive proof to rebut the plaintiff's claims of physical limitations and severity of injury. The use of covert surveillance footage at trial has become increasingly effective due to significant improvements in technology. Small high-definition cameras are now readily available at low cost, making quality equipment easily obtainable and easily concealable. Moreover, in this age of electronics where nearly every cell phone is also a video camera, the ease with which video surveillance can occur is unprecedented.

For years, courts have admitted this proof as a means of preventing fraud, accepting the standard argument advanced by defense counsel that if the plaintiff is telling the truth about her injuries, then she should have nothing to hide. By contrast, if the plaintiff is telling less than the truth, then the video shall serve as a powerful means to expose the lie. More recently, with the advent of small and reliable video cameras, plaintiffs have used surveillance footage of so-called "independent medical examinations" (IMEs) to challenge at trial statements made by the defendant's physicians. This has created a parity amongst the litigants in personal injury cases, effectively permitting defense counsel to use covert video surveillance to challenge the

plaintiff's testimony at trial regarding the extent and severity of her injuries, while allowing the plaintiff to utilize the same means to challenge the testimony of the defendant's doctor on the same issue by exposing the thoroughness (or lack thereof) of the doctor's examination of the plaintiff.

Our first article on the topic of secretly taping IMEs (Rubinowitz and Torgan, ["Turning the Table: Cross-Examining IME Doctor Using Video of Exam,"](#) NYLJ, Oct. 28, 2013) was met with wide criticism by certain members of the defense bar (Spitz, ["Law Does Not Support Videotaping IMEs,"](#) NYLJ, Nov. 20, 2013; Capowski, ["Videotaping Medical Exams,"](#) NYLJ, Nov. 27, 2013; Capowski and Miao, ["There Is No Battle Over Surreptitious Taping of IMEs,"](#) NYLJ, June 16, 2014). However, if we are to achieve fairness in the adversarial process, and if trials are to remain reliable means of discovering the truth, then both sides must be permitted to use covert video surveillance where appropriate.

Need for Accountability

In every personal injury case, the plaintiff has the burden of proof regarding the nature and extent of her injury. As a means of challenging that proof, the defense is afforded a statutory right to conduct an examination of the plaintiff prior to trial by a physician of its choosing (CPLR 3121). A cottage industry has blossomed around this discovery device, and certain physicians across the state now derive a significant portion of their income from conducting defense-oriented medical examinations. Collateral attack during cross-examination, in the authors' experience, has revealed that many of these physicians who conduct these examinations earn well over \$1 million per year as a result of their participation in litigation alone. Indeed, many of these doctors no longer devote the majority of their time to treating patients, since litigation has become too lucrative an endeavor to pass up. However, just as there are certain dishonest plaintiffs who engage in fraud for personal benefit, there are certain

physicians doing the same, conducting countless IMEs in a manner akin to an assembly-line worker, spitting out dishonest reports for monetary gain.

In the response to our earlier column, members of the defense bar opined (or lobbied) that surreptitious surveillance of defense medical examinations should not be allowed (Spitz, Nov. 20, 2013; Capowski, Nov. 27, 2013). Critically, the authors of these articles recognized that there is no statutory prohibition on videotaping IMEs, whether surreptitiously or otherwise. Although there is case law setting forth a balancing test that a court should apply when a party requests permission to conduct open videotaping of a medical examination, there is no basis for the authors' conclusions in those articles that the standard for permitting such videotaping is "extremely high" (Spitz, Nov. 20, 2013), nor do we believe there is any basis for extrapolating—as the authors do—that the existence of this judicially created balancing test operates as an outright prohibition on surreptitious videotaping of an IME.

The fact remains that there is no statutory prohibition on videotaping an IME, whether secret or otherwise, and there is also no requirement that a party obtain court permission to videotape an IME. As such, there are only two issues raised by surreptitious videotaping of medical examinations: (1) the ethical issue of whether an attorney should be permitted to conduct such videotaping, which was addressed in our first article on this topic, and (2) the evidentiary issue of whether the video footage should be admitted at trial, which must be governed by the rules of evidence.

