PRIVACY, SURVEILLANCE & THE LAW

Guidelines for Investigators & Claims Examiners

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ABOUT THE AUTHORS

This paper has been a work in progress since 1994 when it was originally researched and created by **Larry G. Henning, CFE CIFI**, Senior Vice President – MJM Investigations, Inc. When this surveillance project began, Mr. Henning was the Corporate Manager of the Special Investigations Unit for the Nationwide Insurance Enterprise in Columbus, Ohio. Mr. Henning joined the national private investigative firm of MJM Investigations, Inc. [Headquarters - Raleigh, NC) in 1998 as Vice President.

Mr. Henning has more than 27 years investigative experience, with 13 years in law enforcement, and the past 14 years exclusively dedicated to insurance fraud investigations. He is a Past President and Board member of the International Association of Special Investigations Units (IASIU), former Board member of the Insurance Committee for Arson Control (ICAC), and the advisory Boards to the National Insurance Crime Bureau (NICB) and National Healthcare Anti-Fraud Association (NHCAA). He has been involved with many other industry professional associations, and a frequent presenter at conferences and seminars throughout the world.

MJM Investigations is the largest private investigative firm in the U.S. conducting surveillance, claims investigations, SIU Services, training & consulting exclusively for the insurance industry. Their clients include insurers, third-party administrators, self-insured corporations, government, and insurance defense law firms.

In 1996 **Edward J. Wilbraham, Esq.** became involved with the project and has been instrumental in the continued development of this paper. Mr. Wilbraham graduated from the University of Notre Dame in 1968, and from Villanova University Law School in 1974. After eleven years spent gaining extensive litigation experience as a Philadelphia County Assistant District Attorney, Mr. Wilbraham joined a large regional law firm in 1985. As a senior associate, he practiced insurance defense law, handling both bodily injury and property damage cases. Mr. Wilbraham founded the firm of Wilbraham, Lawler, & Buba in 1989; he has served as its president since its inception. Mr. Wilbraham is licensed to practice law in Pennsylvania, New Jersey, New York, West Virginia and Texas. He has tried to verdict more than a hundred civil jury cases. He serves as national trial counsel to several Fortune 500 corporations and conducts his trial work in Pennsylvania, New Jersey, New York, Delaware, Ohio, West Virginia, Maryland, Texas and Virginia.

Both Mr. Henning and Mr. Wilbraham have lectured in the United States and internationally, on the subjects of ***Privacy*** and ***Surveillance & The Law***, using this paper in their presentations. They have written numerous published articles on this and many other subjects related to insurance fraud investigation.

The authors frequently make individual and joint presentations on this subject to professional educational conferences of insurance professionals, attorneys, and law enforcement personnel.

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I. INTRODUCTION

Since the mid-1980's, the insurance industry in the United States has experienced an alarming and dramatic increase in the number of fraudulent insurance claims. Certainly, a large percentage of these involve fraudulent or exaggerated personal injury, disability, or worker's compensation claims. In response, insurance companies have created or widely expanded their Special Investigation Units (SIU). Several states already require insurers to maintain a Special Investigation Unit, while many more states are considering this proposal.

This paper is intended to provide an introduction into the professional and practical considerations involved when an insurer utilizes or engages in the use of photographic surveillance to combat fraudulent personal injury, disability, and worker's compensation claims. Moreover, this paper shall serve to apprise insurance investigators, managers and claims adjustment professionals of the legal minefields that exist and important factors to be considered prior to conducting or contracting covert surveillance work. The information is not legal advice and the authors strongly suggest that you utilize the legal services of the Office of General Counsel within your company or a competent outside insurance defense attorney to inform you of specific legal guidelines or restrictions which may exist in your state of operation.

II. THE NEED FOR SURVEILLANCE

In the context of insurance investigations, covert surveillance is the observation of an individual from a hidden or unknown position to document the extent of a subject's physical activities.

The claims adjuster or insurance investigator may suspect that the individual filing the injury or disability claim may be exaggerating their injury in order to collect benefits that they are not entitled to receive. The claims adjuster may then want to consider referring the claim file to the Special Investigation Unit for investigative assistance and, if warranted, surveillance.

The permanent recording on videotape of a claimant engaged in activity that contradicts his or her personally or medically stated physical abilities, as part of an alleged disability or injury, may be a key factor in determining an appropriate settlement position with that claimant. Video surveillance is most frequently used to determine whether a claimant is engaged in physical activities that contradict the nature and extent of the alleged injury.

