Strategic Planning in Discovery

Using the Tools of Discovery in a Cost-Effective Way to Achieve Your Client's Goals

WHY ATTEND?

Successful trial lawyers know the important role that preparation plays in the outcome of a case. In fact, the liberal discovery rules in Massachusetts provide counsel with numerous vehicles to maximize case preparation. But without a considered strategic approach, discovery can become no more than an expensive and fruitless paper chase. Furthermore, as clients continue to demand that litigation costs be kept under control, the practice of planning your discovery rises to a new level of importance.

This seminar explores the considerations relevant to choosing the discovery strategy most likely to help you accomplish your litigation objectives. Faculty members present practical illustrations of strategic choices they have made in their own cases. Brief lectures followed by open question-and-answer periods enable you to discuss your own strategies with the faculty.

YOU WILL LEARN

- Considerations governing a general discovery strategy.
- Considerations governing whether you should obtain information through discovery or investigations.
- How to use discovery to position your case for settlement.
- The impact of the new local rules on discovery strategies in federal cases.

AGENDA

Overview
The importance of strategic planning; the new federal rules

Developing a Discovery Strategy
Discovery budgets; positioning your case for settlement; cases that must be tried; when not to depose a witness; implications of a discovery strategy

Complex Litigation; What You Can Learn from Your Own Client
Working with your client to understand your case; working with experts to understand the technical aspects of a case; timing and sequence of discovery; Rule 30(b)(6) depositions

A Plaintiff's Approach to Personal Injury Cases
When to depose; when not to depose; videotaped depositions for settlement; economic discovery techniques; how to prepare a party for deposition; timing and sequence of depositions; public records that can cut discovery costs

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4-7 P.M.
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Tuition includes written materials.

CAN'T ATTEND?

WRITTEN MATERIALS $55
AUDIOCASSETTES $75

SEMINAR

STRATEGIC PLANNING IN DISCOVERY

A Plaintiff's Approach to Personal Injury Cases

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INTRODUCTION: The purpose of this paper is to provide an overview of the various discovery tools which are available to prepare a personal injury case for settlement or trial.

I. INFORMAL DISCOVERY

A. ADVANTAGES

Informal discovery is inexpensive and it is conducted without your adversary's knowledge. Informal discovery should start during the initial client meeting and it continues throughout the duration of the case.

B. DISADVANTAGE

The major disadvantage of informal discovery is that an informal witness statement does not preserve the evidence in a form that will be admissible at trial.

C. RECOMMENDATIONS

Begin informal discovery immediately. One of the goals of informal discovery is to "freeze" the evidence before memories fade and witnesses disappear.

John P. DiNatale, President, DiNatale Detective Agency, Inc., Boston, recently made this observation concerning informal discovery; "It never ceases to amaze me the way attorneys (plaintiff and defendant) and insurance companies handle their investigations. It is no surprise that the most successful law firms and insurance companies are the ones that adequately prepare and investigate their cases so that WHEN THEY ARE READY TO PUT THEIR CASE IN SUIT THEY ARE ALSO READY TO START TRIAL THE NEXT DAY.[1]

D. TYPES OF INFORMAL DISCOVERY

[1] A copy of John P. DiNatale's article entitled "Investigative Services - Just The Facts" is included in the Appendix at Tab A.

1. Photographs - It is imperative to take photographs of the accident scene immediately after the accident. After the accident, the road may be redesigned, lines may be repainted or signs may be erected. Photographs should also be taken of the cars and your client's injuries.

2. Medical Records and Bills - At the initial client meeting, have your client sign a medical authorization so that you can obtain all of the pertinent records. Often times, the emergency room records will contain information concerning the cause of an accident and the identity of witnesses.[2]

3. Employment Records - The client should also sign an authorization so that you can obtain all pertinent employment records. This will help quantify your client's lost wages and loss of earning capacity.[2]

4. Witness Statements - When a new case comes into the office, you should obtain witness statements as soon as possible. Although an attorney or his paralegal can take the statements, it is more prudent to retain a private investigator.

   If you take the witness statement, you will not be able to impeach the witness if he changes his testimony at trial. Similarly, if your paralegal takes the witness statement his impartiality will be attacked because he is employed by your law firm.

5. Statement of Parties - If your client is involved in an accident, it is likely that the other party's insurer will try to contact your client to obtain a written or a recorded statement. Be certain to advise your client that he is not required to give a statement to the other party's insurance company. Advise your client to refer these calls to your office. You should also tell your client that although he will be required to submit an accident report to the police, the Registry of Motor Vehicles and his insurance company, these reports should be reviewed with you before they are filed. These reports have a life of their own and they will be used as binding admissions.

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[2] A copy of a standard authorization form for medical records and employment records is included in the Appendix at Tab B.

If your investigator takes a statement from the other party (Disciplinary Rule DR 7-104 prohibits an attorney or his investigator from taking a statement from the other party where it is known that the other party is represented by a lawyer) keep in mind that the other party has a right to obtain a copy of his own statement. M. R. Civ. P. Rule 26(b)(3).

6. Statements of Other Witnesses - If an investigator takes statements from percipient witnesses, these statements may be protected from disclosure during the formal stages of discovery. Sometimes, a witness will refuse to provide a statement because he already gave a statement to the other party's investigator. Under Rule 26(b)(3), you may not get a copy of that statement unless you can convince a judge that you have a "substantial need" for the statement and that you are unable to obtain the equivalent without "undue hardship".

All witness statements should be routinely discoverable. If you are faced with an adversary who refuses to produce witness statements, refer to Waits, "Work Product Protection for Witness Statements: Time for Abolition" 1985 Wisconsin Law Review 305. Attorney Waits concludes that "work product" protection for witness statements glorifies the adversary system at great costs to the litigants and to the detriment of the search for truth in the courtroom.

Since a court may determine that some witness statements are protected by the work product doctrine, a plaintiff's attorney should not sit back with an expectation that he will receive copies of all witness statements merely by filing a Request for Documents after the lawsuit is filed.

The importance of witness statements is aptly described by John P. DiNatale, President, DiNatale Detective Agency: ". . . the reality of the matter is, the individual who interviews the witness first is generally the individual who obtains the most favorable statement. Simple things such as people not wanting to be bothered more than once, and not understanding why both sides cannot have the same copy of their statement, are simply not comprehended by some people . . . After seventeen years and several thousand investigations there is no doubt in my mind that the one who is best prepared and interviews the witness first is the one who generally wins."

If your investigator locates a witness who already gave a statement to the other party's insurer, you can tell that witness that he has a right to obtain a copy of his statement and that he also has a right to give you a copy. Often times you will notice a deposition of a fact witness and he will call your office to find out why he has to give another statement. If you learn that the witness already gave a statement to the other party's investigator, you can ask the witness to request a copy of the statement and assure him that you will review the statement to determine if it will be necessary to take his deposition. Once you obtain the statement this may obviate the need for a formal deposition.

7. Police Reports and Operators Reports - After an automobile accident, each operator files a report with the police and the Registry of Motor Vehicles. For a small fee, these reports can be obtained directly from the police or Registry. Each report contains a "brief description" of the accident. These statements are often prepared before the operator has retained an attorney and they often contain admissions which will go a long way towards resolving the case. Sometimes, the police reports will not be provided if there is a criminal investigation pending. If you learn that the other party was given a citation, you should follow up with the police or the local District Court to find out when the citation or criminal matter will be heard. You should attend any court hearings and request transcripts of relevant testimony.

8. Networking - One of the easiest and most cost effective ways to obtain informal discovery is to "network" with other plaintiff's attorneys. Once you are able to locate other attorneys who have handled similar cases, it is likely that they will share their informal and formal discovery with you.

   The Association of Trial Lawyers of America (ATLA) maintains a service known as "ATLA Exchange" (800-344-3023) which can help you establish an appropriate network. For a modest fee you will obtain a wealth of information from ATLA. ATLA will search its databases to put you in touch with attorneys who have handled similar cases. These attorneys will provide you with insight, information and strategies. One of the requirements for obtaining information from ATLA is a reciprocal agreement that you will respond to any and all requests from other ATLA members.

ATLA has also developed sixty five separate litigation groups. These litigation groups have databases of expert witnesses, abstracts of similar cases, citations for legal and technical articles, news stories, court documents, government regulatory information, depositions and trial transcripts of defense experts, briefs (indexed by subject and state), informational databases on discovery abuse, protective orders, federal preemption, Rule 11 and other trends in litigation.

ATLA litigation groups have existed since 1962. A litigation group is a voluntary, non profit group, all of whom must be ATLA members, who are handling similar cases or who have an interest in these cases. The purpose of each group is to permit each injured person to benefit from the collected experience, materials and information in the possession of the plaintiffs' attorneys litigating similar cases, while reducing the high costs of litigation. The litigation group provides a collegial networking structure whereby members exchange information, share experiences and develop discovery and litigation strategies in the spirit of professional cooperation towards mutually held goals. The following is a list of the existing ATLA Litigation Groups:

Accutane
AIDS
Aquatic Injuries
Subgroup: Scuba and Diving Accidents
ATM/Bank Security
Attorneys Information Exchange Group, Inc. (AIEG)
Subgroup: Airbags
Subgroup: All-Terrain Vehicles
Subgroup: Brakes
Subgroup: Child Restraints
Subgroup: Defective Firearms
Subgroup: Fuel System Integrity
Subgroup: Helmets
Subgroup: Motorcycles
Subgroup: Pleasure Boats/Personal Watercraft
Subgroup: Roof Crush
Subgroup: School Buses
Subgroup: Seat Belts
Subgroup: Seat Design
Subgroup: Vehicle Rollovers
Automatic Doors
Back-Up Alarms
Battery Explosions
BIC Lighters
Birth Defects, Teratogens, and Bendectin
Subgroup: Ethylene Oxide

Birth Trauma
Breast Cancer
Breast Implants
Child Sexual Abuse
Chymopapain
Construction Site Accidents
Crane Injury
Dalkon Shield
Defibrillators
Delivery Service Negligence
DES
Diet Products
Subgroup: HMR 500
Dioxin and PCP
Dry-Cleaning Fluid Exposure
Electrical Accidents
Electromagnetic Radiation
ERISA/Employee Benefits
Fire Loss
Formaldehyde
Halcion
Hard Metals Disease
Hazardous Materials
Heart Valves (Bjork-Shiley)
Homeowner Warranties
Industrial and Agricultural Products and Vehicles
Insurance Bad Faith
Interstate Trucking
Isocyanates
Kerosene Heaters
Lead Paint
Legionnaires' Disease
Lender Liability
Liquor Liability
L.P. Gas Explosions
L-Tryptophan
Mining and Oil Field Products and Accidents
Motorcyclists' Rights
Multi-Piece Wheels/Rims
Non-Steroidal Anti-Inflammatory Drugs (NSAIDS)
Nursing Homes
Occupational Hearing Loss
Pesticides
Pharmacy Liability
Protective Orders
Prozac
Psychotherapy: Patient Sex Abuse
Sudden Acceleration
Tap Water Burns
Tardive Dyskinesia
Theophylline
Tire/Rim Mismatch
Toys and Recreational Equipment
Traumatic Brain Injury

Transmissions
Urocanic Acid
Vaccines
Vehicle Underride
Vending Machine Tip-Overs
Versed

Similarly, Jury Verdict Research (LRP Publications 800-341-7874) has been tracking personal injury verdicts and settlements for over twenty years and their databases include information on thousands of personal injury cases. This information is now available on Westlaw and Lexis and by using these databases, you can put yourself in direct contact with experienced attorneys and their experts.

