EXPOSING THE SURVEILLANCE DEFENSE - DISCOVERY OF SURVEILLANCE VIDEOS AND REPORTS

Barry R. Conybeare
Conybeare Law Office, P.C., St. Joseph, Michigan

2002 MTLA Rapid Fire Seminar

May, 2002
Novi, Michigan

EXPOSING THE SURVEILLANCE DEFENSE - DISCOVERY OF SURVEILLANCE VIDEOS AND REPORTS

I.BEFORE LITIGATION

.Prepare your client from the outset for the potential of surveillance. This should be addressed during the initial interview and confirmed in the initial letter.

.Advise your client that they should always be on the lookout for private investigators or surveillors, and that certain days present higher risk then others. High risk surveillance days include the day before, the day of and the day after the following events:

?Plaintiff`s deposition
?Defense medical examination
?Settlement Conference
?Facilitative mediation
?Known and scheduled medical appointments

.Be aware that some claims are more likely to draw surveillance than others. For example, when injuries heal within three to six months for most people, but not for your client, a defendant`s suspicions may be raised. Chronic neck and back pain cases are always prime candidates for surveillance. Claims that involve the need for the use of a cane or other walking assistance, a chronic limp or claimed non-use of a hand or arm are also likely to draw surveillance.

II.THE SURVEILLANCE DISCOVERY REQUESTS

.Serve a comprehensive and boilerplate set of surveillance interrogatories and requests to produce early in the litigation.

.Ensure that your discovery requests are served on all defendants more than 28 days before the plaintiff`s deposition.

.A sample set of discovery requests concerning surveillance are attached as Exhibit A.

III.THE FIGHT OVER PRODUCTION OF SURVEILLANCE INFORMATION

A.Work-Product Privilege

.The most common response to surveillance discovery requests is an objection claiming the information sought is subject to the work-product privilege and was prepared in anticipation of litigation. No details are

disclosed other than claiming the privilege. The work-product privilege is contained in MCR 2.302(B)(3)(a).

.A follow up telephone conversation with defense counsel will usually reveal whether surveillance was or was not performed. Defense counsel will almost always admit or agree that he or she will disclose the surveillance information following the plaintiff`s deposition and depending upon how the plaintiff testifies.

.At this point, the plaintiff must file a motion to compel production of the surveillance information.

B.The Motion to Compel

.The plaintiff`s deposition should not occur until plaintiff`s motion to compel the surveillance information is filed and heard on the merits.

.Under MCR 2.302(B)(1), surveillance information, including logs, reports, videotapes, audiotapes and photographs, are relevant and discoverable materials.

.A sample Motion to Compel and Brief in Support of Motion, containing most of the following arguments, is attached as Exhibit B.

.There are four basic arguments that can be raised in the Motion to Compel. They are as follows:
?The surveillance information should not be afforded work-product protection.
?Even if the surveillance information is subject to the qualified work-product privilege, defendant has expressly or impliedly waived the privilege by claiming or intending to disclose and use the information following the plaintiff`s deposition. (This argument was not included in the attached sample Motion to Compel).
?Even if the surveillance information is subject to the qualified work-product privilege and has not been waived by the defendant, plaintiff can show a "substantial need" and "undue hardship" under MCR 2.302(B)(3)(a); and
?If the work-product privilege applies and plaintiff is not entitled to the information before the deposition, then defendant must be precluded from using the information at any time or in any way during the litigation or at trial.

.Support for each of these arguments is set forth below and/or in the brief attached as Exhibit B.

1.Surveillance information is not work-product.

.Defendants must disclose the relevant facts of the surveillance even if they claim the qualified work-product privilege. In this regard, defendants are obligated to inform plaintiff fully of all the facts surrounding the surveillance, including the dates and times it was performed, the date that the material was generated, the individuals performing the surveillance, identification of whether

videotapes, photographs or audio recordings exists, etc. "The [work-product] doctrine furnishes no protection against discovery, by any permitted means, of the facts that the adverse party or that party's lawyer has learned, of the identity of persons who furnished such facts, of the existence or non-existence of documents, or of the underlying documents themselves." Dean, Longhofer, Michigan Court Rules Practice, Section 2.302.9 (1998).

.Surveillance information is evidence which is relevant to the issue of plaintiff's injuries and damages.

.The majority of jurisdictions hold either that surveillance information is not work-product at all and is freely discoverable, or it is protected as work-product but the protection is automatically overcome because substantial need and undue hardship are inherently present. See the cases collected at footnotes 20 and 21 in Comment, "The Discoverability of Personal Injury Surveillance and Missouri's Work-Product Doctrine," 57 MO Law Rev 871, 874-75 (1992).

.Attached as Exhibit C are orders from two Michigan trial courts compelling defendants to produce surveillance materials before the plaintiff's deposition.
?Friske v State Farm (finding that the surveillance information is not work-product)
?Hubbard v Amtrack

.Videotapes of plaintiff's activities are admissible evidence. Strach v St. John Hospital Corp., 160 Mich App 251, 276-78 (1987) (day-in-the-life video).

.Videotapes may be admissible as business records. Lopez v GM Corp., 224 Mich App 618,626-35 (1997) (crash test videos).