Video surveillance may also provide key documentation that the claimant's physical activities have not been limited as a result of any alleged injuries.

In general, the expanded use of video surveillance over the past several years has enabled insurers to uncover a larger number of fraudulent and/or exaggerated claims. However, the use of video surveillance does not come without certain risks that must be recognized by investigators, claim representatives, and their managers.

It is prudent for insurers to demand that the investigators performing the video surveillance assignment, whether an investigator in the insurer's SIU or an outside private investigation vendor, be adequately trained in the proper technical procedures of performing a photographic surveillance. It is equally important for the individual handling the video surveillance assignment to receive updated continuing education and training involving the potential legal ramifications of surveillance.

III. LEGAL ISSUES RELATING TO THE USE OF SURVEILLANCE

A. The Insured's Right to Privacy v. The Insurers Right To Investigate

Courts have generally encouraged the use of surveillance as a means of investigating suspected fraudulent insurance claims, especially those involving fraudulent or exaggerated personal injury, disability, or worker's compensation claims. "*Because of the public interest in exposing fraudulent claims, a plaintiff must expect that a reasonable investigation will be made subsequent to the filing of a claim*." **Tucker v. American Employer's Insurance Co.,** 171 So. 2d. 437, 438 (Fla. Dist. Ct. App. 1965). **Tucker** found that investigators must limit themselves to *reasonable* means of surveillance or risk exposing themselves and the insurer to liability for a tort claim.

In American jurisprudence, most litigation involving improper surveillance procedures or techniques is based upon legal theories of trespass, invasion of privacy, unfair claims practice, defamation, slander, bad faith, and intentional infliction of emotional distress.

In the case of **Forster v. Manchester**, 189 A.2d 147 (Pa. 1963), the Pennsylvania Supreme Court held that two investigators conducting a surveillance of a woman only when she left her house was "reasonable" because the woman exposed her activities to the scrutiny of the public at large whenever she left her home. The court approved of the investigators' surveillance methods

because they attempted to observe the woman unobtrusively and the investigators neither trespassed upon her property nor spied on her in the privacy of her home.

It is from the **Forster** case that we attribute the famous quote, " . . . *It is in the best interests of society that valid claims be asserted and fabricated claims be exposed*."

A similar case was found in **Figured v. Paralegal Technical Services, Inc.**, 555 A.2d 663 (NJ Super. Ct. App. Div. 1989), appeal dismissed, 583 A.2d 350 (N.J. 1990), where investigators received a surveillance assignment to assess the severity of a plaintiff's injuries. The investigators watched the plaintiff in her yard from the road in front of her home, followed her when she drove to a store, and allegedly stared at her as she sat in the parking lot. A week later, the investigators followed the plaintiff as she drove forty miles down the highway and, when she pulled into a rest area, the investigators again stared at her. The plaintiff's complaint relied upon the Restatement (Second) of Torts provision regarding "*Intrusion Upon Seclusion*." This provision states:

> **One who intentionally intrudes, physically or otherwise**, **upon the solitude or seclusion of another, or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person. -- Restatement (Second) of Torts, § 652 B.**

The New Jersey Superior court found that such surveillance was incapable of producing, "*mental distress . . . so severe that no reasonable man could be expected to endure it*." The court, in this case, also rejected a claim for invasion of privacy because the investigators only observed the plaintiff in public and, "*whatever the public may see from a public place cannot be private*."

In an action by a worker's compensation claimant who alleged that his privacy was invaded by investigators hired by the insurance carrier to observe him, the court dismissed the claim against the insurer, stating that the claimant had to expect reasonable inquiry into, and investigation of, his claims. The investigator's actions consisted of parking outside claimant's house to observe his outside activities, where claimant's activities could be observed by any passerby, and where there was no wrongful intrusion into claimant's privacy. **Johnson v. Corporate Special Services Inc.**, 602 So.2d 385 (Ala. 1992).

B. Unreasonable Intrusion

An individual conducting an unreasonably intrusive surveillance can lead to liability on the part of the investigator and the insurance carrier who employs or retains the investigator. The use of improper procedures can also render the video footage captured during the surveillance inadmissible at a worker's compensation hearing and/or at the trial of the personal injury or disability claim.