9. Freedom of Information Act - State and Federal Freedom of Information Acts (Freedom of Information Act, 5 USCA §552) are useful for pretrial investigation and discovery. Obtaining information from FOIA allows you to obtain information concerning a defective product without putting the defendant on notice that you have obtained that information. For a detailed description of public record searches, see Cameron, Public Record Searches & Preliminary Asset Discovery, Practical Litigation Skills for Legal Assistants (MCLE 93-05.23). See also Tilson, Freedom of Information Acts: Invaluable Resources, Trial Magazine pg. 43 (May 1993).

10. Retention of Consulting Experts - In products liability cases or serious automobile cases, you should retain appropriate experts as soon as possible. The experts should carefully examine the product or the accident scene. Make it clear (in writing) that your expert cannot perform any destructive testing. In Nally v. Volkswagon of America, Inc., 405 Mass. 191 (1989), the Supreme Judicial Court held that in a civil case, where an expert has removed an item of physical evidence and the item has disappeared or the expert has caused a change in the substance or appearance of such an item in such circumstances that the expert knows or reasonably should know that the item in its original form may be material to litigation, the Judge, at the request of a potentially prejudiced litigant, should preclude the expert from testifying as to his or her observations of such items before he or she altered them and as to any opinion based thereon. The reason for the rule is the unfair prejudice that may result from allowing an expert deliberately or negligently to put

himself or herself in the position of being the only expert with firsthand knowledge of the physical evidence on which expert opinions as to defects and causation may be grounded. As a matter of sound policy, an expert should not be permitted to intentionally or negligently destroy or dispose of such evidence and then to substitute his or her own description of it.

11. Statements of Parties or Other Witnesses Who May Not Be Available for Trial - If your client or an important witness is terminally ill or about to leave the country and you would like to preserve their testimony for trial, it is critical to follow the statutory procedures for preserving this evidence. In Anseomo v. Reback, 400 Mass. 865 (1987), the decedent gave a video tape statement to her attorney in a question and answer format. The video tape was made before suit was filed and without notice to any of the potential defendants. The plaintiff attempted to introduce the video tape into evidence as a statement of a decedent under the provisions of G.L. c. 233, §65. However, the Court held that the tape was not admissible. The Court reasoned that the tape was not admissible because the legislature had devised a statutory method for preserving evidence prior to filing suit.

G.L. c. 233, §46 provides that if a person desires to perpetuate his own testimony or the testimony of another person, he shall apply in writing to two justices of the peace or notaries public or a justice of the peace and a notary public, one of whom shall be an attorney at law requesting them to take his deposition or the deposition of the person whose testimony he desires to perpetuate and stating briefly and substantially his title, claim or interest in or to the subject relative to which he desires the evidence perpetuated, the names of all other persons interested or supposed to be interested therein, and the name of the witness proposed to be examined.

G.L. c. 233, §47 requires the justices of the peace or notaries to notify the interested persons of the time and place appointed for taking the deposition thus providing affected persons with an opportunity for cross examination. Similarly, M. R. Civ. P. Rule 27(a) governs the perpetuation of testimony by means of a deposition before the commencement of an action. The Rule provides for notice to adverse parties thereby allowing those persons the opportunity to cross examine the deponent.

E. TIMING OF INFORMAL DISCOVERY

1. Photographs - Photographs of the accident scene, the vehicles and the injured party should be taken immediately after the accident. Even if the client is interviewing several law firms, go out and take photographs immediately in order to "freeze" the evidence.

2. Other Forms of Informal Discovery - Ideally, all informal discovery should be complete before filing suit. In a products liability suit, it is helpful to complete your investigation and informal discovery before filing suit so that you can send out an appropriate 93A demand letter prior to commencing suit. G.L. c. 93A, The Massachusetts Consumer Protection Statute, is applicable to a products liability action because a defendant who is liable for negligence and breach of the implied warranty of merchantability has thereby committed an unfair or deceptive trade practice. Maillet v. ATF Davidson Company, 407 Mass. 185 (1990). As a result of the Maillet case, it is appropriate to send a 93A demand letter to the appropriate defendants in any products liability case. This is a potent weapon for plaintiffs' attorneys. If it is determined that there was a breach of warranty, the plaintiff may be entitled to multiple damages and attorney's fees. If the demand letter makes reference to other similar cases, identifies experts who have testified against the defendant in other cases and references known recall notices, the defendant and his attorneys will know that the plaintiff is serious about the case and that he is ready to file suit and ready to go to trial.

II. FORMAL DISCOVERY

After a law suit is filed, all of the formal discovery tools come into play. These include Interrogatories (Rule 33); Request for Production of Documents (Rule 34); Requests for Admission (Rule 36); Motion for a Physical Exam (Rule 35); and Depositions (Rule 30).

A. TIMING AND COST CONSIDERATIONS

As a plaintiff's attorney, you have the first opportunity to file discovery requests. In most cases, it is wise to file a set of Interrogatories and a Request for Documents with the complaint. As a plaintiff, it is your job to move a case expeditiously. By filing these discovery requests with the complaint

you will keep the pressure on your opponent to keep the case moving. Copies of sample Interrogatories and a Document Request for an automobile case are included in the Appendix at Tab C.

The initial set of interrogatories and the document request should seek to elicit basic information concerning the identity of any and all witnesses to the accident. After you obtain the identity of all important witnesses, you can then determine which witnesses need to be deposed.

When you file the first set of Interrogatories and the Request for Documents, you should send out a certified letter pursuant to G.L. c. 233, §23A demanding copies of any statements which were previously made by your client. If copies of the statements are not sent back within ten days then the use of the witness statements can be prohibited at trial.

In the event that your client gave a written statement soon after the accident, you should familiarize yourself with G.L. c. 271, §44. In substance, that statute will prohibit the use of any witness statements which were taken within fifteen days of an accident while your client was confined in a hospital.

B. MOTIONS TO COMPEL COMPLIANCE WITH DISCOVERY

Once you receive responses to the initial discovery requests, be sure to follow up on any objections with a discovery conference (Superior Court Rule 9C) and, if necessary, a motion to compel compliance with your discovery requests (Rule 37 M. R. Civ. P.).

After you have received responses to the interrogatories and the document request, you should consider Requests for Admissions under Rule 36. These are under utilized discovery tools which can narrow the issues at trial and eliminate the need to call some witnesses at trial.

C. PHYSICAL EXAM

Rule 35 of the M. R. Civ. P. is a discovery tool for the defense and your client should be aware of the fact that the defense may file a motion to have your client submit to a physical exam. As a practical matter, a motion is not usually necessary because plaintiff's counsel usually agrees to a physical exam. However, you must take the time to meet with your client to discuss the physical exam. You should advise your client to bring a friend or family member with him to the exam so that there is a witness to the exam and to any conversations. Your client should document how much time he spent in

the waiting room and exactly how much time he spent in the exam room. Immediately after the exam, your client should write down the specific questions which the doctor asked and the answers given by your client.

In Smith and Zobel, Rules Practice, the authors point out that an attorney's presence at an IME may be helpful. However, in Green v. Dolan, 369 Mass. 959 (1975), the Supreme Judicial Court held that a motion judge did not abuse his discretion by denying an attorney the opportunity to accompany his client to the medical exam. In more recent cases, other courts have held that a plaintiff does have a right to have his attorney present. Acosta v. Tenneco Oil Co., 913 F2d 205, 210 (CA 5th 1990); Langfeldt-Haaland v. Saupe Enterprises, Inc., 708 P2d 1144 (1989).

D. VIDEOTAPE DEPOSITION

If your case is likely to go to trial, and if you will need live medical testimony in addition to the medical reports (authenticated under G.L. c. 233, §79G), you should consider a video tape deposition of your expert. There is nothing more difficult than trying to schedule a doctor to testify in court. A video tape deposition can actually save you money in the long run because you will not have to pay your expert every time the case is called for trial and then postponed. You will also relieve yourself of much anxiety because you will not have to juggle your calendar, the doctor's calendar and the court's calendar. The mechanics of a videotape deposition are set forth in Rule 30A of the M. R. Civ. P.

Although the videotape deposition of your expert is critical if your case is actually going to trial, the videotape deposition can also be used as a powerful settlement tool. See Heller, The Televised Witness: Preparing Videotaped Depositions, Massachusetts Lawyers Weekly (June 7, 1993). A copy is included in the Appendix at Tab E.

E. PREPARING YOUR CLIENT FOR HIS DEPOSITION

You must spend a considerable amount of time preparing your client for his deposition. As soon as you receive the deposition notice, send out a letter or brochure to your client detailing the subtleties of deposition practice. A copy of a sample informational brochure is included in the Appendix at Tab D. After reviewing the deposition brochure, the client should come into your office to discuss the deposition process. When the client comes into the office, take the opportunity to show him a video tape on the deposition process. There

are many professionally prepared video tapes available to help attorneys explain the deposition process to their clients. After viewing the videotape, sit down with your client and answer all of his questions concerning the deposition. Then take the opportunity to do a mock deposition of your client and let him know that you will simulate a true cross examination. It is also helpful to videotape the mock deposition. Let the client take the video tape home so that he can examine his body language and demeanor. The time that you spend with your client will help him understand the process and it will also ease some of the normal fears and anxieties of the process.

F. DAY IN THE LIFE VIDEOS

"Day in the Life" video tapes may be utilized for settlement or for trial. Although the Massachusetts Courts have not clearly defined when these tapes are admissible, there is a tendency to use these films at trial.

