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HEADLINE: Trial Advocacy, The Tale Of The Tape: Dealing With Video Surveillance Of Your Client

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BODY:

One of the most powerful mediums through which a defense attorney can persuade the jury that your case is not all it is cracked up to be is the video tape; specifically, clandestine surveillance of your client.

The war stories discussing these types of videos are legion: the plaintiff with the injured back changing a tire; the plaintiff with the injured leg playing basketball or walking down a flight of stairs; or the injured plaintiff dancing at a party. This evidence not only has the potential to undercut your client's position but has the potential to destroy your credibility as well. It is up to you as the advocate to meet this evidence head-on by conducting appropriate pretrial discovery, by preparing appropriate motions in limine and objections for use at trial and by preparing a strong cross-examination of the private investigator/videographer.

Pretrial Prep, Discovery

First, you must determine if the tapes truly harm your case. Review the deposition transcript taken of your client to see if there are any inconsistencies between her testimony and the tapes. For example, is she walking without a limp or assistance when she says she cannot?

Take advantage of your right to depose the investigators who took the videos. Compel disclosure of the investigators' notes, memoranda and bills. Discover whether they followed the plaintiff for many more hours and days than their video captures. Determine whether their notes referred to the plaintiff in a derogatory manner. Ascertain whether they made a lot of money on the surveillance with very little to show for it. Learn what the lawyer's retention letter asked them to capture on film. Find out what information the investigators were provided in order to recognize the plaintiff. Identify the type of camera used, whether the speed was improperly adjusted and whether the film was edited. Have the film reviewed by your own expert to reveal whether any foul play was utilized in putting together the video. And just as importantly, get all the surveillance films taken, including the out-takes.

To be admissible, the videotaped evidence must be material, relevant and competent. While the tape usually will be relevant, motions in limine can be made on issues of competence dealing with hearsay objections such as narration; inaccurate portrayal due to surreptitious editing (i.e., reversal of negatives, switching a right hand for a left hand); material alteration or fabrication and issues related to the best evidence rule when the original unedited tape is not produced and an edited version is offered without appropriate explanation.

Cross-Examination

The defense has used varying and clever tactics to procure videos helpful to their cause. Letting the air out of the plaintiff's tire to videotape the tire change is one; dropping money on the sidewalk in front of his house, ringing the doorbell and filming the "pick up" is another. Some resourceful videographers have even hired attractive investigators to take the plaintiff out dancing only to capture the evening on film. Others have offered temporary but high-paying strenuous jobs subsequently captured on video. Some strategies are more offensive than others, but whether a strategy will offend a particular jury depends on the individual juror attitudes. As a general rule, a defense-oriented juror will love any strategy smoking out a "faking" plaintiff, and any plaintiff-oriented juror will hate it.

Many times the defense investigators are in the dark regarding what the plaintiff actually looks like. They are armed only with a photocopy of a driver's license photograph. As a result, they are given additional descriptions

by the insurance carrier which are potentially offensive, and they sometimes capture the wrong people on tape:

Q: You, as the investigator for the defense, had never seen Mrs. Jones before the day of surveillance, correct?

Q: The only thing you had to go on was a photocopy of her driver's license, true?

Q: Which certainly made her difficult to recognize, right?

Q: You were actually given her description by the defense lawyer, correct?

Q: And that description was memorialized in your notes, true?

Q: Which are in evidence since they were kept in the regular course of your business, right?

Q: And that description was as follows: The plaintiff is black with curly hair, a large flat nose and a large rear end, correct?

Q: That is all the information you had, right?

Q: And armed with that information you sat outside Mrs. Jones' apartment building?

Q: But you weren't exactly sure who she was?

Q: But nonetheless you sat outside her building filming people you believed fit that description?

Q: And you captured 10 people on tape, true?

Q: People who had nothing to do with this case?

Q: Correct me if I'm wrong, you never got their permission to videotape them, true?

Q: You did that on your own, right?

Q: At the request of the defense?

Q: Of course, you charged the defense for filming the wrong person?

Q: All in a days' pay, true?

Surreptitious Nature

A basic cross-examination technique involves underscoring the surreptitious nature of the defense investigators' duties. Obviously, the last thing they want is to be discovered by the plaintiff. Pointing this out can go a long way on cross:

Q: You told us you used a van to conduct your surveillance of Mrs. Jones, correct?

Q: You sat outside her apartment building, true?

Q: In your vehicle, right?

Q: With tinted windows, true?

Q: So people couldn't see in?

Q: But so you could see out?

Q: And that way you could look at somebody without them knowing it, correct?

Q: Surreptitiously, right?

Q: Secretly?

Q: Behind their backs, true?

Q: So that they would have no idea they were being followed, let alone videotaped, true?

Q: In fact, you have to be good at deceiving people to do your job well, right?

Q: That's what you do for a living, true?