Some courts have gone so far as to hold that a plaintiff implicitly waives his right to privacy when he files an action for damages because the defendant has a corresponding right to "*reasonably investigate and ascertain for himself the true state of the claimant's injury*" **Pinkerton National Detective Agency, Inc. v. Stevens**, 132 S.E.2d 119 (Ga. App. 1963).

However, in **Pinkerton** the Georgia Court of Appeals found in favor of the plaintiff because the investigators' surveillance procedures and techniques were not considered reasonable conduct in an investigation. In this case, the investigators cut a hole in plaintiff's hedge so they could peer into her windows and eavesdrop upon the plaintiff's activities in her home.

Moreover, the investigators came to plaintiff's home on two occasions pretending to have business with her, and engaged in overt and prolonged trailing of the plaintiff in a conspicuous manner so as to excite the speculation of neighbors. The plaintiff became emotionally disturbed and manifested physical conditions in the form of nervous spasms, sleeplessness, nightmares, rashes and lesions accompanied by uncontrollable itching because of the investigators' prolonged unreasonable surveillance and investigation.

C. Unreasonable Investigation

Two California investigators became unreasonably overzealous in their creative surveillance techniques in **Unrah v. Truck Ins. Exch.**, 498 P. 2d 1063 (Cal. 1972). The investigators received an assignment to assess the severity of a woman's workers' compensation disability claim. One of the investigators initiated a romantic relationship with the claimant, and on one of their dates, he took her to Disneyland. There, the investigator and the claimant engaged in several physically demanding rides and activities, while the second investigator secretly videotaped their exploits. When the tape was shown at claimant's workers' compensation hearing, she suffered a physical

and mental breakdown. The California Supreme Court found that the insurer's immunity did not extend to intentional torts. The Court held that the investigators acted with malice and purposely intended to inflict emotional distress. The claimant was awarded two million dollars in punitive damages.

In **Schultz v. Frankfort M. Acc. & P.G. Ins. Co.**, 139 N.W. 386 (Wis. 1913), the "*rough shadowing*" (that is, the open, public, and persistent following of the plaintiff, without any attempt at secrecy and in such a manner as to make obvious to the public that the plaintiff was being followed and watched), was held to be an actionable tort for which the plaintiff was entitled to recover damages. The private detectives employed by the defendant kept the plaintiff under surveillance day and night, watched his home, eavesdropped there, and made known to the plaintiff's neighbors that he was being watched, thus restraining him of his liberty.

A very close question of unreasonable investigation was presented in **Turner v. General Adjustment Bureau**, 832 P.2d 62 (Utah App. 1992). In this case, two investigators were assigned to determine the legitimacy of a claimant's workers' compensation claim. During a period of three months, the investigators were able to repeatedly gain access to the claimant's home by posing as representatives of a product marketing research company. They gathered information on the claimant's activities, which was later used to successfully deny his claim. The court rejected the claimant's fraud claim because there was no evidence that the plaintiff had suffered any actual damages from the investigators' masquerade. The court also found that the jury's verdict was supported by competent evidence that the investigators entered the home with the consent of the claimant, for a legitimate purpose, and only for short periods of time. The court also made a special note of the lack of any allegations that the investigators harassed or annoyed the plaintiff during the investigation.

D. Invasion of Privacy

In the case of **Crump v. Beckley Newspapers Inc.** 320 S.E. 2d 70 (W.Va. 1983), the West Virginia Supreme Court stated that there are four different types of invasion of privacy claims. They are:

(1) Unreasonable intrusion upon the seclusion of another;

(2) Appropriation of another person's name or likeness;

(3) Unreasonable publicity given to another person's private life; and

(4) Publicity that unreasonably places another in a false light before the public.

By recognizing a cause of action for "invasion of privacy," this case as well as other state and federal cases, pose a definite and substantial risk of liability for improper surveillance. Moreover, this line of cases propounded a test for "reasonableness" when determining a cause of action for "invasion of privacy."

(1) Privacy Rights Outside the Home

Privacy, in light of recent events, has become a hot button issue. Politicians use protection of privacy interests as a campaign tool to attract votes while pundits decry what they see as assaults on privacy in our daily lives. While September 11th may have changed some of the surveillance rules for the government, the ones for private investigators remain unchanged. None of the bills before the House or Senate granting law-enforcement greater leeway in invasions of privacy are in any way related to the private sector.