Some defense attorneys file interrogatories early on to determine if the plaintiff prepared any Day in the Life videos. The following is a set of interrogatories specifically designed to elicit pertinent information concerning these videos:

> 1. Please state the full name and business address of any and all individuals and employees of Acme Video Productions, Inc. who participated in the production of the "Day in the Life of Peter Plaintiff" videotape (the "Videotape"), including as part of your answer the name(s) of any and all individuals or employees who participated or were otherwise involved in the editing process of the Videotape.
>
> 2. For each such individual or employee identified in your answer to Interrogatory No. 1, above, please state in complete detail the duties and/or responsibilities of each such individual or employee in connection with the production and editing of the Videotape.
>
> 3. Please state in complete detail the employment history of each such individual or employee identified in your answer to Interrogatory No. 1, above.
>
> 4. Please identify all advertising materials that Acme Video Productions, Inc.

utilized in promoting its videotaping business during the last five years.

5. Please describe in complete detail the method of production of the Videotape, including as part of your description the equipment used in creating the Videotape, and any and all alterations, omissions, or other edits or aspects of the editing process in connection with the production of the Videotape.

6. Please identify each and every individual who was present during the production and/or editing of the Videotape, including as part of your answer the reason why each such individual was present.

7. Please identify the date and time of any and all rehearsals and/or test shootings of the Videotape.

8. Please state whether the Videotape was edited and, if so, please state the individual(s) name(s) who took part in the editing process, the location of the edited portions of the Videotape, and the circumstances and/or criteria utilized in determining which portions of the Videotape would be edited.

9. Please describe all conversations that took place between or among Acme Video Productions, Inc., its employees, agents or servants, regarding the production of the Videotape, including as part of your description, the date and location of each such conversation, the persons present, and the substance of what was said by each person present.

10. Please describe all conversations that Acme Video Productions, Inc., its employees, agents or servants had with Peter Plaintiff in this case regarding the Videotape, including as part of your description, the date and location of each such conversation, the persons present, and the substance of what was said by each person present.

11. Please describe all conversations that Acme Video Productions, Inc., its employees, agents or servants had with Peter

Plaintiff's attorney in this case regarding the Videotape, including as part of your description, the date and location of each such conversation, the persons present, and the substance of what was said by each person present.

Because these videos can be controversial, at least one commentator has suggested that a motion in limine should be standard procedure for the use of "Day in the Life" films. The motion also offers a chance to sanitize the film of any prejudicial portions. Pikula, The Evidentiary Aspects of Day in the Life Films, 69 Massachusetts Law Review June, 1984 pp 59-67.

Courts which have excluded Day in the Life films have determined that the probative value of the film is outweighed by its prejudicial effect. However, there are several Courts which have held that the probative value of the film outweighs the prejudicial effect even in very graphic "Day in the Life" films. See Air Shields, Inc. v. Spears, 590 SW 2d 574 (Tex Civ. App. 1979) (Video showed a blind plaintiff getting around his house and yard when he was 2 and 6 years old) and Apache Ready Mix Co. v. Creed, 653 SW 2d 79 (Tex Civ. App. 1983) (Video showed semicomatose 11 year old quadriplegic during rehabilitation treatments, in a hospital bed and in a wheelchair. The Court noted that the shock of seeing the plaintiff in person might be greater than the "soundless sterility of the video screen".

G. SURVEILLANCE FILMS

Some insurance companies and defense firms will take surveillance films of your client in an effort to show that your client is a malingerer. You should discuss surveillance films with your client at the initial meeting to let him know that it is possible that he will be followed and filmed. As a plaintiff's attorney you should also file a set of interrogatories and a request for documents to obtain the surveillance films. George LaMarca of LaMarca & Landry in West Des Moines, Iowa serves the following interrogatories in cases where surveillance is a possibility:[3]

1. State whether or not the defendant has conducted any type of surveillance on the plaintiff in this action. If so, for each

[3] See DeCaire's Surveillance Videos New Technology Creates a Lethal Courtroom Weapon, 93 LW USA 135 (May 24, 1993). A reprint of the article is included in the Appendix at Tab F.

surveillance activity and or technique, set forth the following:

a. The person conducting the surveillance;

b. The method of surveillance;

c. Identify all tangible evidence obtained as a result of said surveillance;

d. Identify the custodian of all documents or tangible items of any kind, the subject matter of which is in whole or in part a result of said surveillance; and

e. Give a brief description of the activities which were the subject of said surveillance, including the dates, names, and locations therefor.

Snead v. American Export - Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973) is the seminal case dealing with the discovery of surveillance films. In the Snead case, the Court noted:

(1) Most defense lawyers contend that if a plaintiff knows that a surveillance film exists, he will tailor what he has to say accordingly. For tactical reasons, the defense would prefer to have plaintiffs testify and then let the jury see the films. Defendants contend that uncertainty as to the existence of surveillance films is the best way to promote truthfulness.

(2) Plaintiffs lawyers argue that unless they can check the integrity of the photographer, the accuracy of his methods and review the pictures he has taken, they are deprived of the proper means to cross examine or seek rebuttal testimony. Thus, they maintain that the need to prevent possible abuse by defense investigators requires full disclosure as to the films in advance of trial.

After considering these arguments, the Snead Court concluded that the defense was required to disclose the existence of surveillance films. However, the Court held that the defense did not have to respond to any discovery requests concerning surveillance films until after the plaintiff was deposed.

Similarly, in Cabral v. Arroda, 556 A 2d 47 (R.I., 1989), the Court held that the defendant was required to produce the surveillance film but the defendant had the right to depose the plaintiff before producing the films.

EXHIBIT A

LAWYERS WEEKLY
PUBLICATIONS

Investigative Services

Just The Facts

By John P. DiNatale

It never ceases to amaze me the way attorneys (plaintiff and defendant) and insurance companies handle their investigations. It is no surprise that the most successful law firms and insurance companies are the ones that adequately prepare and investigate their cases so that when they are ready to put their case in suit, they are also ready to start trial the next day.

A funny thing happened on my way to work; I was a witness to an automobile accident. As I was driving, I saw a police officer riding a motorcycle hit the back of an automobile and go flying through the air. I immediately picked up my car phone and notified the local police department that an officer was down and that there may be serious personal injury.

While I was on the telephone, the operator of the vehicle that had been hit by the motorcycle proceeded to leave the scene. I was somewhat amazed since, from what I had seen, the accident appeared to have been the fault of the officer on the motorcycle. I informed the police officer whom I had an the telephone of what was happening and he told me to make sure I got the registration number of the vehicle. As the vehicle drove past me, I read the registration number and dictated it to the officer on the telephone. Due to the fact that the motorcycle officer appeared seriously injured, I decided not to follow the vehicle, but to go to the officer's assistance.

Once the vehicle had passed, it occurred to me that I had been so intent on making sure that I had the registration number of this vehicle, that I never really got an adequate look at or description of the driver. After going to the injured officer's assistance and waiting for the ambulance to arrive, I got back in my car, immediately took out my tape recorder and dictated a statement. From my professional experience, I knew it was important to memorialize my thoughts. It was amazing that after only 45 minutes of having witnessed the accident, that some of the minor details were a bit unclear. Sure, I remembered what happened, but then I thought: Did somebody cut the motorcycle off? Did I miss something? Why did that driver leave the scene?

The more I thought about this case and the aftermath of my becoming involved in the criminal case as a witness, the more I started to think about the thousands upon thousands of automobile and personal injury accidents I have investigated, as well as the thousands of witnesses I had interviewed. I began to think about the questions I would ask witnesses four years after the fact; whether they remembered if someone had their directional on; whether they could recall if there had been sand on the sidewalk where the individual fell; or whether the ice appeared dirty. Questions which generally were never answered adequately since the most common responses were, "After such a long period of time, how could I remember something like that?" Or, "I just have the basic facts in my mind and that's all I can remember."

After mailing my statement to the local police department and identifying myself as a witness, I was asked to appear in criminal court to testify. After arriving at the courthouse the first time, I found that the case had been continued and this continuance had been agreed upon two days prior to the time of my appearance in court. Being familiar with the system, I was not particularly surprised, but more upset with myself for not realizing that I should have checked ahead of time. After two additional appearances in court, it was on my third visit that I was told that the case had been nolo processed. As I walked away, I thought, how many witnesses who had to take this kind of time off from work, have walked away from the experiences saying, "Never again will I stand up and tell someone I saw their accident if this is what I have to go through."

Importance Of Memory

Some 18 months after the criminal case, I was contacted by an insurance company in regard to civil litigation on this accident which was now pending. After handling thousands of cases from my own office, I was happy to know that I could refer to my own signed statement, knowing that the information I recorded shortly after the accident

was accurate. Some of the smaller details of the accident were now faded and if I had not had my statement, I probably would have forgotten them.

I also thought to myself, "Well isn't this typical; 18 months later, someone is just getting around to asking a witness what he saw that day." It never ceases to amaze me the way attorneys (plaintiff and defendant) and insurance companies handle their investigations. It is no surprise that the most successful law firms and insurance companies are the ones that adequately prepare and investigate their cases so that when they are ready to put their case in suit, they are also ready to start trial the next day.

Smart Strategies

Different insurance companies and law firms utilize different resources to help prepare their cases. Some use adjusters, some paralegals and others, professional investigators. But, the difference between adjusters, paralegals and professional investigators is like night and day. As a professional investigator, I would never think of interviewing someone on the telephone unless it was a situation where the individual lived out of state. If at all possible, a witness is interviewed in person and a handwritten, signed statement is obtained. You cannot adequately evaluate a witness for your clients on the telephone. A good investigator will pay as much attention to someone's behavioral response to a question as they will to the verbal response. You don't know what type of appearance this individual would make; and when you are dealing with complex accident scene locations, it is so useful to be able to sit down and draw a diagram with that witness and have him pinpoint exactly where he was and what he saw and in which direction the vehicles were traveling.

When a witness has been interviewed on the telephone and a transcript made of that interview, chances are that three or four or five years down the road when that case goes to trial, the witness is going to have a difficult time remembering exactly what he said on the telephone. Even though he may be shown a copy of that transcript, his signature is not on it. What you usually end up with is, "I may have said that, but I don't have a specific recollection." However, when that individual is presented with a three or four page handwritten statement which is signed at the bottom of each page in his handwriting, chances are that even if he does not recall most of the details, he will adopt that statement as his own, knowing that he never would have signed it unless it was an adequate declaration of the facts as he recalled them when the statement was taken. An interview is not worth the paper it's written on if it is not signed.