Moreover, and more importantly, the counter argument to the defense position that surreptitious videotaping of IMEs should be prohibited is nearly identical to the defense argument as to why video surveillance of a plaintiff should always be permitted, i.e., if the doctor conducting the examination is telling the truth, then he should have nothing to hide and should welcome the admission of the video. In such a scenario, the video will serve as

substantive proof of exactly what is stated in the doctor's report. However, if the doctor is not telling the truth, or if the doctor failed to conduct a sufficiently thorough examination of the plaintiff so as to provide a credible opinion as to the severity of the injuries, then the video will expose the lie.

For instance, in the case of *Bermejo v Amsterdam & 76th Assoc.* (Index No. 23985/09 [Sup. Ct. Queens]), the examining doctor testified that his IME lasted approximately 10 to 20 minutes. The video told a far different story. The video surveillance of the IME proved, unequivocally, that the total time of the examination was only one minute and 56 seconds. Not only did the video have the effect of impeaching the examining doctor's credibility, but it challenged the substantive proof as well. Without the video, even the most experienced cross-examiner would not be able to thoroughly expose the discrepancy as to the time it took to conduct the exam. Indeed, a plaintiff's contrary testimony as to the length of the examination would merely create a credibility contest between the plaintiff and the doctor. To preclude a party from offering surveillance footage when a dishonest act has taken place is tantamount to allowing one party, or its agent, to perpetrate a fraud with impunity.

A difficult issue which will ultimately arise in this area of the law is when the disclosure of the video should take place. However, just as the case of *DiMichel v South Buffalo Ry. Co.* (80 NY2d 184 [1992]), and the enactment of CPLR 3101(i) defined the scope of discovery regarding video surveillance of the plaintiff, judicial opinion and legislation will, in the future, have to spell out the discovery requirements for video surveillance of IMEs.

Truth Behind Evidence

All evidence offered during trial presents potential risks and benefits, and video footage is no different. In the case of video surveillance of a plaintiff, the benefits to the defense are often clear: If the surveillance of the plaintiff shows exaggeration or any form of deceit, that

proof will likely serve to put the nail of defeat in the plaintiff's case. However, there are also risks to the defense in offering such evidence, which must be capitalized on by plaintiff's counsel.

First, always consider the total amount of time that a hired investigator spent conducting surveillance of the plaintiff. If the investigator spent 100 hours surveilling the plaintiff, yet only obtained 15 minutes of "bad" video footage, then the obvious question, if properly developed, is what occurred during the other 99-plus hours of surveillance. To properly cross-examine the investigator who conducted the surveillance, the preparation must start well in advance of trial. Demands for discovery and inspection must be served that include, at least, the following:

1. All unprocessed video footage in original and native format.
2. All photographs in original format.
3. All reports, documents and memoranda relating to the surveillance.
4. All communications regarding this case, including all emails and hard copies of letter and memoranda.
5. All billing and time records of any person, company or firm performing work of any kind on this case.
6. All computer video editing and photo editing files of any nature or kind.
7. An identification of all video and still photography equipment used, including manufacture numbers, model numbers and serial numbers.
8. Identification of any computers used for video editing, including, software identification and version used for editing.
9. Identity of all persons who participated in the editing and renderings of any video clips.

10. Identification of all locations for all surveillance of any kind.

11. All materials reviewed by the investigators or any members of the investigation firm including its independent contractors for purposes of surveillance.

While the appropriateness of the demands might be argued, the failure to call for such production will only serve to limit the effectiveness of the cross-examination. Similarly, in light of the Bermejo case, the defense will no doubt start making similar demands on plaintiff's counsel regarding the IME.

