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DISCOVERY

Using Surveillance Material in Discovery

BY CARI A. COHORN | August 2012

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In many cases that involve personal injury claims or disability issues, the defense routinely conducts surveillance, hoping to capture images of the allegedly debilitated claimant skiing, running a marathon, or vigorously working out at the local health club. The aim, of course, is to set up that dramatic moment at trial when the defense springs the footage on the unsuspecting plaintiff, destroying her credibility and carrying the day with the jury.

Yet despite the widespread use of surveillance, a vital question remains largely unanswered by governing California law: Are surveillance materials discoverable? (See Rutter Group, Cal. Prac. Guide: Civ. Procedure Before Trial, Chapter 8C ¶ 8.243 (noting lack of authority addressing this question).)

Defense counsel typically assert that the materials were generated in anticipation of litigation, at the direction of counsel, and therefore are protected by the work-product privilege. (See Cal. Code Civ. Procedure § 2018.010-2018.080. (All section references below are to the Code of Civil Procedure.)) But does the work-product privilege apply to a video of the injured plaintiff?

Work Product

The attorney work-product doctrine rests on two important premises: first, that attorneys must be free to investigate the strengths and weaknesses of their clients' cases without having to turn over their findings to opposing counsel (see § 2018.020(a)); and second, that lazy lawyers

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shouldn't be able to get a free ride on the efforts of their adversaries (see § 2018.020(b); *Jasper Constr., Inc. v. Foothill Junior College Dist.*, 91 Cal. App. 3d 1, 16 (1979)).

The work-product privilege is further subdivided into two distinct categories: items that are *absolutely* privileged, and those that are protected by a *qualified* privilege. This distinction is crucial. Absolutely privileged items cannot be discovered under any circumstances; but when a piece of evidence is subject to a qualified privilege, the court *may* order its production.

The absolute privilege covers only writings that truly reflect "an attorney's impressions, conclusions, opinions, or legal research or theories." (See § 2018.030(a).) Stated with a bit more flair, these are materials that, if discovered, would "be tantamount to compelling the attorney to become a witness." (*Suezaki v. Superior Court*, 58 Cal. 2d 166, 178 (1962).)

When the qualified privilege applies, a document or other item is discoverable if the refusal to disclose it would "unfairly prejudice" the other side or otherwise "result in an injustice." (§ 2018.030(b).) Most battles over work product are waged in the gray area of the qualified privilege.

Whether and to what degree the privilege shields materials from discovery depends on where they fall on the continuum between *interpretive* material (which is absolutely protected) and *evidentiary* material (which may be discoverable). (See *Fellows v. Superior Court*, 108 Cal. App. 3d 55, 68-69 (1980).) As the courts have noted, information regarding "an event provable at trial" is evidentiary material, whereas interpretive material reflects counsel's analysis. (*Mack v. Superior Court*, 259 Cal. App. 2d 7, 10 (1968).)

By distinguishing between interpretive and evidentiary material, judges balance the competing goals of encouraging thorough investigation and preparation for trial and of "permitting broad discovery to prevent trials from constituting games of chance." (*Fellows*, 108 Cal. App. 3d at 69.)

Surveillance Debate

Defendants often contend that surveillance materials - whether photographs, videotapes, or investigators' reports - are subject to at least a qualified privilege. Although the California Supreme Court has held that photographs and videos are not absolutely privileged (*Suezaki*, 58 Cal. 2d at 177-178), some defendants nonetheless assert that an investigator's report should be absolutely protected. Thus disputes over discovery of surveillance documentation typically center on the degree of protection the materials are to be afforded. In one out-of-state case, the court observed that materials prepared in anticipation of litigation are privileged only to the extent they truly convey the "mental impressions and opinions" of counsel. (See *Dominick v. Hanson*, 753 A.2d 824 (Pa. Super. Ct. 2000).)