Knowing how to deal with people, interviewing them, visiting their homes and being able to recreate the facts in the best possible light, is the job of a good investigator. We are not out there changing the facts, but the reality of the matter is, the individual who interviews the witness first is generally the individual who obtains the most favorable statement. Simple things such as people not wanting to be bothered more than once, and not understanding why both sides cannot have the same copy of their statement, are simply not comprehended by some people. They do not understand the complexity of the legal system, the rules of discovery and the civil court system. Coupled with the present state of the economy, people are very reluctant to get involved, go to court and miss time from work.

Overcoming Hesitancy

Another oddity I have seen throughout the years are those forms for witnesses to fill out sent by insurance companies. A number of plaintiff attorneys do the same. When there is no response to such forms, an investigator (or adjuster) is contacted to go out and interview this witness. My experience is that there are a lot of people out there who are simply afraid to write. Whatever the reason, they are reluctant to put a pen in their hand in an attempt to describe what they saw. I cannot tell you how many times I have interviewed people at their homes and told them that I needed to take a handwritten statement from them. When they realize that I am the one who will write out the statement for them, more often than not, a wave of relief passes over their faces. The general rule is that many people are terrified to put a pen in their hand.

The forms which are sent out to witnesses leave space for an explanation of about three or four lines, and after having taken a statement of six or seven pages, it is not uncommon for me to hear, "Gee, I didn't realize I saw as much as I did."

A Professional's Worth

Paralegals and insurance adjusters are just that; they are not professional investigators. They do their work from an office on a telephone and generally work from 9 a.m. to 5 p.m. They are not out visiting people or knocking on doors trying to locate witnesses. Additionally, to locate people, a professional investigator has resources available to him that paralegals and adjusters would not know how to access. This is the computer age. There are thousands of databases available which we use as very effective tools to locate witnesses.

I have seen more than one case settled in the seven digit figures, knowing to myself that if the other side had just bothered to go out and knock on some doors, or were capable of locating a particular witness, that those witnesses would have "shed a different light" on the case, thereby altering the outcome of the settlement. Instead, because they were faced with an opponent who was well-prepared, they felt threatened by taking a particular case to court, and opted to settle.

After 17 years and several thousand investigations, there is no doubt in my mind that the one who is best prepared and interviews the witness first, is the one who generally wins. Winning means money, money means success, success means more cases. These are just the facts.

John P. DiNatale is president of DiNatale Detective Agency, Boston.

EXHIBIT B

AUTHORIZATION

TO WHOM IT MAY CONCERN:

You are hereby authorized and directed to permit the examination of, and the copying or reproduction in any manner, whether mechanical, photographic, or otherwise, by my attorney, Edward C. Bassett, Jr., or any employee of Mirick, O'Connell, DeMallie & Lougee, all or any portions desired by him/her of the following:

(1) Hospital records, X-rays, X-ray readings and reports, laboratory records and reports, all tests of any type, character and reports thereof, statement of charges, any and all of my records pertaining to hospitalization, history, condition, treatment, diagnosis, prognosis, etiology or expense;

(2) Medical records, including patient's record cards, X-rays, X-ray readings and reports, laboratory records and reports, all tests, of any type and character and reports thereof, statements of charges, and any and all of my records pertaining to medical care, history, condition, treatment, diagnosis, prognosis, etiology or expense;

(3) All my personnel and employment records including those regarding my wages or salary while employed by you.

You are further authorized and directed to furnish oral and written reports to my attorney or other representatives from Mirick, O'Connell, DeMallie & Lougee as requested by him/her on any of the foregoing matters.

A copy of this authorization form shall be deemed as valid as the original.

_____

Dated:

NOTE: As of March 21, 1991, health care providers, including (but not limited to) physicians, surgeons, chiropractors, dentists and nurses are <u>required</u> by Massachusetts law, M.G.L. ch. 112, §12CC, to provide at <u>reasonable</u>* cost, a <u>copy</u> of the patient's record to the patient or his authorized representative.

* A charge in excess of $.25/page or a clerical fee in excess of $20.00 per hour is considered excessive by the Massachusetts Board of Registration in Medicine, 243 CMR 2.07 (13).

EXHIBIT C

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

*

Plaintiff

vs.

*

Defendant

PLAINTIFF'S INTERROGATORIES
TO THE DEFENDANT

1. Please identify yourself, including as part of your identification, your full name, residential address, occupation and business address.

2. Please state whether on or about * you were the operator of the motor vehicle which allegedly struck the motor vehicle operated by the plaintiff.

3. Please identify the owner of said motor vehicle, including as part of your identification, the name and present address.

4. If you were not the owner of said motor vehicle, please state whether you operated the motor vehicle with the consent or permission of the owner of the vehicle.

5. Please state whether at the time of the accident you were acting as a servant, agent or employee of the owner of the vehicle in the course of the owner's business or employment.

6. Please identify the motor vehicle which you were operating which allegedly struck the plaintiff's motor vehicle, including as part of your identification, the registration number of the motor vehicle, the State or Commonwealth with which the motor vehicle was registered, the date of registration and the year, make, and model of the motor vehicle.

7. Please identify all persons which were in the motor vehicle you were operating at the time of the accident, including as part of your identification, the name, present address and the location where they were seated in the vehicle.

8. Please describe how the accident occurred, including as part of your description, all the events in the order in which they occurred form the time that you first observed the automobile operated by the plaintiff until immediately after the accident.

9. Please describe the speed of the motor vehicle you were operating, including but not limited to, the speed at: 500 feet prior to the point of the accident; 200 feet prior to the point of the accident; 50 feet prior to the point of the accident; 10 feet prior to the point of the accident, and at the exact point of the accident.

10. Please describe the weather conditions at the time of the accident, including but not limited to, the condition of the road, atmosphere and lighting.

11. Please state what signals or warnings were given by you prior to the accident.

12. Please describe what action you took to prevent the accident.

13. Please describe everything you did in the operation of your motor vehicle from the time you first saw the automobile which the plaintiff was operating up to the time of the accident.

14. Please describe the movements of the motor vehicle which the plaintiff was operating between the time you first observed it and the time of the accident.

15. Please describe any conversations you had with the plaintiff immediately after the accident.

16. State whether you have made any statement or statements in any form to any person regarding any of the events or happenings referred to in the Complaint. If so, state, with respect to each such statement:

    (a) The name and address of the person or persons to whom such statement was made.
    (b) The date the statement was made.
    (c) The form of the statement, whether written, oral,

by recording device, or to a stenographer.
(d) Whether the statement, if written, was signed.
(e) The names and addresses of all persons presently having custody of the statement.
(f) Whether you received a copy of said statement.

17. State whether you, your attorneys, your insurance carrier, or anyone acting on your or their behalf, obtained statements in any form from any persons regarding any of the events or happenings that occurred at the scene of the incident referred to in the Complaint immediately before, at the time of, or immediately after said incident. If so, state, with respect to each such statement:

(a) The name and address of the person from whom the statement was taken.
(b) The date on which the statement was taken.
(c) The name(s) and address(es) of all person(s) and employer(s) of such person(s) who took the statement.
(d) The name(s) and address(es) of all person(s) having the custody of the statement.
(e) Whether the statement was written, by recording device, by court reporter, or by stenographer.
(f) Which of the statements mentioned in subparagraph (a) above are signed by the person giving them.

18. State whether there is or was in existence any policy of liability insurance that would or might inure to the benefit of the plaintiff herein, by providing for payment of a part of or all of any judgment rendered in favor of the plaintiff against any defendant or against any other person, firm or corporation who is or may be liable to the plaintiff by reason of the incident described in the Complaint, and if the answer is in the affirmative, state as follows as to each such policy of insurance known or believed to exist by you or your attorneys:

(a) The name and address of the insurer on each such policy.
(b) The name and address of each named insured on each such policy.
(c) The relationship, if any, between each named insured on each such policy and any named defendant(s) in this cause.
(d) The policy number of each such policy.
(e) The name and address of any person, firm, or corporation who is or may be an "additional

insured" under such policy by reason of the incident described in the Complaint, and the relationship, if any, between such "additional insured" and any named defendant(s) in this cause.

(f) The limits of liability in such policy as might be applied to any one plaintiff by reason of any one incident and the total limits of liability to all persons by reason of any one incident.

(g) Whether or not any insurer has notified any insured that said insured or other person, firm, or corporation must pay a part of or all of any judgment before the insurer must make any payment, if so, what payment must be made and by whom before the insurer must make payment.

(1) If the answer to subparagraph (g) is in the affirmative, describe the reason given for the claimed lack of coverage or failure thereof as stated by said insurer (identify same) to said insured (identify same), and state the date of such notice.

(h) The exact name and address of the resident agent of each insurance company.

19. Please identify each person whom you intend to call as an expert witness at trial, including as part of your identification, the name and address of each such person, the occupation of each such person and the place of occupation of each such person.

20. With respect to each person whom you expect to call as an expert witness at trial, please state the subject matter on which the expert is expected to testify.

21. With respect to each person whom you expect to call as an expert witness at trial, please state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

22. Please describe any motor vehicle traffic citations which you have received in the past five years including the date of each citation, the name of the police department which issued the citation, the nature of the alleged offense and the disposition of each citation.

23. Please describe any motor vehicle accidents which you have been involved in during the past five years, including the date of each accident, and the names and addresses of the parties involved in each accident.

*,

By * Attorneys,

Edward C. Bassett, Jr.
Mirick, O'Connell, DeMallie
& Lougee
1700 Mechanics Bank Tower
Worcester, MA 01608
(508) 799-0541
B.B.O. #552176

Dated: ±

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO.

* , Plaintiff	
vs.	PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS BY THE DEFENDANT
* Defendant	

The plaintiff, * , pursuant to the provisions of Rule 34 of the Massachusetts Rules of Civil Procedure hereby requests that the defendant produce the following documents within forty-five (45) days of service:

1. All documents constituting, commemorating or relating to any policies of liability insurance that would or might inure to the benefit of the plaintiff herein, by providing for payment of a part of or all of any judgment rendered in favor of the plaintiff against the defendant.

2. All documents constituting, commemorating or relating to any statements given by the defendant to any person concerning the incident referred to in the Complaint.

3. All documents constituting, commemorating or relating to any statements given by the plaintiff to any person concerning the incident referred to in the Complaint.

4. All documents constituting, commemorating or relating to any witness statements concerning the incident referred to in the Complaint.

5. All documents constituting, commemorating or relating to any accident reports or other statements submitted to the Registry of Motor Vehicles or to any state or local police department.

6. All documents constituting, commemorating or relating to the damage done to the defendant's motor vehicle as a result of the incident referred to in the Complaint.

7. All documents constituting, commemorating or relating to any photographs or sketches relating to the accident referred to in the Complaint.

