

Production of Surveillance Evidence in Personal Injury Cases

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The Legal Intelligencer
November 18, 2016

As the defense attorney in any personal injury case, at some point you will need to decide whether you want to retain an investigator to observe the plaintiff. There are many factors to consider. First, does the case warrant surveillance? For example, if the plaintiff filed the case as an arbitration matter and she has not had any medical treatment for the alleged injury for over a year, surveillance may not help your defense. In addition, your client likely won't authorize the expense.

Second, does the plaintiff live or work in an area that lends itself to surveillance? If your investigator will have difficulty positioning himself to capture valuable footage, it may not be worthwhile.

Third, does the plaintiff claim that she is limited in her daily activities? For instance, if the plaintiff claims either through verified Answers to Interrogatories and/or deposition testimony that she mows her lawn, gardens often, shovels snow, jogs frequently or lifts heavy objects, - surveillance may reveal information helpful to your defense.

Assuming you've considered these factors and decided to proceed with surveillance, the question becomes if and when you produce the footage and any written report to plaintiff's counsel. In Pennsylvania, the case law indicates that this production should occur early enough before trial so that opposing counsel has an opportunity to review it and prepare for cross-examination. However, every case is fact-specific and the trial judge has latitude to admit or exclude surveillance evidence based on the circumstances.

In [Mietelski v. Banks](#), 854 A.2d 579, 581 (2004), the Superior Court affirmed the trial court's decision to exclude the defendant's surveillance video of one of the two plaintiffs, as well as the defense medical expert's testimony regarding that video, because the video was not made available to plaintiffs' counsel until three days before the expert was deposed. The Superior Court noted that defense counsel had possession of the footage more than one month prior to the expert's deposition, yet he did not disclose the existence of the footage until three days before the deposition and ten days before trial was set to commence.

Alternatively, in [Dominick v. Hanson](#), 753 A.2d 824 (2000), the Superior Court affirmed the trial court's judgment in favor of the defendants. The jury returned a verdict for the defendants after viewing surveillance evidence of the plaintiff that was not produced to plaintiff's counsel before trial. Rather, defense counsel indicated his intention to present the surveillance evidence of the plaintiff after - plaintiff's counsel completed his case in chief.

The court noted that, although the plaintiff's counsel had served written discovery directed to the defendants requesting surveillance evidence, the defendants lodged objections to those discovery requests. Plaintiff's counsel never challenged those objections, which rendered his objections at trial moot.

A 2004 trial court opinion authored by Judge Stanton R. Wettick Jr. in Allegheny County addressed whether surveillance evidence must be produced to the plaintiff's counsel before the plaintiff is deposed. In *Morganti v. Ace Tire*

& Parts, 70 Pa. D. & C.4th 1, **2, the plaintiffs alleged that the plaintiff-husband sustained permanent and irreversible brain damage as a result of a motor vehicle accident. The defendants indicated in their Answers to Interrogatories that their representative had conducted surveillance of the plaintiff and that they were in possession of videotapes of that surveillance. The plaintiffs' counsel filed a Motion to Compel the production of those - videotapes prior to the plaintiff's deposition.

Wettick relied on the [Superior Court's decision in *Bindschusz v. Phillips*, 771 A.2d 803](#) (Pa. Super. 2001), in determining that the defendant must be permitted to depose the plaintiff regarding the alleged injuries before defense counsel is obligated to produce surveillance footage. Id. at **13-14, citing "this court agreed that the purpose of Pennsylvania's own discovery rules—prevention of surprise and unfairness, and the fostering of a fair trial on the merits—was best served by the procedure espoused in the federal cases."

What's the takeaway for those of us who practice personal injury defense in Pennsylvania? First, ensure that you have served objections to any discovery requests involving surveillance experts, reports, videos and photographs. If the plaintiff's counsel challenges those objections and prevails, you must abide by the court's order. In that situation, ensure that you produce the surveillance evidence in accordance with the court's order.

If the plaintiff's counsel does not serve discovery involving surveillance, or if she fails to challenge your objections to such discovery, you have to make a judgment call. Do you wait until the plaintiff completes her case before announcing your intention to present surveillance evidence to the jury, as defense

counsel did in *Dominick*? Or do you produce the surveillance evidence to plaintiff's counsel before trial, thus avoiding the risk that the trial judge will exclude the evidence based on unfair surprise and prejudice?

You should also consider what your client's goals are with respect to the surveillance evidence. For example, your client may want to resolve the case before trial. If you produce your surveillance evidence before trial, or even before a settlement conference with the court, you may be in a better position to resolve the case.

Finally, you should consider whether to conduct surveillance of the plaintiff before and after her deposition. If you conduct the deposition before surveillance commences, you'll be better equipped to inform your investigator of what to look out for in terms of limitations and such. In addition, you won't face the decision of whether to produce any footage before the deposition because the deposition will have already occurred. However, if you conduct surveillance before the deposition, you may obtain valuable footage from which you can tailor your deposition questions.

The takeaway is that every situation is different. Therefore, you and your client must consider your endgame for the case, as well as how likely it is that the court will admit your surveillance evidence at trial.



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