The area that is most likely to affect a private investigator is the issue of reasonable expectations of privacy in public areas. So where are these boundaries of acceptable behavior when it comes to surveillance in public areas? This article will examine recent court decisions in various jurisdictions in the hopes of giving the private investigator a general idea about the current state of privacy law. Investigators are reminded that before beginning a sensitive surveillance action that it would be a good idea to consult with counsel with expertise in this specialized field.

(2) Private Clubs

In January of 2000, the Court of Special Appeals of Maryland ruled in favor of a private investigator who had sneaked onto property owned by a private club of which the plaintiff was a member. In Furman v. Sheppard, the plaintiff, Furman, was a party in a personal injury action. Thinking he was making his injuries out to be more substantial than they really were, Defendant Sheppard was hired to investigate him.

Sheppard followed Furman and his family to the Maryland Yacht Club in Pasadena, Maryland. Sheppard sneaked onto the club's grounds to get a better view of Furman. From the club's guest parking lot, Sheppard was able to get video footage of the Furman sailing on his boat and engaging in heavy labor.

The court rejected Furman's argument that the club was a private area therefore entitling him to protection from Sheppard's prying eyes. It also rejected his argument that because Sheppard had trespassed upon club grounds to obtain the footage it was an unreasonable intrusion upon his privacy. The court stated in its opinion that not every trespass is an unreasonable search or intrusion. It is only when a trespass invades a reasonable expectation of privacy that it becomes such.

Furman was in plain view when he was on his boat in the water, which is a public place. Because any non-trespassing member of the club could have seen his actions in plain view, the fact that Sheppard was on private property when he videotaped Furman was not relevant.

It should be noted that it is probably a good idea to stay off private property if at all possible. It would prevent a suit like this one from being brought in the first place. This case just illustrates two principles: 1) There is no reasonable expectation of privacy at a private club; and 2) that should you find yourself in a lawsuit of this nature, all might not be lost.

On the other side of the country, a similar argument was made by a plaintiff who had been observed using cocaine in a parked car in a private parking lot. In Salazar v. Golden State Warriors, the plaintiff had been put under surveillance by the Warriors on the suspicion that he was abusing drugs. Upon receiving video confirmation of this suspicion, the Warriors fired the plaintiff. The private investigator, with the aid of high tech video cameras and light-amplification night-vision equipment, videotaped Salazar using cocaine in a parking lot at a wedding reception he was attending. Plaintiff argued that because the parking lot was "not highly traveled but rather dark and isolated" he had a reasonable expectation of privacy.

The United States District Court for the Northern District of California (applying California state law) flatly rejected this argument. The court applied reasoning used in criminal cases. Under the 4th Amendment, parking lots are considered to be public areas and saw no reason to treat them differently in civil actions. It should be noted that this case is not published so it is not binding law. It could be, however, indicative of legal attitudes regarding privacy in public places.

(3) "Private" Acts in Public Areas

Dissenting opinions are certainly not controlling law, but they can sometimes be predictions of what is to come. Recently, in a 6-3 decision, the Supreme Court of Alabama in I.C.U. Investigations v. Jones found for the private investigator in a privacy lawsuit that came about when he, on several occasions, videotaped Jones urinating in his front yard. The majority held that the front yard, which in this case was at the intersection of two main roads, is in public view. Because the public can see actions that occur on the front yard, there is no reasonable expectation that actions that occur there, no matter how intimate, are private.

The majority's opinion is unremarkable, but what is really disturbing about this case is the minority's dissent. The dissent believed that urination is a private and personal act not meant for the eyes of the public, regardless of where it is performed. The dissent felt that some matters, like urination or a person's underwear or lack of it, are private matters not intended for public gaze. One dissenting justice even likened the surveillance to "prurient Peeping Tomism."

If you've watched late-night cable television you may have seen advertisements for racy videos containing footage of college-aged women exposing themselves in public. Recently, a woman who appeared on tape has sued a maker of such videos. AccroMedia, producer of "Wild Party Girls", is being sued by a woman who they videotaped taking part in a wet t-shirt contest in which she ended up removing her top. Her topless image, albeit altered for television, appeared in advertisements and on the company's website. She alleges AccroMedia invaded her privacy by videotaping and displaying her engaged in lewd activity in public.

In a similar case, a Florida State University student filed an invasion of privacy suit against the producers of "Girls Gone Wild," a video of the same nature as the party girls video. According to the complaint filed in Florida court, the student was filmed on a balcony at Mardi Gras while exposing her breasts to a crowd below.