8. All documents constituting, commemorating or relating to the defendant's motor vehicle license and registration which were in effect on the date of the accident.

9. All documents constituting, commemorating or relating to any motor vehicle violations, citations or tickets arising out of the incident referred to in the Complaint.

*,

By * Attorneys,

Edward C. Bassett, Jr.
Mirick, O'Connell, DeMallie
& Lougee
1700 Mechanics Bank Tower
Worcester, MA 01608
(508) 799-0541
B.B.O. #552176

Dated:

EXHIBIT D

DEPOSITION ADVICE FOR CLIENTS INVOLVED IN A PERSONAL INJURY CASE

Mirick, O'Connell, DeMallie & Lougee

Personal Injury Practice Group

Under Massachusetts law, each side in a lawsuit has the right to take the discovery deposition of the opposing party. The following information will acquaint you with what is expected and how you can be an effective witness at deposition time.

What is a deposition? A deposition is your testimony under oath. You will be asked questions by the opposing attorney (and in some cases by your own attorney). The questions and your answers will be recorded by a court reporter. A court reporter is a person who is competent to take down exactly what is said with a special transcribing machine. A deposition is less formal than a trial and will customarily be held either in the offices of one of the attorneys or in the office of the court reporter.

Purpose of a deposition. The opposing attorney wants to find out what you know. The attorney is interested in what your story is now and what it is going to be at the time of trial. The hope is to catch you in an inconsistency, even if only on a minor point, so that at trial your story might appear to be inconsistent.

These are legitimate purposes. Your attorney has the same right to take the discovery deposition of the opposing party.

Deposition Pointers:

1. Before the deposition, carefully review any interrogatory answers, affidavits, accident reports or other statements provided to you by your attorney.

2. Pay attention to your physical appearance. It is important that you make a good impression on the opposing counsel and the opposing party. You should appear dressed as if you were actually going to court. You should be clean and wear clean, neat clothing. If you are the victim in the lawsuit, come prepared to exhibit all injuries you have suffered.

3. Treat all persons in the deposition room with respect. Do not be afraid of the lawyers.

4. Speak slowly and clearly. Answer all questions directly, giving concise answers to the questions, and then **STOP TALKING.**

5. Tell the truth. Do not try to figure out before you answer whether a truthful answer will help or hinder your case.

Many questions you will be asked will not be admissible at trial, but the opposition is entitled to an answer in order to help prepare its case. Many cases are lost because a witness tries to hide something. Many of the questions cannot be used in the trial unless you have not told the truth and your false answers can be shown at the trial.

6. Never state anything as a fact that you do not know. There is, however, a distinction between a guess and an honest estimate.

7. **DO NOT VOLUNTEER ANY FACTS NOT REQUESTED.**

8. Do not, unless your counsel so requests, reach for a social security card, driver's license, or any other document.

9. Give the information you have readily at hand. If you are the plaintiff in the lawsuit, have with you the facts and figures about your time lost from work, wages lost, doctor bills, hospital bills, and all other facts concerning damages caused as a result of your injury. Be certain that you have reviewed all of these materials with your attorney before the deposition.

10. Do not try to memorize your testimony.

11. Do not answer a question unless you have heard it and clearly understand it. Ask for the question to be repeated or, if necessary, for a moment to think.

12. If you are the plaintiff in the lawsuit, report accurately your injuries or losses, but do not exaggerate them.

13. Be prepared to answer the question "What could you do before the accident that you cannot do now?".

14. If your attorney begins to speak, stop whatever answer you may be giving and allow him or her to make the statement.

15. If your attorney objects to a question, your answer deserves more careful consideration than usual. You can ask the stenographer to read back the question so you can study it carefully. After you have heard the question again, you should answer it.

16. You must answer all questions unless your attorney instructs you not to answer, in which case you do not answer. If you think some questions are unfair, or too personal, or for some other reason you do not want to answer them, you should ask for a recess to discuss those questions with your attorney.

17. Do not let the opposing attorney get you angry or excited.

18. Never joke in a deposition.

19. During recesses, and after the deposition is over, do not chat with the opponents or their attorneys.

The most important aspect of your lawsuit is *you*. If you are earnest, fair, and honest, and if in giving your deposition you keep in mind these suggestions, you will be taking a great stride toward the successful completion of your case.

After you have read this, please note any questions you may have and discuss them with your attorney before your deposition is taken.

EXHIBIT E

The Televised Witness: Preparing Videotaped Depositions

BY FRED I. HELLER

It behooves litigators to learn how to take full advantage of modern technology. Television is a powerful medium that has been underused by large segments of the legal community. A videotaped deposition can present captivating testimony and demonstrative evidence. Because this information is prerecorded, the litigator can control the content and form of the presentation much more than with live testimony.

Litigation is about communication and persuasion. Television is without equal in its ability to capture attention and communicate information. However, it remains a vastly underused tool in litigation. This article will describe the most effective techniques for both conducting the deposition and presenting it at trial.

There are many reasons to use videotaped depositions. They can greatly reduce the cost of litigation and remove many uncertainties of trial. In addition, videotaped depositions often contribute to favorable settlements. [See Videotaped Settlement Brochure, 43 AM. JUR. Trials 239, § (1991).]

Cost should not be a barrier to their use. On the contrary, a deposition can be recorded on videotape for a small fraction of the cost normally paid to have a certified court stenographer present. It is simple and inexpensive to set up a semi-permanent "in-house" video deposition facility in counsel's office and hire an independent videographer as needed to operate the firm's equipment. Alternatively, local bar associations may be willing to set up more technically advanced facilities for members to use.

Videotapes have been used in jurisdictions throughout the country for more than two decades. New York and many other states permit videotaping depositions whenever an ordinary stenographic recording may be used. In many jurisdictions, a videotaped recording may be the official deposition record and a hard-copy transcript may be prepared from the audio part of the recording. Usually, no court stenographer is required.

Despite all this, videotaped depositions remain the exception rather than the rule. This is principally because the typical litigator doesn't know how to videotape witnesses. Use of television is not commonly taught either in law schools or as a part of continuing legal education seminars. Another explanation is the widely held misconception that live-witness presentations are invariably more effective than televised ones.

It is inevitable that television will play an ever-increasing role in litigation. Sooner or later, every litigator is likely to have a case in which video is used — maybe by the opposition. Accordingly, litigators should learn proper and improper video usage both for recording proceedings and participating in them.

Guidelines

What follows is a series of guidelines that I have developed from over a decade of producing videotaped depositions and studying other litigators' techniques. Each topic will only be an introduction to the subject.

Whenever possible, demonstrative evidence should be included in the deposition. The typical videotaped deposition conducted today is a head-and-shoulders view of one person. Unfortunately, television is not good at maintaining people's interest in a "talking head" for very long. There must be variety and movement.

One way to accomplish this is to use demonstrative evidence (e.g., X-rays, photographs and models). Even page-size hand-written charts can be used effectively. Counsel should review with the videographer before deposition what exhibits will be used. Competent video professionals will review with counsel how the exhibit should be displayed and illuminated.

The litigator should always be a key part of the proceedings. When conducting videotaped depositions, lawyers should participate in the same way they would in court. It should be obvious that they are participants, lest jurors think that they are uninterested. Lawyers should always make sure there is an "on camera" identification

(See page 6)

Fred I. Heller gave up his partnership in a law firm in 1980 to specialize as a "lawyer-videographer" under the name Heller Associates in Merrick, N.Y.

Reprinted with permission of Trial magazine, September 1992.

The Litigious Mind-Set

The scene is the deposition of the vice-president of High Tech, Inc., a local manufacturing company. The plaintiff alleges that the defendant, a competitor, stole High Tech's business by using inside information provided by a salesman that used to work for the plaintiff. The V.P. has been subpoenaed as the High Tech officer who dealt with the salesman.

The deposition has been going as planned. The plaintiff's counsel, a litigator in a mid-sized firm, spent the morning going through the V.P.'s education and employment background. Next on the agenda is an exhaustive exploration of his duties and responsibilities. The litigator should get to the initial contact by the salesman sometime this afternoon. It looks like the deposition will have to be continued tomorrow.

Sound familiar? This is the kind of thing that drives in-house counsel crazy. The litigator is doggedly making sure that he leaves no stone unturned. Meanwhile, any chance of the plaintiff ever recovering High Tech's business is going down the drain. It was bad enough that the litigator subpoenaed the V.P. without checking with in-house counsel first. But now the litigator is inflaming things through far-reaching and irrelevant questioning. Imagine the V.P.'s response when the litigator announces at 4 p.m. that he "isn't going to finish today." Guess who the V.P. is going to blame and what he is going to tell his friends in the industry about the plaintiff's company. And wait until you see the bill for the deposition.

This scenario is replayed in various forms over and over in litigation and is a direct expression of the psychology of the litigious mind-set. It is important for the in-house lawyer to understand this mind-set if he or she hopes to avoid winning the battle and losing the war.

Why They Do The Things They Do

Why is the litigator going through the V.P.'s background in such detail? The litigator would say that he is being thorough and because something unexpected might turn up. True enough, but there is something more at work here. The litigious mind is afraid of the unknown. Just as doctors routinely order a battery of tests to detect a one-in-a-million illness, litigators exhaust every avenue of inquiry because they are terrified of missing something. And of course the litigator has no idea what that something might be. When you read 20 pages of deposition transcript devoted to teasing out irrelevant facts you are reading the results of the litigator's fear of the unknown.

A deeper aspect of litigious psychology is reflected in the word "litigate" itself, which comes from roots meaning "to carry on strife". This suggests that our common understanding of litigation as a means for resolving conflicts is mistaken. The psychology of litigation is dedicated to carrying on strife, not resolving disputes.

This point is essential for understanding the hidden forces that drive litigation. The litigious mind loves strife, is devoted to it, and will look for ways to keep it present. Although winning is important, continuing the litigation is the thing. In practical terms, this means that litigators are prone to being swept up in the process and procedures of litigation. For example, when the litigious mind looks at rules and procedures meant to govern litigation, it looks first to see what they will allow instead of considering what they are meant to prohibit. It is symptomatic that Rule 11, which was intended as an exceptional means to curtail incivility, is now used routinely as a normal part of the litigation process.

The litigious mind's dedication to carrying on strife also is reflected in the business of litigation. Law firm billing structures reward controversy. The longer our angry V.P. sits at the table, the longer the meter continues to run. No wonder that one litigator I know has a button in his office that reads "Why Settle?"

What In-House Counsel Can Do

So how does in-house counsel help win the case without forever losing High Tech's business? The first thing is to be alert for symptoms of unbridled litigation so that steps can be taken to rein it in. The second is to complement the litigious mind's innate contentiousness with in-house counsel's own preference for peaceful resolution.

