

## **Surveillance: Is the Law Changing on Discoverability?**

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The videocamera is one of the most powerful weapons in an SIU's arsenal. How many times have we heard stories of plaintiffs alleging serious back injuries only to be caught on tape loading heavy loads into the back of a pickup truck? We also know how satisfying it is to impeach the credibility of a plaintiff who we know is malingering or worse. They will usually trot out the old canards like "You caught me on a good day" or that "the investigator was selectively filming me" in order to try to explain away what is on the tape.

Now imagine what would happen if the defendant had to hand over the tape *before* the plaintiff was even deposed. It would give the plaintiff and his counsel plenty of time to come up with a story to explain the tape away before defense counsel could get a chance to set up impeachment for trial. Sound outrageous? It may be, but it is the law in New York.

### **The Minority Rule: The New York Rule**

New York law, prior to 2003, struck a balance between defendants, who favored withholding evidence of surveillance until trial so as to prevent the plaintiff from tailoring his testimony to fit the contents of the tape, and the plaintiffs who feared such tapes could and would be edited or otherwise altered to suit the defendant's needs. It was in line with the majority of states.

In 1993, the New York Legislature enacted a statute which required that "there shall be full disclosure of any films, photographs, video tapes, or audio tapes, including transcripts or memoranda thereof...there shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use." CPLR §3101(d)(1)(i).

The Court of Appeals of New York dealt a blow to fairness in 2003 when it held in Tai Tran v. New Rochelle Medical Center that §3101(d)(1)(i) required full disclosure with no limitation as to timing, unless and until the legislature declared otherwise. In Tai Tran, the plaintiff sued the defendant doctor and hospital for injuries arising from failure to properly diagnose and treat an injury. He alleged that as a result of his injuries he was unable to return to work. When defendants learned that plaintiff had indeed returned to work, they requested that plaintiff be put under surveillance. Plaintiff learned of the surveillance and filed a motion for the immediate disclosure of the unedited videotape. Defendant doctor and hospital argued that disclosure was not required until after the plaintiff had been deposed, as the court had previously held in DiMichel v. South Buffalo Railway Co. Plaintiff argued that §3101, which was passed mere months after the DiMichel ruling, was silent as to timing. The court found in favor of the plaintiff holding that if the legislature had wanted to provide a limitation on the disclosure provision of §3101, it would have done so in the statute.

The court also stated that because §3101 required full disclosure there was no need for plaintiff to make a showing of undue hardship or substantial need. In essence, once the plaintiff knew of the existence of videotape surveillance, he could make a demand for it, regardless of whether or not he had been deposed.

What does this mean for SIU's in New York and across the country? The good news is that most states that have addressed this issue permit defendants to hold onto video surveillance until after deposition. Some states require defendants to disclose the existence, but not the contents, of video surveillance upon demand of the plaintiff. The bad news is that SIU's and insurance company counsel in New York are severely hamstrung by the Tai Tran ruling; but there is a way around it.

Most video surveillance occurs as part of the claims process before defense counsel has even been retained. Under the full disclosure provisions of New York law, the entire videotape, whether it ultimately aids defense or plaintiff, must be turned over upon demand whether or not it is "work product" made in anticipation of litigation. While this is the rule for audio and video surveillance, 3101(d)(1)(i) is the exception to the general rule about disclosure of work product. Section 3101 as a whole still maintains the traditional definition of work product, that is, product made in anticipation of litigation. It protects against disclosure of mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party, including SIU's, concerning the litigation. What this means is that if an insurance company wishes to find out if the insured is perpetrating some sort of fraud or is otherwise malingering before it has retained counsel, then it should instruct its SIU to conduct surveillance, but not to videotape the surveillance. Of course, questions as to the credibility of the surveillance will become an issue. But any notes or mental impressions of the insured's conduct would still be protected under the general provisions of §3101.

Thus, by not videotaping surveillance done in the initial stages of an investigation, the insurance company will not run the risk of later having to turn over the videotape. And as long as the insurance company can show that any memos or notes made by its SIU were done in anticipation of litigation, those notes will be protected under the work product doctrine. So if your SIU comes back from his untaped surveillance with eyewitness evidence that the insured is malingering, you may want to wait until your insured is deposed before pressing the "Record" button.