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However, a more fundamental question is whether surveillance materials are a work product at all. As one California appellate court observed, a piece of evidence is not privileged merely because it is in part the product of an attorney's work. (*Kadelbach v. Amaral*, 31 Cal. App. 3d 814, 822 (1973).) Indeed, it would be unusual for photographs or video footage taken by an investigator to reflect an attorney's impressions, other than perhaps a general theory that the plaintiff is exaggerating the extent of her injuries. But by the time most surveillance is conducted, defendants typically have already revealed that they are pursuing such a theory. When that is the case, disclosure of the materials would not further reveal the defense counsel's analysis - even when an attorney's instructions to the investigator divulge some details of the defense's "exaggerated injury" theory. In a Maryland case, the court made this very point, stating that surveillance materials were discoverable, even though counsel had instructed the investigator to obtain footage of the plaintiff "when he was not wearing his neck collar." (See *Shenk v. Berger*, 587 A.2d 551, 552 (Md. App. 1991).)

Some courts hold that whether surveillance materials constitute work product depends on whether counsel intends to use them at trial. As the Florida Supreme Court has ruled: "Any work product privilege ... ceases once the [surveillance] materials or testimony are intended for trial use. More simply, if the materials are only to aid counsel in trying the case, they are work product. But if they will be used as evidence, the materials, including films, cease to be work product and become subject to an adversary's discovery." (*Dodson v. Persell*, 390 So. 2d 704, 706-707 (Fla. 1980).) Under this approach, a surveilling party's refusal to produce surveillance materials in discovery may bar the use of those materials at trial. (*Dodson*, 390 So. 2d at 708.)

Unfair Prejudice

As noted above, materials subject to the qualified privilege must be produced if a refusal to disclose them would unfairly prejudice the opposing party. Determining whether that standard has been met requires a nuanced inquiry.

The starting point for this inquiry is familiar: Is the evidence relevant or calculated to lead to the discovery of admissible evidence? Of course, surveillance materials are, in virtually any personal injury or disability case, highly relevant. As one federal judge in Pennsylvania put it, "[o]bviously films which would tend to show a [personal injury] plaintiff's physical condition, how he moves, and the restrictions which are his, are highly relevant - perhaps they will establish the most important facts in the entire case." (*Snead v. Amer. Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973).)

Open Question

No California case has addressed the question of whether, or when, withholding surveillance materials causes injustice or unfair prejudice. However, rulings that apply Federal Rule of Civil Procedure 26 or state statutes closely modeled after it provide some guidance.

Rule 26 imposes a stricter standard on parties seeking discovery than section 2018.030(b) does: It authorizes the disclosure of work product only when the party seeking discovery "has substantial need for the materials ... and cannot, without undue hardship, obtain their substantial equivalent by other means." Nonetheless, courts applying the federal standard often compel discovery of surveillance materials. (See *Shenk*, 587 A.2d at 554-555.) California law, by contrast, requires no showing that the evidence cannot reasonably be obtained through other means. Even so, that may be one factor examined in determining whether withholding the evidence will result in undue prejudice or injustice.

Necessity and Surprise

The key inquiry seems to be the necessity of viewing the surveillance material. For instance, a New Jersey court ordered production of surveillance films despite the defendant's argument that plaintiff had "no 'substantial need' to view the surveillance movies because she better than anyone else knows the truth of her physical condition at the time the pictures were taken." (*Jenkins v. Rainner*, 350 A.2d 473, 476 (N.J. 1976).) In Florida, a court likewise rejected the argument that nondisclosure would not prejudice the plaintiff because "the surveillance film involves facts more readily known by the plaintiff than the defendant and consequently there is no surprise." (*Dodson*, 390 So. 2d at 706.)