One way to calm the litigator's fear of the unknown is by providing the litigator with as much information as possible. A common mistake is to try to control the litigator by doling out information a bit at a time. This only fuels the litigator's fear as he or she gropes to find the edges of the controversy. Instead, in-house counsel should try to appease the litigator's need for information. It also helps to remember the old joke that even paranoiacs have enemies. Sometimes the litigator's relentless digging turns up unexpected treasures; it is up to in-house counsel to stop the digging when it threatens hallowed ground.

Restraining the litigation process itself is more difficult. In-house counsel should constantly remind the litigator of what is baby and what is bath water. This requires a mutual understanding at the start of the case as to what the corporate client really wants. Many a litigation has run amok because the litigator didn't know what was really at stake.

Litigation must be closely monitored by in-house counsel. Remember, the litigious mind wants the litigation to continue; it fuels itself. To counteract this dedication to strife, in-house counsel should actively instill notions of compromise and conciliation into the case while always remaining alert for chances to resolve the dispute.

As today's in-house counsel demand more control over litigation, they should be aware that the litigious mind often sees such control as a restraint of the contentious process to which it is devoted. At all costs, the relationship between in-house counsel and litigator must not be allowed to degenerate into adversity. Both perspectives have their blind spots. The task for in-house counsel is to allow the dual psychologies of litigator and in-house counsel to complement one another.

Benjamin Sells is a psychotherapist and counselor in private practice in Chicago. He was a litigator at Jenner & Block in Chicago for six years before opening a private counseling practice that works with individuals and groups within the legal profession.

The Televised Witness: Preparing Videotaped Depositions

(Continued from page 5)

of all counsel that shows their relationship to the case being tried.

The litigator who is never shown on camera becomes a disconcerting voice lacking an associated visual image. If the deposition is taped that way, counsel should explain this to the jury. Otherwise, the jurors will be trying to understand the taping process rather than listening to the testimony.

Making eye contact with the camera is vital. It means making eye contact with each member of the jury — simultaneously. This is true for the proponent of the deposition as well as the adversary. Looking occasionally into the camera is important.

It is very effective for lawyers to address the camera as if they were addressing the jury. Thus, at various points during the taping, counsel should say, "Would you tell the jury..." or "Would you show the photograph to the jury and point out..."

Lawyers should take every opportunity to communicate with viewers. For example, counsel should look at the camera when handing the witness a document. If a wireless microphone is used, counsel could get out of the chair and move around to the witness, glance at the camera, then ask the question. This "passing glance" can have great impact on a jury.

Lawyers using videotape must remember that it will be seen on television. Viewers should feel that the presentation is for their benefit — that they are not mere spectators.

Witnesses should be well prepared. It is imperative that witnesses appear credible. A testifying doctor, for example, should be seated in his or her office and dressed in a white coat. The doctor should appear respectful, interested and responsive — never argumentative, biased or defensive.

It takes practice to make a witness appear appropriately credible on television. Preparation should include an evaluation of how the witness appears on camera. Bad posture and distracting gestures such as rocking back and forth should be eliminated. Witnesses should review a dry run of their testimony on videotape in order to "see" themselves as the jury will. Reviewing previous videotaped testimony with an accomplished expert may also be helpful.

It is especially important that the witness be trained to make eye contact with the camera. A deposition is an "interview," and the viewer expects the information to be an exchange between the examiner and the witness. For this reason, continuous eye contact with the camera would appear artificial. Also, witnesses should avoid looking at counsel as if for approval after each response to an adversary.

Counsel should warn witnesses not to be defensive or aggressive during the deposition. On camera, such behavior can be magnified.

Information can come across very quickly on television. The briefer it is, the better. A simple "no" or a passing glance to the camera can often have greater impact than a long-winded explanation.

Television is very different from live presentation. Consider a response of a plaintiff's expert to an impeachment cross-examination question implying that the witness testified predominantly for plaintiffs. Live, it would be most effective for the witness to give a long answer. If the witness had a stack of letters representing defense firms that had retained the expert, it might be effective to methodically read the names of the defense firms. On television, in contrast, the expert would be better advised to simply hold the letters up and give a short statement about their content.

The videographer should be permitted to vary the shot during the deposition. As discussed previously, few images are more boring to look at on television than a static image of a "talking head". Whenever possible, a videotaped deposition should include variation in camera angles. Simple variations may include an occasional glimpse of the examining attorney within the field of view. This gives the viewer another opportunity to have an image of the lawyer to go with the voice being heard.

Unfortunately, some jurisdictions have rules on what can and cannot be done with camera angles. When camera movement is allowed but opposing counsel expresses concern about its being used unfairly, counsel should request that a monitor be positioned off-screen showing the image being recorded. Opposing counsel can then see what is being recorded as the deposition progresses.

The background behind the witness should be unobtrusive. The most neutral background for a deposition is a blank wall with a light gray or light pastel color. Under no circumstances should the background be uncovered windows with outside light entering as this would give a poor view of the witness and would be distracting. A disorderly background should also be avoided.

Some distractions may not appear obvious at first and attention should be given to how they appear on a television monitor. The two-dimensional television screen may render some backgrounds distracting. Examples would include a flower from a wallpaper print growing out of a witness's head or a pole showing from an unseen lamp or flag. Counsel should be as concerned about the background seen in the deposition as he or she would be about any aspect of a live presentation to a jury.

Videographers who record depositions at various locations should have available two pieces of gray felt material 6 feet wide by 10 feet long. This material, which can be hung behind the witness, is dense enough to cover and block the light through a window. Felt will not show wrinkles if kept in a roll during transportation and storage.

Lighting should be bright, soft and even. The competent videographer will know how to achieve this. Harsh shadows behind a witness that move every time the witness moves are distracting. Also, shadows on the face of a witness may interfere with the viewer's ability to look at a witness's eyes.

Ideal seating prevents a too-relaxed appearance. Just as in a live courtroom, the appearance of the witness before a camera may be as important as the content of the information being given. Counsel should prepare each witness to make an attentive presentation. Whenever possible, the chair in which the witness sits should have a straight back. Ideally, the witness should be seated at a table where a section of the top is cut out. This type of table is used, for example, in the public broadcast television program "Washington Week in Review".

A videotaped deposition should not be recorded using a single microphone. Although it is easier to use one microphone to record all participants, the result is unsatisfactory. A single microphone is likely to pick up background noise. In addition, uneven sound often results when the participants are seated at varying distances from a single microphone.

Each participant should have a small, unobtrusive microphone, referred to as a "lavalier" microphone. This is clipped to a tie, jacket or other article of clothing. These microphones cost as little as $30 apiece and can be used to make high-quality sound recordings.

Wireless lavalier microphones, which cost $200 to $300, permit total freedom of movement for the wearers. These mikes use a very small radio transmitter that can be clipped inside a jacket or placed in a pocket.

Both sound and picture should be continuously monitored throughout the proceedings. It is essential that counsel find competent video producers who will continuously monitor the sound and picture of the

The Televised Witness: Preparing Videotaped Depositions

proceedings to guarantee they are produced impartially. Because there is always the possibility that the person appearing on camera may shift in the chair or otherwise move out of the picture, the image being recorded needs to be monitored continuously. Perhaps less obvious but just as necessary is the need for someone to monitor the audio being recorded. In any videotaping situation there is always the possibility that unwanted sounds may be recorded — for example, noises from heating or cooling vents, an adjoining room, outside the building, or someone in the room. Unwanted sounds may impair the viewer's ability to hear each word or concentrate on its meaning. At a minimum, unwanted sounds are likely to divert the attention of the viewer away from the words and toward the source of the noise.

In any videotaping procedure, there must be an understanding from the outset that the videographer is permitted to interrupt the proceeding or otherwise take appropriate action to alleviate the problem of disruptive noise. Sometimes the source of the sound is a deliberate attempt by an adversary to impair the listener's ability to hear the responses of the deponent clearly. This obstreperous behavior can include constant shuffling of papers close to an open microphone or even exhaling in a noisy way. When this occurs, the offending party should be advised, out of the camera's view, that he or she is the cause of the noise. If the person is especially recalcitrant, it may be necessary to disconnect the microphone.

Videotaped depositions should have a time code on the image, showing the hours, minutes and seconds of the proceedings. Rules on time codes vary from jurisdiction to jurisdiction. Some jurisdictions are silent on the subject, while others specify their use.

A time code burned into the lower part of the camera master is a uniform, inconspicuous reference to every moment of the deposition. This is extremely helpful when obtaining rulings on objections or deciding where to edit the presentation.

Although most video cameras are now capable of burning a time code into a video image, I know of none that is capable of burning in a code that includes seconds. Because this is very important, the videographer should use a separate time-coding device referred to as a "time-code generator". With this, every second of information on a videotape is numbered and identifiable. This allows very specific instructions to be given to a tape editor.

However, contrary to common belief, time-coding is not a foolproof method of authentication. For example, its use does not guarantee that a finished product will not be manipulated. Experts familiar with videotape production and editing can manipulate time-coded information in a virtually undetectable way. This is perhaps the most important reason counsel should use competent ethical videographers.

All equipment should have readily available backups, and all recordings should have redundancies. Only by having recording redundancies and readily available backup equipment is it possible to virtually guarantee against missing any information to be recorded. No production should be undertaken without the immediate availability of an additional camera, videotape recorder, monitor, microphones, light fixtures, bulbs and all cables. Today, none of this equipment is very expensive — even ordinary consumer models can yield acceptable-quality videotaped evidence.

Ideal recording equipment would include a camcorder combination unit, a time-code generator, a separate videocassette recorder and a separate audio-only recorder. This results in the video's being recorded simultaneously on two separate tapes and audio on three — two from the sound being picked up by the individual lavalier microphones and one from the microphone mounted on the camera.

Sooner or later, every litigator is likely to have a case in which video is used — maybe by the opposition.

This redundancy produces a readily available audio cassette that can be used to prepare a "hard copy" transcript should that be desired. Two-hour audio cassettes and one-hour videotapes should be used because they facilitate editing. The only drawback caused by this configuration is the need to go "off the record" one time each hour in order to change the tape.

Just as counsel can speed-read through a traditional hard-copy deposition transcript, he or she can review a videotaped deposition quickly and easily. The deposition should be copied onto another tape using the long play (LP) or extended play (EP) mode. EP is also referred to as super-long-play (SLP) by some manufacturers. Originals should always be mastered using the standard play (SP) mode.