While these cases have not yet been resolved, it is a cautionary statement to investigators that the possibility of suit exists if they videotape someone engaging in voluntary "private" acts in public. While it might seem absurd that people would bring suit for their exhibitionism being caught on tape, it could save an investigator the grief and inconvenience of a lawsuit if he turned his camera off the

moment some intimate activities were seen. What is most disturbing about these suits is that they raise invasion of privacy questions regarding voluntary displays of "private" matters.

In order to avoid possible court battles over videotape, the investigator might be better off only videotaping such a "private" act only if he thinks that it would substantially help his case. Certainly, the investigator would want to avoid the possibility that gratuitous shots like these could be barred from reaching the jury due to the inflammatory nature of the material.

(a) Balconies

Sometimes targets of surveillance will not have a front yard where they can display their lack of injury. They may, however, have a balcony, but there are considerations that must be taken into account in these cases. The key thing to remember about balconies is that if the general public could not see the balcony with the naked eye, then the private investigator should think twice about monitoring events that occur on it.

It is important to note that a Massachusetts court distinguished how a balcony may be viewed. Only those balconies easily seen from public areas may be surveilled. If trespass, or some sort of device like a periscope (to change the angle of view) is needed the court reserved the right to rule on it as an invasion of privacy. *(See Enhanced View)*

(b) Restaurants

NBC found itself in a lawsuit in Wilkins v. National Broadcasting Company, Inc[1], when its journalists videotaped and audio recorded a meeting between its undercover investigative journalists and representatives from an 800 and 900 telephone number company it was investigating. The meeting took place in a crowded outdoor café in Malibu. The videotape revealed that at points during the meeting waiters were standing right by the table in a crowded eatery. The court inferred from this that the conversation was easily heard by patrons and waiters alike thus proving the party alleging injury did not have a reasonable expectation of privacy. The information, while damaging to the company when revealed in the television report, was not considered to be private business information because it was a sales pitch that could have been given to any member of the general public. Also, because the conversation was limited solely to business matters instead of personal ones, the court believed that no privacy interest was harmed.

The important thing to take from this case is that in an outdoor café there is a very limited expectation of privacy. However, many jurisdictions have strict anti-eavesdropping laws so it is important to consult with local counsel if audiotape is desired. A good rule of thumb would be to leave the microphone off and let the actions speak louder than any words.

(c) The Workplace

Sanders v. American Broadcasting Company, Inc. featured another news organization in trouble. This time an undercover reporter for ABC went to work in a telephone psychic office to investigate its business practices. While posing as an employee, she was able to gain the confidence of her "co-workers" and secretly videotaped and audio recorded conversations with them. The company did not allow the general public into the office areas and, because of this, the court held that there was some limited expectation of privacy. This is despite the fact that the court believed that people in the adjoining cubicles could have easily heard the conversations between the plaintiff and the reporter. Their presence was seen as a normal part of the workplace.

The court was interested in protecting workplace conversations from invaders from the general public. Sanders distinguished the principle that privacy is not absolute and society does place degrees and nuances upon people's reasonable expectations of privacy.

(d) Gyms, Surveillance, and Cell Phone Cameras

Picture this: Jane Jones is involved in an automobile accident. She suffers what appear to be run-of-the-mill soft tissue injuries. However, nine months after the accident, she files suit for her injuries. Not only does Jane claim sprain/strain injuries, she also claims her doctor has put major restrictions on her daily activities. She claims she is unable to participate in recreational sporting activities. She also claims that her full-time employment with International Business Technology (IBT) has been affected because she is unable to sit at her work station for periods of longer than twenty (20) minutes at a time. In an effort to determine the legitimacy of Jane's claims, you hire an experienced private investigator. The investigator assures you that he will follow all ethical guidelines and will only conduct his surveillance in public places. The investigator is confident that he will be able to obtain

valuable surveillance using his camera phone. The investigator first trails Jane to her gym, World Sports Club. Purchasing a daily membership, the investigator is able to gain access to the gym. While Jane is working out with a group of friends, the investigator, while pretending to make a call, takes several pictures of Jane (and her friends) in somewhat revealing work out clothes.