### **The Majority Rule**

Courts have moved away from a strict "work product" protection of surveillance tapes. Most courts addressing the issue of disclosure of videotape surveillance have held that a party in possession of a surveillance videotape must disclose it to the opposing party prior to trial<sup>2</sup>. Individual states do have their own nuances to this general rule. "[M]any states that have wrestled with the question have held at least the existence of the videotape must be revealed in response to discovery requests<sup>3</sup>." Thus, you may have to let plaintiff know that you have videotaped him prior to his deposition but he does not have the right to see the tape.

Alabama requires that the defense disclose whether or not surveillance evidence exists<sup>4</sup> but it allows for post-deposition disclosure of the tape itself unless the plaintiff can show substantial need or undue hardship necessitating a pre-deposition disclosure. The court notes that this would be difficult because the plaintiff would have a hard time showing that she was

ignorant of her activities which could have been observed by the defendant<sup>5</sup>. The following are just brief examples of how states apply the majority rule.

Mississippi courts have held that disclosure is required even during a trial. Defendants who conducted surveillance during trial were required to disclose the evidence in response to plaintiff's requests for discovery<sup>6</sup>.

In Indiana, the surveillance tape is only discoverable if the defense chooses to present it at trial, in which case the defense must be given the opportunity to depose the plaintiff before disclosure<sup>7</sup>.

In Louisiana, the plaintiff's deposition generally precedes disclosure of the videotape. However, if the plaintiff is able to show some "special circumstances," he may be able to obtain the tape prior to deposition<sup>8</sup>. An example of such a special circumstance would be where a defendant released a copy of the surveillance videotape to the plaintiff's physician to influence him to terminate the plaintiff's treatment<sup>9</sup>.

In writing on the fairness of removing work product protection from video surveillance, the Supreme Court of New Jersey noted, "it is not probable that pretrial disclosure of [activity inconsistent with alleged injury] will enable [the plaintiff] to salvage the case; more likely it will hasten settlement<sup>10</sup>." The court was not willing to strip defendants of all benefits of surveillance and stated that defendants, in consideration of their making the films available to plaintiffs, should be allowed to first take the deposition of the plaintiff<sup>11</sup>.

Some states, like Connecticut, have conflicts among their judicial districts as to what is and what is not attorney work product when it comes to surveillance. The most recent case in Connecticut's New Haven Judicial District adopted the majority rule but noted its split with other districts which provide greater work product protection<sup>12</sup>.

The general trend is that courts disfavor a blanket prohibition on pre-trial disclosure of surveillance, but they also permit defendants to depose plaintiffs prior to disclosing any surveillance evidence which could be used to impeach even if the states differ in their approaches to this end. If you have questions or concerns regarding how to proceed in your surveillance of a insured and you worry about the insured getting his hands on the videotape evidence too soon or obtaining videotape evidence that may help him, do not hesitate contact competent legal counsel for advice.

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<sup>2</sup> Roundy v. Staley, 984 P.2d 404, 407 (Utah App., 1999).

<sup>3</sup> 6 James Wm. Moore, *Moore's Federal Practice* §26.41(4)(b)(3d ed. 1997)

<sup>4</sup> see Ex Parte Doster Construction Company, Inc., 772 So. 2d 447 (Ala. 2000).

<sup>5</sup> See Ex Parte Thomas H. Weeks, 810 So.2d 661 (Ala. 2001).

<sup>6</sup> Williams v. Dixie Electric Power Association, 514 So. 2d 332 (Miss. 1987).

<sup>7</sup> See Pioneer Lumber, Inc. v. Bartels, 673 N.E. 2d 12 (Ind. App. 5<sup>th</sup> Dist. 1996)

<sup>8</sup> see Wolford v. Joellen Psychiatric Hospital, 693 So.2d 1164 (La. 1997).

<sup>9</sup> McNease v. Murphy Construction Company, 682 So.2d 1250 (La. 1996).

<sup>10</sup> Jenkins v. Rainer, 350 A.2d 473, 476 (NJ. 1976).

<sup>11</sup> Jenkins, 350 A.2d at 477

<sup>12</sup> see Torre v. New Haven Orthopaedic Group, et. al., 1996 Conn.Super.LEXIS 960