.Kissel v Nelson Packing Co., 87 Mich App 1 (1978). In Kissel, defendant attempted to shield the defense medical examiner from discovery by the plaintiff claiming work-product privilege. The plaintiff brought a motion to compel and was successful in obtaining discovery of the DME's opinions. The court held that "upon examining the plaintiff, [the doctor] became a witness to the nature and extent of the plaintiff's injuries. Having first hand knowledge, [the doctor] could then describe what he had seen and give expert inferences therefrom. Such testimony does not fall within any work-product restriction, and therefore the trial court should have granted the plaintiff's motion."

.Surveillance information, and particularly surveillance videotapes, audiotapes and photographs, are "first hand knowledge" of the damages and injuries suffered by plaintiff. The private investigator, upon videotaping, photographing and/or watching plaintiff, becomes a witness to the nature and extent of plaintiff's injuries. This information, therefore, is not subject to a work-product restriction.

.Argue that surveillance videotapes and audiotapes are "statements" that must be produced upon request pursuant to MCR 2.302(B)(3)(b) and MRE 613.

2.Expressed or Implied Waiver

.Clearly any privilege can be waived. Howe v Detroit Free Press, Inc., 440 Mich 203 (1992); Landelious v Sackellares, 453 Mich 470 (1996); Leibel v GM, ___ Mich App ___, docket #224734 (2002). These cases discuss the approaches taken in ruling on whether an evidentiary privilege has been waived.

.Factual work product (i.e. surveillance information) receives less protection than work-product that reveals the opinions, judgments, and thought processes of an attorney. Messenger v Ingham Prosecutor, 232 Mich App 633, 639-40 (1998).

.Defendants will admit or agree that while they are claiming the work-product privilege before the plaintiff's deposition, they will likely waive the privilege following the deposition.

.Domako v Rowe, 438 Mich 347, 355-56 (1991) (holding that the use of a privilege to control the timing of release of information is improper).

.Howe v Detroit Free Press, Inc., 440 Mich 203, 215 and 218 (1992) (stating that a party should not be able to use a privilege "as both the metaphorical sword and shield.")

.Defendants are violating the pronouncements in Domako and Howe by attempting to use the work-product privilege as a "shield" to stop plaintiff from obtaining the surveillance information before deposition; while defendants will subsequently attempt to use the surveillance information as a "sword" to impeach the plaintiff following the deposition.

3.Plaintiff can show "substantial need" and "undue hardship" for the surveillance information.

.The work-product privilege is a "qualified" privilege and documents or information are subject to production upon a showing of cause. MCR 2.302(B)(3)(a) provides that the work-product privilege can be overcome "only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

.As stated above, the majority of jurisdictions hold either that surveillance information is not work-product at all and is freely discoverable, or it is protected as work-product but the protection is automatically overcome because substantial need and undue hardship are inherently present. See the cases collected at footnotes 20 and 21 in Comment, "The Discoverability of Personal

Injury Surveillance and Missouri`s Work-Product Doctrine", 57 MO Law Rev 871, 874-75 (1992).

."Substantial need" and "undue hardship"
?It is relevant evidence to the nature and extent of plaintiff`s injuries and damages.
?The equivalent of surveillance tapes cannot be reproduced by the plaintiff.
?Plaintiff`s inability to remember the extent and fact of every activity he has participated in.
?The time lapse between the time of potential surveillance, discovery deposition and/or trial create an undue hardship on the plaintiff to recall every activity that he has participated in.
?Surveillance can be misleading or distorted by depicting the plaintiff participating in an activity contrary to plaintiff`s injuries but failing to show the pain and limitations the plaintiff experiences.
?The surveillance may distort activities through camera angles, lighting and film speed.

4.If defendant is entitled to claim the work-product privilege, then defendant must be precluded from using the information at any time or in any way during the litigation.

.For the same reasons expressed in the "waiver" argument above, defendants should not be allowed to control the timing of discovery based on the invocation of a privilege and then a later waiver of it. See Domako and Howe.

.The privilege cannot be a "shield" and then a "sword". If the privilege applies, then the defendant should be precluded from using the information at any time and in any way during the litigation.

VI.MISCELLANEOUS POINTS

.Supplementation of surveillance discovery requests. There is an argument that there is a duty to supplement surveillance information because the investigator is a person with knowledge of discoverable matters, and therefore supplementation must take place pursuant to MCR 2.302(E)(1)(a)(i). On the other hand, plaintiffs should probably serve "new requests for supplementation of prior responses" at multiple points during the litigation pursuant to MCR 2.302(E)(1)(c).

.After obtaining copies of all relevant surveillance information, depose the investigator. Establish that he was trying to "catch" the plaintiff in certain activities and, therefore, was not filming the "normal" activities of your client.

.Always review all videotape, not just edited verisons produced by the investigator.

.At trial, take control of the situation and show the surveillance tapes during your opening statement or case-in-chief. Minimize the harm of the defendant`s use of the materials.

.Do not underestimate the potential for a jury to be angry at surveillance if it does not catch your client doing anything egregious.

.If defendant`s surveillance information is not produced or is not used at trial by the defense, seek an instruction under SJI2d 6.01 that the jury can infer that the information would have been adverse to the defendant.

.Review Dave and Cameron Getto`s article - - "Stalking the Plaintiff: Surveillance, Lies and Videotapes", MTLA Quarterly, Summer 1999, attached as Exhibit D. The Getto article addresses what types of actions can be taken by the plaintiff against the private investigator and/or the defense attorney, i.e. using the anti-stalking laws, intentional and negligent infliction of emotional distress, protective orders, MRPC 4.2 and 4.4.