The copy is reviewed with a videocassette recorder that is not capable of playback in anything but the normal SP speed. While this results in the participants' voices sounding like "The Chipmunks", the words will be understandable. A deposition copied onto a tape using the LP mode will take half as long to review as the original recording; in the SLP or EP mode, it will take one-third as long. The copy produced using the LP mode will be easier to understand than if it had been recorded in EP. With practice, most depositions can be reviewed using the faster speech on the EP mode.

Videotaped depositions should be edited before being presented to a jury. Alfred Hitchcock once said, "A movie is life with the dull parts cut out." Presenting a witness by videotape gives the litigator an opportunity to present only relevant and persuasive information and to remove parts that are irrelevant, non-responsive or otherwise objectionable.

The concept of editing a deposition is not new. It is familiar to any litigator who has presented the testimony of a witness previously recorded by a stenographer. Just as every word of an entire transcript would not be read to a jury, neither should every moment of videotaped deposition be shown. Invariably in every deposition that is recorded on videotape, there will be information that will not be probative or relevant. Sometimes it is simply a delay in finding a document, while the viewer is forced to stare at the silent image of the witness.

Unfortunately, even though they would not hesitate to edit testimony found in a transcript, when it comes to editing information appearing on videotape, many lawyers believe a different set of rules should apply. This can be a serious mistake.

Of course, in any editing process, fairness must be the standard. Any material omitted by the proffering party would be admissible by the other side. Counsel would be foolish to selectively edit a deposition, leaving it to the adversary to present the damaging material that was omitted.

Courtroom playback should be simple and unobtrusive. For courtroom playback, counsel should use a television and screen size commonly found in the average home. By keeping playback simple and unobtrusive, the litigator is assured that maximum attention will be paid to the messages being communicated during playback rather than to the novelty of the equipment being used.

Great Advantage

It serves neither the lawyer's nor the client's interest to ignore the possibilities of videotaped evidence. It is time to take advantage of technology's potential in the trial setting. The testimony of a witness offers the litigator the greatest opportunity to learn about this medium.

EXHIBIT F

SURVEILLANCE VIDEOS

New Technology Creates a Lethal Courtroom Weapon

By John DeCaire

Although the possibility of surveillance videos has been around for years, recent developments in the technology have made them much easier to obtain.

As a result, they are turning up in all sorts of cases — and yet lawyers who are unfamiliar with video often make big and costly mistakes.

Nashville attorney Paul Ney, Jr., was defending against a plaintiff who "couldn't get around without a cane." So he hired an investigator to keep an eye on the plaintiff. The morning the trial started, the investigator caught the plaintiff on videotape "bopping down some concrete steps without the cane," he recalls.

The case settled quickly.

Cheap, portable video cameras have become universally available, and defense lawyers and insurance companies are increasingly taking surveillance videos in personal injury and workers' comp cases. Tennis courts, golf courses and bowling alleys have become the haunts of paid videographers waiting for the perfect video clip.

Videos are even being used in family law cases where one spouse hopes to gain leverage in a custody dispute or show an improper dissipation of marital assets.

"The technical capabilities of video are amazing," says Carole Bos, a partner at Buchanan & Bos in Grand Rapids, Michigan and co-author of *How to Use Video in Litigation*.

"Video cameras can be small enough to fit into a handbag, and remarkable things can be done at the touch of a button with lighting control and other features," she says.

Almost all trained investigators are familiar with video cameras, according to Bos, and the cost of a surveillance video is probably no more than that of any other investigation. Ney estimates that a surveillance tape could cost as little as $200 to $300.

For such a low cost, video evidence can have a powerful impact. A "two-minute video, if well made, will make a greater impression on the minds and emotions of jurors than the world's best expert," says Judge Eli Chernow of the Los Angeles Superior Court. "The familiar power of television will shoulder everything else aside."

But Lawyers Make Mistakes

Despite the recent technological advances, experts agree that videos are only starting to become common in the courtroom.

"The use of television in litigation is still in its infancy. Lawyers have very little understanding of television and television production," says Fred Heller, an attorney who runs a video consulting business for lawyers.

Lack of familiarity often causes defense attorneys to misuse video, and results in tapes that do more harm than good.

According to Heller, lawyers frequently turn control of a video's production over to a non-lawyer videographer who is trained to use a camera to make an impact and create drama — exactly the opposite of the "objective" sort of evidence a lawyer wants to offer a judge.

"Having non-lawyers produce evidence for the courtroom is an outrage," says Heller.

Plaintiffs' lawyers, on the other hand, "are intimidated when they are confronted with video and they forget traditional objections than might be applicable — portions of the video could be cumulative or inflammatory, etc. — or they just come up with a blunderbuss objection to the video, like 'it's edited,'" according to Heller.

Plaintiffs' lawyers need to look at television in the same way that they analyze written documents, isolating objectionable portions and making specific arguments to judges, Heller says.

Lawyers Weekly USA spoke with numerous experts around the country on the use of surveillance videos in litigation. Here is their advice for both defense and plaintiffs' lawyers.

For Defense Lawyers: Using Video Evidence for Maximum Effect

When to Use Video

Don't make a surveillance video in every case, advises Paul Ney, Jr., of Nashville. Save the video camera for cases where you have a strong suspicion that the plaintiff is out to defraud your client.

A surveillance tape can actually harm the defense if the plaintiff's injury is clear and there is no reason to suspect that the plaintiff is lying, says Ney. The jurors may be offended by what they consider an unmerited intrusion into the plaintiff's life.

Good candidates for surveillance are cases where the plaintiff was treated by a chiropractor instead of a physician, workers' comp cases where a plaintiff gets injured shortly before he was scheduled to be laid off, and other cases where the plaintiff claims that he is unable to return to work, says John Tarantino of Adler, Pollock & Sheehan in Providence, Rhode Island.

Choosing a Videographer

Lawyers should not make surveillance tapes themselves, says Carole Bos, of Grand Rapids, Michigan, co-author of *How to Use Video in Litigation*.

Plaintiffs' attorneys will check whether the lawyer or someone attached to the defense team, such as a legal assistant, actually taped the video so they can point to bias, she says.

An independent videographer will probably be a witness at trial to authenticate the video and testify about the conditions under which it was taken. "Choose him as you would choose an expert witness," advises Ney.

Beware of videographers who claim to be certified for legal video, suggests Fred Heller, an attorney who runs a video consulting business for lawyers. These claims are "bogus" because there are no uniform standards for legal videographers, he says.

Generally, lawyers can turn to whomever they normally use as an investigator when they want a surveillance tape, according to Bos. Because portable cameras are so ubiquitous, almost any investigator will know how to use one.

Producing the Video

Lawyers should closely supervise the taping of the video; "otherwise the lawyer may end up spending his money for a useless product," Bos says.

"I wouldn't send a photographer out on the job without having first established

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For Plaintiffs' Lawyers: Minimizing the Impact of Video Evidence

The following advice for plaintiffs' lawyers is offered by John Tarantino of Adler, Pollock & Sheehan in Providence, Rhode Island, and George LaMarca of LaMarca & Landry in West Des Moines, Iowa:

• Start addressing the possibility of surveillance evidence as soon as you get a case. LaMarca always discusses the likelihood of surveillance with his clients so they will be mindful of their actions. He encourages them to stick to their doctor's recommendations about what they should and shouldn't do.

Tarantino also tells his clients that surveillance is a possibility, and emphasizes the danger of creating misimpressions. For instance, he tell clients not to buy or wear medical appliances without a doctor's advice.

• Always ask for any surveillance tapes during discovery. Most jurisdictions allow plaintiffs to see tapes in an unedited form before trial.

Even if you're confronted with a case holding that surveillance films are nondiscoverable work product or impeachment material, check for any local rules that nevertheless require defendants to disclose unedited tapes. (Paul Ney, Jr. of Nashville has encountered such rules and expects them to become more prevalent as disputes over video editing become more common. "Judges don't want trials held up while these disputes are going on," he says.)

• LaMarca always serves the following interrogatory on defendants in cases where surveillance is a possibility:

INTERROGATORY NO. ____ State whether or not the defendant has conducted any type of surveillance on the plaintiff in this action. If so, for each surveillance activity and or technique, set forth the following:

a. The person conducting the surveillance;

b. The method of surveillance;

c. Identify all tangible evidence obtained as a result of said surveillance;

d. Identify the custodian of all documents or tangible items of any kind, the subject matter of which is in whole or in part a result of said surveillance; and

e. Give a brief description of the activities which were the subject of said sur-

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For Defense Lawyers: Using Video Evidence for Maximum Effect

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a script and production schedule that he is to follow scrupulously," says Ney.

What the defense lawyer wants is a short unedited video baring the fiction behind a claimed injury. "It doesn't take too much to show a malingering plaintiff," says Bos, and plaintiffs' lawyers are bound to capitalize on any editing when they argue that a tape doesn't fairly represent a plaintiff's injury.

Defense lawyers should remember that plaintiffs' counsel will probably be able to discover *all* surveillance tape taken by a videographer, the experts warn. If a zealous videographer has indiscriminately taken days of videotape, then edited it down to a couple of minutes showing the plaintiff doing something his injury should prevent, the plaintiff's lawyer will be able to point to the much more substantial "outtakes" showing the injured plaintiff.

The outtakes might even show the plaintiff suffering the consequences of an unwise action, thus playing into the hands of the standard plaintiff response to a videotape — "Boy, did I hurt for days after I did that."

To avoid these problems, Bos says the videographer should do the bulk of the surveillance work before he ever turns on the camera. Once he has an idea of the plaintiff's habits, he will know that all he has to do is take his camera to the bowling alley on a Thursday night to get a short, compelling and unedited tape.

Defense lawyers should tell videographers whether they want any written reports in addition to videotape, says Ney. Otherwise videographers may automatically write reports, and plaintiffs can discover them. The reports may contain editorial or extraneous comments suggesting bias, prejudice or unprofessionalism.

For the same reason, lawyers should instruct videographers to keep the sound off when they make tapes, Ney says.

Defense lawyers should curtail any tendencies of the videographer to be an "auteur." "Lawyers really need to take charge of the information and produce it themselves," says Heller, "because videographers are trained to make an impact and create drama."

Fancy editing, zoom lenses and the like do not create the kind of "objective" evidence a judge wants to see. A good plaintiff's lawyer who sees a cleverly edited or otherwise selective piece of video will be quick to ask for any outtakes, and will apply traditional objections to the evidence. Heller recommends keeping the video as simple, nonprejudicial, and noncumulative as possible.

In addition, juries are not easily bamboozled by tricky editing, Bos believes. "We're all professional TV watchers. Our eyes are trained to see glitches, and we can spot something wrong with the editing process even on a sophisticated TV show. And most defense lawyers are not going to be able to afford great productions."