There's nothing wrong with this scenario, right? Wrong. Or, at least, possibly wrong. Camera phones may make everyone's life a little more convenient, but for the insurance company hiring an investigator, a little technology may be a big headache. "While cell phones have numerous features and are convenient for [taking pictures] on the go, the new "hidden camera" feature has caused some major privacy concerns in gyms, shopping malls, bookstores and now even on college campuses, according to published reports" according to a recent article in the Ramapo Record of Ramapo College.

The Gym is clearly a public place. The investigator was legally entitled to be on the premises, by virtue of his day pass. However, used in certain contexts and in certain situations, camera phones can violate privacy laws.

Assume that the gym, like many gyms these days, has a strict "No Camera Phones" policy. The investigator is able to take the pictures without attracting the suspicions of the inattentive staff. Does Jane have a cause of action for invasion of privacy? At first glance, the answer is no. But privacy is a tricky area, subject to people's individual expectations.

In Jane's case at the gym, they had signs posted specifically prohibiting the use of camera phones on the premises. In fact, in the daily membership agreement the investigator signed, he agreed not use any such device. The Indiana Court found that the lack of such a sign was a significant factor. If Jane were to sue the insurer or the investigator, it is most likely that the Court would not find that there was an invasion of privacy. There was no physical invasion. And not many courts are willing to find a tort of invasion of emotional privacy. Jane was photographed, although in revealing work out clothes, in the presence of forty other patrons. It is doubtful that such surveillance was an invasion of her privacy.

However, an argument could be made that there has been an intentional infliction of

emotional distress. The gym clearly prohibited it and the investigator clearly knew he was violating the rules of the club. After the pictures were taken, the investigator emailed them to his office. The pictures were passed around the office so that the guys could "check out" the ladies as they worked out. Such a situation could very well give rise to a claim of intentional or negligent infliction of emotional distress.

(e) Churches & Intentional Infliction of Emotional Distress

In Creel v. I.C.E. & Associates[2], the claimant received benefits under a disability insurance plan. The insurer commissioned the defendant investigator to conduct surveillance and instructed the agency to videotape the claimant's activities during services at her husband's church. On two occasions, the investigator presented himself as a worshipper at scheduled church services. Each time, the investigator wore a sling on his arm that concealed a video camera. When the pastor greeted him, the investigator indicated he was visiting friends in the area. The services were open to the public and there were no signs prohibiting any form of videotaping.

After Plaintiff's disability claim was denied, the Creels filed suit against the agency, alleging invasion of privacy and intentional infliction of emotional distress. The Indiana Court of Appeals took a narrow view of the tort of invasion of privacy, finding that it required intrusion into the Plaintiff's "private physical space." The Court stated there must be some physical contact or invasion into physical space, such as her home. The court also discussed invasion of "emotional privacy" but found that the circumstances of the Creels' case did not establish such a tort.

However, the Creels also asserted a claim for intentional infliction of emotional distress. To establish intentional infliction of emotional distress, a defendant must engage in "extreme and outrageous conduct" that "intentionally or recklessly" causes emotional distress to another.[3] In its analysis, the Court held that "what constitutes extreme and outrageous conduct, depends, in part on prevailing cultural norms and values." There was no doubt that the investigator's behavior was "devious" and "distasteful" (more on that later). But the Court found that there was no explicit prohibition from videotaping church services. Furthermore, the investigator simply videotaped Plaintiff while she was in full view of 120 parishioners. Therefore, from a legal standpoint, the investigator's behavior was not extreme or outrageous enough to rise to the level of intentional infliction of emotional

distress. However it is important to note that the Indiana Court gave serious consideration to the claim of intentional infliction.

4) INVADING THE PRIVACY OF A THIRD PERSON

Can Jane's friends sue the investigators for invasion of privacy? After all, they weren't the claimant. Yet their pictures were taken and passed around the office. Was there publication?

If, during the course of his surveillance, your investigator captures images of third parties, either as a mistake or as part of the a picture of the claimant, can you be liable for invasion of privacy to that third party? In **Association Services v. Smith**[4] Joann Pierce injured her ankle while working for Pierce Poured Walls. As a result, she filed a workers compensation claim. The carrier retained Bullock Investigations to conduct an "activities check" on Pierce. In an effort to determine whether Pierce was, in fact, able to work, an investigator employed by Bullock, videotaped a woman fitting Pierce's description working at Southeastern Ornamental, watering plants and filling birdbaths, showing no signs of injury. The investigator believed that the woman he was videotaping was Pierce. However, he had mistakenly videotaped Bobbie Smith, Pierce's sister.