Additionally, surveillance—over any length of time—can be viewed by a jury as intrusive and creepy. If the plaintiff has been seriously injured and is attempting to get her life back in order, any evidence that a hired investigator was spying, or hiding in the bushes with a high-powered camera, can work to the disadvantage of the defense. In this same vein, another consideration that must be explored prior to trial is whether the investigator conducted surveillance that involved children. In many states, anti-stalking laws preclude such covert videotaping of children; New York provides increased penalties for offenders who stalk children (Penal Code 120.55). Even in the absence of such laws, the use of high-powered video equipment directed into the plaintiff's home or yard—an obvious invasion of privacy—might serve to fuel the jury's ire against the investigator and the lawyer who allowed or ordered such surveillance in the first place.

Imagine the following scenario. Assume the plaintiff, a 35-year-old father of three young children, was in a rear-end collision with a truck. Prior to the accident, he had never suffered a back or neck injury. Following the accident, he was taken to a hospital and diagnosed with a cervical (neck) herniated disc. Although his back hurt, that pain dissipated as time passed. The neck pain, however, continued. He tried a course of conservative treatment for an entire year,

but the radiating pain and discomfort grew worse. The following year, he underwent surgery in the nature of a cervical discectomy and fusion.

At his deposition, the plaintiff testified that he had extreme difficulty playing with his children, and that his physical abilities were severely limited. The defense hired an investigator to conduct video surveillance of the plaintiff. After more than 70 hours of surveillance, the defense produced a 10-minute video, which was offered into evidence and which showed the plaintiff playing catch with his son in his backyard.

To defuse the "gotcha" moment offered by the defense, and to turn the impact of the surveillance on its head, the cross-examination of the investigator must be carefully developed. The best way to develop this cross is to carefully think through the best argument to be used on summation. Words such as invasion of privacy, spying, intrusion will be used, but only after the events surrounding the surveillance are made clear. Focus on the acts done by the investigator, as well as the acts not done, the information not known, and facts not disclosed.

Q: Your assignment was to investigate (my client), true?

Q: You received information from the defense attorney, true?

Q: Were you told that (my client) underwent surgery?

Q: Were you told that he spent more than 500 hours in physical therapy following the surgery?

Q: Did you ever inquire how often he wanted to play ball with his son?

Q: Did you learn how often he couldn't play with his children due to pain?

Q: Did you make any inquiry at all as to how often he was unable to play?

Q: You followed him for more than 70 hours?

Q: And you ended up with only 10 minutes of video?

Q: You were paid for more than 70 hours of work, true?

Q: How many hours did you spend learning about (my client) before you began your surveillance?

Q: So in total, not even including today, you were paid for more than 100 hours of work, true?

Q: At a rate of \$150 per hour?

Q: Did you follow (my client) to church?

Q: Did you follow him to his doctor's appointments?

Q: Did you follow him to physical therapy?

Q: Yet, you have no video to show us any of that, true?

Q: Did you take any still photos?

Q: You used a high-powered video camera, right?

Q: You never let him know you were videotaping him?

Q: You hid in the bushes?

After this line of inquiry, and with knowledge of how much video footage exists, the following low-risk, open-ended question can be put to the witness:

Q: What did you do with the other 69 hours and 50 minutes of video?

Q: Did you advise (defense attorney) that those hours were not much help?

Q: Did you mention to the defense attorney that the footage might actually help the plaintiff's case?

Q: And you would agree that since you can't produce those other 69-plus hours of video we can't see for ourselves if (the plaintiff) was grimacing, true?

Q: And we will never be able to see with our own eyes what that additional video showed?

Q: Did you ever think for one moment that he wanted to play with pain just to be with his kids?

Q: Or whether he was having difficulty in moving his neck?

With proper discovery and a pointed cross-examination of the defense investigator, the trial attorney can easily turn the tables on the defense use of surveillance films. Likewise, with an effective surveillance video of the Independent Medical Examiner, the truth of the case will ring true. Fairness to both sides requires that surveillance of both the plaintiff and the defense doctor should be freely allowable.

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