Courts have similarly thwarted efforts by the defense to spring a revealing video on an unsuspecting plaintiff at trial. The *Jenkins* court specifically held that it would be "plainly unfair" not to allow the plaintiff the chance of "attacking the integrity of the film and developing counter-evidence." Conversely, the court noted, the risk of harm to the defendant was minimal; if the surveillance materials depicted the plaintiff engaging in strenuous activities, pretrial disclosure would not enable her to repair the damage to her case. Finally, the *Jenkins* court held, the plaintiff would be unable to obtain the equivalent of the surveillance materials by any other means without undue hardship: Specifically, because the footage had been captured in the past, plaintiff could not re-create it, and it was therefore "unique." (350 A.2d at 477.) Indeed, a New York federal court noted that "[s]ince plaintiff's past activities obviously can no longer be filmed, the barrier of the work-product rule is lifted." (*Martin v. Long Island R.R. Co.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974).)

At least one court has determined that a refusal to produce surveillance materials in a personal injury case constitutes undue hardship, even without any further showing of prejudice to the plaintiff. In *Cabral v. Arruda* (556 A.2d 47, 50 (R.I. 1989)), the Rhode Island Supreme Court stated that the introduction of surveillance photographs and films at trial creates a risk of exaggeration, distortion, and even fraud by the defendant. Because "the existence and extent of injury is the very essence of plaintiff's claim," the court held, "surveillance materials need to be scrutinized carefully" and are therefore discoverable. (556 A.2d at 50.) Likewise, a Louisiana court found that materials shown to an expert witness must be disclosed, even if the materials

themselves will not be introduced at trial. (See *Clark v. Matthews*, 891 So. 2d 799, 804 (La. App. 2005).)

Stipulated Solution
Courts weighing the discoverability of surveillance materials, then, will strive to prevent unfair surprises at trial and any situation in which potentially misleading evidence is presented, without the plaintiff having a meaningful opportunity to rebut it. As one court observed: "[T]he camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events." For these reasons, judges are rightly concerned that a tool theoretically deployed to reveal the truth "may be distorted, misleading and false." (*Snead*, 59 F.R.D. at 151 (ordering defendants to either disclose surveillance materials or refrain from using them at trial).) But if the party asserting the work-product privilege stipulates that none of the requested materials will be used at trial, the opposing party is far less likely to be prejudiced, and the materials need not be produced. (See *Fletcher v. Union Pacific R.R. Co.*, 194 F.R.D. 666, 669 (S.D. Cal. 2000); *Angelucci v. Gov't Employees Ins. Co.*, 2011 WL 4953009 (M.D. Fla. Oct. 17, 2011).)

Impeachment Only
Although parties can effectively resist producing surveillance materials by stipulating that the items will not be used at trial, they have had far less success by asserting that the evidence will be used only for impeachment. In fact, when the defendant has already taken the plaintiff's deposition and received responses to written discovery, courts have uniformly rejected the argument that disclosing surveillance materials would unfairly hinder the defendant's ability to use them for impeachment. (*Dodson*, 390 So. 2d at 708; *Blyther v. Northern Lines, Inc.*, 61 F.R.D. 610 (E.D. Pa. 1973).)

In one case the court compelled production of surveillance materials despite the defense counsel's argument that production would destroy the materials' impeachment value by permitting the plaintiff to tailor his testimony to be consistent with the surveillance footage while still exaggerating his injuries. (*Cabral*, 556 A.2d at 50.) Because the plaintiff had previously been deposed, the court found this argument "unpersuasive" and ordered the materials to be produced.

To prevent loss of the impeachment value of surveillance materials, the defense must have an opportunity to first depose the plaintiff fully as to his or her injuries, their effects, and the plaintiff's present disabilities. Once that deposition testimony is memorialized, any variation at trial can be used to impeach the plaintiff's credibility, and an injury claimant's knowledge at deposition that surveillance films may exist "should have a salutary effect on any tendency to be expansive." (*Snead*, 59 F.R.D. at 151; *Bryant v. Trexler Trucking*, 2012 WL 162409 (D.S.C. Jan.

18, 2012).)

Cari A. Cohorn, an associate with Phillips, Erlewine & Given in San Francisco, focuses on civil litigation, particularly in the areas of employment, sports, and entertainment.

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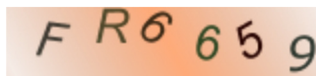

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