The investigator forwarded the tape to Tracy Nolton, the claims handler. Nolton, after viewing the tape and believing that it showed Pierce engaged in physical activity, she sent it to Kevin Carlock, the attorney handling this claim.

Carlock sent the videotape to Pierce's physician, Dr. Maecenas Hendrix. Dr. Hendrix had previously prepared a report was unable to return to work. A subsequent report provided Pierce could return to work with restrictions on her lifting. Carlock sent the video and a letter seeking his professional opinion about Pierce's ability to return to work. Carlock also notified Pierce of the investigator's findings. Pierce disputed the findings, and Carlock scheduled a meeting with the Pierces. After a second meeting attended by Smith, Carlock acknowledged that the subject of the videotape was actually Smith.

Smith filed suit against the carrier alleging both "intrusion of solitude and seclusion" and "false light invasion of privacy." In order to recover for the "intrusion of solitude", Smith would have to a "physical intrusion analogous to a trespass.[5] The investigator testified that he did not go onto either Pierce or Smith's private property. However, there was also conflicting evidence whether the investigator trespassed at Southeastern Ornamental. He also admitted placing at least seven

"pretext" telephone calls to Smith's workplace.

The Georgia Court of Appeals held that a genuine issue of material fact remains as to whether the investigator's conduct constituted an unreasonable intrusion into Smith's seclusion and privacy.

"Publicity which places the plaintiff in a false light in the public eye" is another of the four torts that make up the general tort of invasion of privacy in Georgia.[6] In a false light case, "the interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation."[7]

Basically, to establish a claim of false light, a plaintiff must establish the existence of false publicity that "depicts the plaintiff as something or someone which she is not." The plaintiff must also show that the "false light in which she was placed would be highly offensive to a reasonable person."[8] Smith claimed she was captured in a false light by an investigator who believed her to be Pierce. The Court of Appeals disagreed. First, the Court found that Smith had not been placed in the public eye by the carrier. Even though the tapes were played at a meeting of lawyers, investigators and the parties, there is no evidence that any members of the general public saw the tape or were even aware of it. Furthermore, although the tape was sent to Dr. Hendrix, he did not recall viewing it. The lawyers and investigators viewed the tape in connection with their investigation of Pierce's claims.

Even assuming that the depiction of Smith was viewed by members of the public and did place her in a false light, the Court "cannot conclude that the false light in which Smith was placed would be "highly offensive to a reasonable person." The activities captured on videotape could not be found to be "offensive to a reasonable person of ordinary sensibilities."[9]

Pierce also sued on the same grounds. The Court found that there was conflicting evidence as to whether the investigator trespassed on Pierce's property and remanded the matter for trial.

Pierce also sued, claiming false light invasion of privacy. Pierce argued that she was falsely depicted in the videotape as someone who was misrepresenting her injuries and as her sister. Again, the Court found that Pierce failed to demonstrate that the video was viewed by any member of the general public. Finally, the court found that it wasn't offensive to be mistaken for one's sister.

E. A NEW TORT OF INTERFERENCE WITH MEDICAL TREATMENT?

Now, assume for a minute, that the mistaken identity case was taken one step further. Assume that Dr. Hendrix viewed the tape and also assumed he was watching Pierce. After watching the tape of "Pierce" performing work duties, Dr. Hendrix lifted her working restrictions. Given the mistaken identity, is the carrier liable for "interference with medical treatment?"

In Green v. Alaska National Insurance Company,[10] Plaintiff filed a claim for personal injuries. Plaintiff was seen by a physician of his choosing, Dr. Watermeier for his alleged injuries. Dr. Watermeier recommended back and neck surgery. Plaintiff was also seen by Dr. Edmund Landry, who was a physician chosen by Alaska National Insurance Company, the insurer of plaintiff's employer. Dr. Landry concurred in the recommendation for back surgery but not in the recommendation for neck surgery.

At this point, Alaska National sent a surveillance videotape of Plaintiff to Dr. Landry. After watching the videotape, Dr. Landry withdrew his recommendation for back surgery. The Court stated that the complaint was unclear whether Dr. Watermeier changed his opinion in any way.

