Illinois Association of Defense Trial Counsel
P.O. Box 7288, Springfield, IL 62791
IDC Quarterly, Vol. 7, No. 3 (7.3.29)

Evidence and Practice Tips

By: Stephen J. Heine
Heyl, Royster, Voelker & Allen, Peoria

Surveillance Videotapes at Trial

Anyone who doubts that old saying "a picture is worth a thousand words" has missed seeing a jury watch videotape surveillance of a plaintiff claiming serious injuries. Surveillance videotapes have enormous impact on the decision-making process even where the videotapes are not directly impeaching of the plaintiff's trial testimony.

Surveillance films may be used to expose a malingering plaintiff. *Carney v. Smith*, 240 Ill.App.3d 650, 608 N.E.2d 379, 181 Ill.Dec. 306 (1st Dist. 1992); *Mathias v. Baltimore & Ohio R.R. Co.*, 93 Ill.App.2d 258, 236 N.E.2d 331 (1st Dist. 1968); *McGoorty v. Benhart*, 305 Ill.App. 458, 27 N.E.2d 289 (2d Dist. 1940).

Films and videotapes, when properly authenticated and relevant, are admissible as demonstrative evidence. *Cisarik v. Palos Community Hosp.*, 193 Ill.App.3d 41, 549 N.E.2d 840, 140 Ill.Dec. 189 (1st Dist. 1989), *affirmed in part and reversed in part*, 144 Ill.2d 339, 579 N.E.2d 873, 162 Ill.Dec. 59 (1991). The fact that a film is made covertly rather than openly is immaterial. *Cisarik v. Palos Community Hosp.*, 144 Ill.2d 339, 579 N.E.2d 873, 162 Ill.Dec. 59 (1991).

Simply having the surveillance videotape in your possession will not guarantee that the jury will ever see it, however. The first thing to consider is whether such tapes are discoverable and, if so, at what time. There is some authority from other jurisdictions that discovery requests regarding information as to whether or not surveillance videotapes and photographs were taken is privileged by reason of being prepared in anticipation of litigation and, therefore, not subject to discovery. Taking such an approach in Illinois is probably risky. The same is true for the federal system. A reasonable argument can, however, be made to protect the discoverability of surveillance photographs, videotapes and reports prepared by the surveillance investigators prior to the time that the plaintiff is deposed.

A related issue is the extent to which it is necessary to produce the notes, reports and master videotapes. Often, surveillance tapes have large time gaps when the surveillance investigator turned off the video camera during periods of inactivity by the plaintiff or when the plaintiff himself was not actually being observed. For example, the investigator may have seen the plaintiff going into his house, left the video camera running for 15 minutes showing nothing but the front door and then turned it off for the next three hours while the plaintiff remained in his house and nothing was being filmed other than the front door. The videotape camera is often then turned on when the investigator observes the front door open. The time gap where no filming occurred should not be a problem as long as the gap is plainly apparent on the tape, and the investigator is available to explain the reason for the gap (e.g., the camera was turned off because there was nothing of any significance to film and no useful purposes served by three hours of videotape of the front of plaintiff's house). The master tape should show the date and time of the film to avoid or minimize suggestions that the tape has been altered. It is best to obtain exact and complete copies of the master videotapes and produce those to the plaintiff's counsel well prior to trial and after the deposition of the plaintiff. It is advisable to produce an exact duplicate copy of all of the tape shot by the surveillance investigator. Do not allow the surveillance investigator or his or her employer to edit the tapes that are sent to you. If the investigator does so, you will save some time in your review of the videotapes, but you will feel very uncomfortable when you attempt to use the tapes at trial and must explain why you have not produced an exact duplicate copy of the master tapes to the plaintiff. You will have a difficult time explaining that there is nothing of any significance on those master tapes if you have not seen them.

The presentation of surveillance videotapes to the jury is not without hurdles. First, determine whether you wish to present the testimony of the surveillance investigators themselves on issues other than the authentication of the videotape surveillance exhibit. It is my experience that little is to be gained by the presentation of the testimony of the surveillance investigator on any issue other than the authentication of the videotape. These individuals are often relatively inexperienced at testifying, fairly young, and are often perceived by the jury to be biased. Attempt to present the testimony of the surveillance investigators and have them detail what they saw the plaintiff do also is likely to result in a wide ranging cross-examination about the minute-by-minute activities of the investigator in an attempt to make the investigator look sneaky, dirty and underhanded. The presentation should be focused on the videotape and the activities of the plaintiff, not on the testimony of the investigators. Remember, the foundation for the videotape is no different than that for any other film or still photograph. As long as the film or videotape truly and accurately shows what it is represented to show, it has been authenticated.