The Element of Surprise

Effective use of a tape at trial will hinge upon the degree to which it takes the plaintiff by surprise, says Ney.

A tape is most devastating when it flatly contradicts a plaintiff's testimony about his activities or abilities. When the plaintiff knows the tape is coming, he will tailor his testimony accordingly.

While this in itself is helpful, and may obviate any need to actually show the tape, Ney says it is usually still preferable to take the plaintiff by surprise. Dishonest plaintiffs may lie about more than the extent of their injuries, he says; for instance, they may lie about causation. Tapes which surprise plaintiffs and dramatically unmask a bald-faced lie not only serve as substantive evidence about the plaintiff's injury; they also have great impeachment value by showing that the plaintiff is not credible.

Most jurisdictions allow plaintiffs to discover and view surveillance tapes before trial. However, Ney says surprise may still be possible because in his experience plaintiffs often simply fail to request videotapes during discovery.

Moreover, surprise tactics are not completely eliminated even in jurisdictions which allow liberal discovery of videotapes. Most of these jurisdictions still allow defense counsel to depose the plaintiff before disclosing the tape. At trial, defense counsel can create some drama by having the plaintiff read his deposition testimony before showing the tape.

Ney suggests that defense lawyers responding to plaintiff's requests for production of tapes try to get a court order governing the sequence of discovery.

Ney's other discovery suggestions include:

- Don't tell your client about your tape or show it to him. Your client will probably be deposed and could be asked if he knows about a tape.
- Don't show the tape to your expert witness unless he has to review it; if the tape is part of the basis of the expert's opinion, it may be subject to pretrial disclosure.
- Even if you haven't made a film, and don't think you're going to, object to a plaintiff's request to produce tapes instead of responding that no tapes exist. You may decide that you want to make a tape later, and if you originally told the plaintiff you didn't have one you may have an obligation to supplement and amend your discovery responses.

Using the Video at Trial

Before showing a tape at trial, Ney recommends considering the possibility that a particular judge or jury will find surveillance repugnant or video an unreliable form of evidence. Hostility to a tape could negate all of its substantive value.

"Video evidence is never neutral," says Tarantino. "It either has the effect the defense wants, or it rebounds."

However, Bos thinks these concerns are generally inflated. "The world being what it is, people are sophisticated about this," she says. "People watch TV; they see shows involving surveillance like 'The Rockford Files,' and they know that if you make a claim you're fair game to be watched."

What's more, "people don't like malingerers, and juries won't dislike the proponent of a tape showing a malingering plaintiff." Bos also notes that lawyers who carefully screen cases before deciding to use surveillance and who supervise their videographers have already countered most of the factors that could cause a jury's hostility toward unmerited or intrusive surveillance.

Bos emphasizes that video is no more inherently manipulable than any other form of evidence, and a lawyer can tell this to the judge. "The risk of manipulating evidence is always there with unscrupulous lawyers," she says, "and it doesn't depend on the medium; for instance, you can take the negative of a photo and reverse sides so that left becomes right."

Lawyers who decide to show a tape at trial should consider timing and staging, says Ney, who cites the following as important:

- If you've been able to keep your tape a secret, consider the ramifications of setting up your videotape player as soon as the trial begins. If you do this the plaintiff will be alerted to the existence of a tape, although he won't know what's on it. This gives the plaintiff some incentive to temper any extravagant claims when he testifies; you may not even have to use the tape. This could be the best approach where the actual tape is not all that helpful to the defense.
- On the other hand, where the tape is a secret and shows that the plaintiff is clearly out to defraud your client, keep your videotape player under wraps until you show the video. First tailor your cross-examination of the plaintiff to the events you have on tape, and see if the plaintiff sticks to a false version of events. Here the element of surprise will give the tape maximum impact.
- Put your videographer on the stand to lay the foundation for the evidence (i.e., to testify to the accuracy and authenticity of the tape). Do this instead of presenting the video to impeach the plaintiff's testimony during your cross-examination of the plaintiff. Although you could then have the plaintiff himself authenticate the tape, it could distract the judge and jury from the tape's impact if the plaintiff has an immediate chance to explain discrepancies with his testimony.
- If the plaintiff saw the tape before trial, but you were able to depose him before disclosing the tape, try to keep some drama in your presentation. Have the plaintiff himself read his deposition testimony, then present the tape and have the plaintiff authenticate it. Impress upon the jury that the deposition was taken under oath.
- Prepare your videographer for a vigorous cross-examination on the technical aspects of the videotaping. Make sure he remembers the conditions under which he videotaped, as well as the speed at which he set his camera and the specifics of any editing or other post-production work. A good plaintiff's lawyer will always do his best to suggest that technology was used to distort reality.

Rein in the Videographer

A videographer "is an extension of you, your law firm, and your client, and should follow the ethical standards and restrictions that govern your conduct as an attorney," says Ney.

Courts have recognized that defendants can investigate to uncover fictitious injuries, and are receptive to "reasonable" and "unobtrusive" investigations. However, they have imposed tort liability on defense lawyers and clients who facilitated unreasonable, overly intrusive surveillance.

Invasion of privacy, intentional infliction of emotional distress and trespass have all been the grist of successful actions by videotaped plaintiffs.

Generally, videographers should be told not to create situations designed to elicit strenuous plaintiff activity. (The textbook example of this is slitting the tires on a plaintiff's car so you can tape him changing the tires.)

Make sure you specifically instruct your videographer to avoid misconduct; don't just assume he'll behave himself. Tactics such as the tire example are not uncommon, according to George LaMarca of West Des Moines, Iowa. As time goes by, the ruses employed "just take more clever twists," says LaMarca; "out of frustration people will still do this sort of thing when they don't get the evidence they want."

Videographers must also respect the plaintiff's privacy. Ney makes the following suggestions:

- Videographers should be told to stay off private property, especially the plaintiff's property. Otherwise trespass might be an issue.
- Videographers should avoid special lenses that allow a camera to probe inside the plaintiff's house or other area where a plaintiff might have an expectation of privacy. Tell your videographer to take the film from a public vantage point.
- The videographer should not eavesdrop. Have him turn off the sound on the camera. Any conversation on the tape will be hearsay, and the videographer will be a witness at trial. He should not record the plaintiff's conversations or be a party to conversations with the plaintiff.
- Put a reasonable time limit on the investigation.

An unprincipled investigator can even end up aggravating a plaintiff's injury. LaMarca cites a ploy where an investigator offers a plaintiff who is out of work because of an injury an attractive wage to plant some shrubbery, then tapes the activity. The plaintiff herniates another disc when he plants the first shrub. It's all on tape. Now the defendant faces the original personal injury claim, a brand new personal injury claim, and an assortment of other tort claims as well.

For Plaintiffs' Lawyers: Minimizing the Impact of Video Evidence

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veillance, including the dates, times, and locations therefor.

- Thoroughly depose and cross-examine the videographer. The first thing to ask is how long he kept your client under surveillance, says LaMarca. The defense lawyer will try to present a short video featuring your client, and the period of surveillance preceding the filming was probably a lot longer than the tape itself.

Ask the videographer what he saw before and after he videotaped, and stress that the overwhelming majority of your client's actions were perfectly consistent with his claimed injury.

"Show how limited the scope of the film is," says LaMarca. "A half hour is hardly anything out of a person's life."

In one case LaMarca got a videographer to say how difficult it was for him to get a video, because the plaintiff was in general so sedentary. LaMarca used this to argue that the tape showed only "one small insignificant portion" of the plaintiff's life.

If the videographer was foolish enough to keep his camera rolling during an entire lengthy surveillance, and had to edit hours of film down to a small segment that was useful to the defense, you can try to get all the videotape in front of the jury. Let the jury see what the plaintiff did *not* do, says Tarantino.

- Ask the videographer about his methods. The judge or jury may become hostile to intrusive or deceptive techniques. You may even have grounds to consider tort claims against the defense.
- Ask the videographer about his fees and his relation to the defendant. Make sure the jurors know that he was paid and was hired for the specific purpose of coming up with evidence against your client.

Some questions suggested by Tarantino are "That was your job, wasn't it, coming up with evidence against my client?" "You stayed as long as it took, didn't you?" and "Tell us about the thousand other things you saw."

- Emphasize what a videotape does *not* tell the jury, says LaMarca. He likes to ask videographers a series of questions designed to make this point, such as "You don't know how much Mrs. Jones hurt after she did that gardening, do you?" "You don't know she had to take Tylenol after she did that, do you?"

Keep in mind that all a film means is that a plaintiff did something, says LaMarca. It doesn't mean that there was no pain, or that the plaintiff doesn't have a problem. All the defendant has is a depiction of an act. You have the crucial information about pain and suffering.

LaMarca notes that rational people will often do things despite consequent pain. For instance, LaMarca likes to fish, and does so even though he has some carpal tunnel syndrome and fishing makes his hands hurt. Juries understand this sort of thing.

In addition, plaintiffs may have to perform necessary chores despite aggravation of their injuries, because if they don't do them they simply won't get done. Tarantino says such explanations can be very powerful with juries; for instance, a plaintiff who explains that she was bending over to do laundry because otherwise she couldn't provide her children with clean clothes.

- Don't let the technical aspects of video intimidate you and don't forget about traditional evidentiary objections.

Tarantino suggests that extensive editing of a tape (for example, where the defense edited two days' worth of tape down to one minute) can make the tape so unrepresentative and "grossly unfair" that it should be entirely excluded from evidence.

LaMarca notes that a possible source of abuse in surveillance filming is the speed at which the camera is operated. If the videographer speeds the tape up, an activity can look more rigorous than it was.

According to LaMarca, he was once able to get a videographer to say that camera speeds can be varied, and he was unaware of the speed at which his camera was set. Then he had to admit that he didn't know whether the tape might show the plaintiff's actions occurring faster than they actually did.

LaMarca also notes that "objects can be distorted by camera angle and depth in comparison to field of vision." For instance, a one pound box, given a certain camera angle or field of vision, may appear much bigger and heavier than it is. He recommends that plaintiffs' lawyers make their own investigation to determine sizes and weights of objects.

If you suspect any serious technical manipulation of a tape, you should hire a forensic audiovisual expert, says Tarantino. However, he notes that sophisticated technical manipulation of surveillance tapes is not common.

- Finally, you should point out the intrusive nature of surveillance in your closing argument, Tarantino says.

He tells the jury that a series of harms was done to the plaintiff; the plaintiff was injured and came before the court with his legitimate claim, and the defense — who already injured him — responded to this by investigating him and invading his privacy.