Q: You follow people without their knowledge?

There are situations in which the plaintiff has moved since the inception of the lawsuit and is difficult for the defense to find. Therefore, staking out the plaintiff's residence is an impossibility. In situations like that investigators wait for the day of the plaintiff's so-called "Independent Medical Examination" to conduct the surveillance. That way, they know where and when the plaintiff will be available for videotaping. Once the physical is over, they also know definitively who the plaintiff is. As a result, many defense investigators actually speak to the defense doctor or his staff to confirm the appointment. Cross-examining the defense investigator on this issue can help impeach the Independent Medical Examiner as well:

Q: You testified on direct that you followed my client to her "IME" or Independent Medical Examination, correct?

Q: Now you actually used the term, "Independent Medical Examination" to this jury, right?

Q: And by independent, you meant that Dr. April wasn't taking sides in the litigation as far as you knew, correct?

Q: A separate entity, completely detached from the defense?

Q: And totally detached from the defense team, true?

Q: Yet, when you were sitting outside Dr. April's office, you knew without question that Mrs. Jones would be at his office that morning, true?

Q: And that's because it was Dr. April's office that told you that Mrs. Jones would definitely be there that day, correct?

Q: You spoke to Dr. April's office, not just one time, true?

Q: You spoke to them many times, right?

Q: Because Mrs. Jones kept canceling her appointment, right?

Q: And each time she canceled, Dr. April's secretary would call and tell you, true?

Q: So you wouldn't waste your time, correct?

Although effective video surveillance can be devastating to a plaintiff, often-times the videos show no smoking gun or major inconsistency between the claim of injury and what the tape reveals. When that occurs, point it out to the jury:

Q: You were given a specific assignment in this case, correct?

Q: You know when you follow people who are injured, that one of the things you want to do is catch them doing something they say they can't do, right?

Q: And the accident happened five years ago, true?

Q: You can't say that you are the only investigator who has been hired by the defense to follow Mrs. Jones, can you?

Q: As a matter of fact, you don't know how many firms have been retained to follow her and capture her on videotape?

Q: But according to your notes, you have been following her on and off for the last two years, true?

Q: And you showed this jury six minutes of videotape taken over that time, right?

Q: You'd agree, there is not one shot of Mrs. Jones running, true?

Q: Not one video of her lifting heaving items, right?

Q: Not one picture of her so much as mowing the lawn?

Q: Or changing a flat tire?

Q: You'd agree that these six minutes of film were the best you could do, right?

Q: Six minutes of film over the course of five years since the accident, true?

Even if the private investigator tapes your injured client changing a tire, there are ways to approach the cross-examination. One way might focus on the unusual coincidence that the private investigator just happened to be present at the exact moment when the client had to change a flat tire:

Q: Did you at any time during the early morning of Jan. 20, 1999 touch or tamper with a tire on plaintiff's car?

Q: Do you know of anyone who might have done that?

Q: Certainly, during the course of your years of investigation, you've heard of this happening?

Q: You certainly knew that those who hired you would be extremely pleased if you were to film such an event?

Q: You just happened to be fortunate enough to be there on that one day at that one time in the last 30 years when plaintiff had to change a tire, true?

Q: You've been involved in this line of work for approximately 20 years, true?

Q: Conducted video surveillance of hundreds of people, true?

Q: Of those hundreds of people how many were filmed while changing a tire?

Q: But the one thing you do know from your careful observations of the plaintiff and his car is that the tire was punctured, true?

Now focus on the negatives that the investigator could not have known and does not know, setting the witness up

and knocking him down:

Q: You've heard of back braces and orthopedic devices that are worn under the clothes, true?

Q. One of the things you can't state is whether plaintiff was wearing such a brace at that time?

Q. You certainly have heard of pain killers, analgesics and nonsteroidal anti-inflammatories, true?

Q. You have no idea if plaintiff was taking them on that date, true?

Q. In fact, you can't say whether plaintiff was taking them on that day while changing a tire?

Q: You don't know what effect the brace or medication had on plaintiff's abilities that day?

Q: In fact, from your vantage point you never filmed plaintiff's face while he was changing the tire, true?

Q. So you have no idea if he was grimacing in pain while changing the tire because you chose not to video his face, true? Even with effective surveillance films, a good cross of the defense investigator can aid your case. At a minimum it can reveal the covert and sneaky nature of his business. At best it can show the defense was unfair by failing to show all the films to the jury or by the videographer's actions in putting the camera down or shutting it off at key times. Moreover, if the defense investigator has followed the plaintiff over a period of months or years, you can argue that the lack of incriminating footage is actually supportive of plaintiff's claim of disability.

Sometimes you can even show a defense conspiracy involving the defense doctor the so-called independent medical examiner and the defense investigator. Most of the time you can demonstrate that showing just a few minutes of film to reflect many years of post injury suffering is downright unjust.