Do not limit the relevance of the videotape film to impeachment only. In any bodily injury claim there is an issue concerning the nature, extent and duration of the plaintiff's alleged injuries, his disability, and the pain and suffering experienced in the past and reasonably certain to be experienced in the future. The videotape and still photographs are probative to each of these matters in controversy whether or not directly impeaching of any testimony of the plaintiff. Even videotapes that show the plaintiff engaged in activities that do not require vigorous exertion may be sufficient to rebut an inference that the plaintiff was in constant pain. *See e.g., Carney v. Smith*, 240 Ill.App.3d 650, 608 N.E.2d 379, 181 Ill.Dec. 306 (1st Dist. 1992).

The mechanics of presenting the tape to the jury and preparing the exhibit are important. Preparation of a composite or compilation tape fairly representing a cross section of many hours of the videotape is an acceptable method. The compilation or composite exhibit still must be authenticated. This may require calling one or more of the surveillance investigators simply to authenticate the tape. The use of a request to admit the authenticity of the compilation or composite tape to be shown to the jury may eliminate this rather cumbersome procedure. Restricting the direct examination of the surveillance investigators to the issue of the authentication of that portion of the compilation or composite tape taken by that investigator should preclude cross- examination of the investigator on numerous collateral issues.

Having present in court the master videotapes themselves (those from which the compilation or composite exhibit tape was made) will go a long way toward convincing the trial court that the compilation or composite exhibit tape is the only one properly shown to the jury. Most trial judges are (and counsel should be) concerned with wasting time and boring the jury. A legitimate answer to any claim of the plaintiff that you have selected only highlights favorable to your client is that the master tapes have been produced and are present in the courtroom, and the plaintiff can show any part of or all of those tapes to the jury that the plaintiff and his counsel choose to show.

Use of a composite tape rather than voluminous lengthy tapes has been approved in the federal court in *United States v. Bakker*, 925 F.2d 728 (4th Cir. 1991). In *Bakker*, a composite videotape showing the defendant's attempts to solicit funds during his television evangelism programs was deemed to be admissible even if more than 200 hours of original tapes had not been introduced into evidence where the defense counsel was given access to the original tapes at least six months before trial. The court found that requiring formal introduction of the voluminous tapes would have served no useful purpose, and the fact that a composite tape was admitted went only to its weight not to its admissibility.

Moving *in limine* to preclude cross-examination on collateral issues of the surveillance investigators is also useful and helps to minimize the often unfair and unsupportable claim by the plaintiff's counsel that the defendant and its counsel has done something wrong by conducting

surveillance on the plaintiff. In *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290 (7th Cir. 1993), the defendant railroad moved *in limine* to limit the admission of evidence concerning its surveillance of the plaintiff. The court precluded evidence concerning the defendant's policies, practices and procedures conducting surveillance basing its decision on
Federal Rule of Evidence 403. Rule 403 provides that the district court may exclude relevant evidence if, *inter alia*, its probative value is substantially outweighed by the danger of unfair prejudice or time considerations. In *Scaggs*, the court precluded the plaintiff's attempt to prove a negative with the lack of evidence showing the plaintiff doing very little, finding that the plaintiff's attempt to prove the negative had little probative value when compared to concerns about unfair prejudice and the waste of time.

Contents of the photographic evidence can be admitted as evidence independent of the testimony of any witness to the events depicted — again, a picture is worth a thousand words and, in fact, is more important than the words themselves.

In *U.S. v. Rembert*, 863 F.2d 1023 (D.C. Cir. 1988), the court affirmed the admissibility of a bank surveillance camera under the "pictorial testimony" theory of the use of photographs as evidence finding that a sponsoring witness, whether or not he is the photographer, who has personal knowledge that the photograph fairly and accurately portrays the scene depicted satisfied the authentication requirement for the use of an automatic teller machine surveillance camera videotape pursuant to Federal Rule of Evidence 901(b)(9). Note that in such a situation, there is no witness who could testify that he actually observed the plaintiff, whether through the lens of a video or other camera or otherwise, do what the person filmed is shown doing on the videotape. The same may be true for a surveillance film where one or more of the surveillance investigators is unavailable to testify at the time of the trial.

One other method might be considered for the authentication of the compilation or composite exhibit videotape: Most plaintiffs will admit to having viewed the tape and that everything on the tape is true. It is irrelevant to the issue of authentication that the plaintiff claims that he was in pain after he did whatever he is shown doing on the tape, that he had to go into his house and lay down or that the tape did not show all of his activities that day.

About the Author

Stephen J. Heine is a partner in the Peoria firm of *Heyl, Royster, Voelker & Allen*. He has tried cases in the areas of construction, first party property claims, railroad, products liability, professional liability, trucking and automobile. Mr. Heine received his B.S. from Illinois State University in 1978 and his J.D. from Southern Illinois University in 1981. He is a member of several organizations, including the IDC, DRI, National Association of Railroad Trial Counsel, Illinois Appellate Lawyers Association and Peoria County, Illinois State and American Bar Associations.