There was no allegation that the videotape was obtained in any improper way, no allegation that the videotape was false, incomplete or misleading and no allegation that the videotape or any information from it was disclosed to any person other than the physician engaged by Alaska National to examine and evaluate the plaintiff.[11] The complaint made no claim of invasion of privacy. Plaintiff claimed that the sending of the videotape to Dr. Landry constituted a tort of *interference with medical treatment.*

The Trial Court and the Louisiana Court of Appeals found that the Plaintiff had developed a creative theory of a *possible* new tort. The Court of Appeals found that, even if such a new theory of liability existed, the facts of the present case were not sufficient to prove plaintiff's case.

The Court found that nothing false or misleading was sent to the doctor. So long as the surveillance videotape submitted to Dr. Landry by Alaska National showed Plaintiff at a time subsequent to the alleged injury and had not been altered or tampered with to make it false or misleading, "we cannot say that the insurer acted tortiously by submitting it to the doctor."[12]

Furthermore, because Alaska National was paying for the treatment by Dr. Landry, it had a legitimate interest in submitting the information to the doctor. Id.

While the Court found in Alaska National's favor, Plaintiff found support in a strongly worded dissent. While not controlling law, dissenting opinions can be strong indicators of what is to come.

The dissent found that after learning of the second orthopedic surgeon's recommendation for surgery, Alaska National sent to the orthopedist a surveillance videotape and investigative report for "no medically legitimate purpose other than to intimidate, manipulate and/or disturb petitioner's right to proper medical treatment and was solely done to interfere with the second orthopedic surgeon's rendering objective opinions and recommendations for treatment of petitioner."[13]

Because the actions taken by the defendants were done without either the express or implied permission or approval of the petitioner, these actions constitute an unreasonable interference with petitioner's medical treatment.[14]

Invasion of privacy is defined in Louisiana as an unreasonable intrusion into a person's seclusion or solitude. The right of privacy may be lost by express or implied waiver or consent. In Louisiana, when an individual's medical records are obtained for litigation purposes, the individual must be notified so that he may give his consent or objection.[15]

The dissent found that the taking of the surveillance video for purposes of submitting to the treating doctor was the equivalent of obtaining medical records. Therefore, Alaska National should have obtained the consent of claimant before taking the video (which obviously defeats the purpose). In the alternative, the carrier should have given the claimant the opportunity to review the surveillance tape before it was forwarded to the doctor and either consent to its release or respond and object.[16]

The dissent further found that as a result of the defendant's intentional actions of interfering with the

medical treatment, petitioner was upset, annoyed and distressed and has incurred emotional distress, mental anguish and anxiety.

F. LIABILITY TO UNINTENDED THIRD PARTIES

We've already discussed the surveillance of the wrong person. But what happens if you capture images of a third party while surveilling your claimant?

After the gym, the investigator is able to follow Jane to work. While presenting himself as a salesman, he is able to gain access to the IBT premises while taking pictures of Jane throughout the course of her afternoon.

More and more employers are passing rules prohibiting camera phones on their premises in an effort to protect both employee privacy and trade secrets. According to a recent story in USA Today, major corporations such as DaimlerChrysler, General Motors, Texas Instruments and Samsung all have restrictions on possession of camera phones on their premises. The reasoning is two-fold: to protect employee privacy and, perhaps more importantly to them, to protect their trade secrets.

Back to Jane at work. What if your investigator, during the course of photographing Jane moving boxes, inadvertently photographs a new product prototype? Did he just step into the middle of a possible charge of corporate espionage? Hard to tell, but more and more companies are aggressive in their corporate securities. An investigator's constant awareness of their surroundings, and due caution may be the best course.

What Does it All Mean?

Privacy was a much talked-about issue prior to the tragedy of September 11th. However, now that new laws have been enacted regarding the Federal Government's power to invade privacy, public discourse on privacy issues could likely increase. In terms of actionable offenses, privacy law is relatively new. As a result, courts are still trying to set the boundaries of acceptable behavior. The dissent in the Jones case could be an aberration. On the other hand, it could be a harbinger of what is to come in privacy law. Without more cases like it being decided as of yet, it is not easy to

tell. The examples provided above can hopefully provide investigators with a general idea of what is out there regarding privacy boundaries.

F. The Test of Reasonableness

Investigators failed the test of *reasonableness* in **Souder v. Pendleton Detectives Inc.**, 88 So. 2d 716 (La. Ct. App. 1956). In **Souder**, the investigators, "*constantly shadowed, watched, and eavesdropped on a workers' compensation claiman*t." They used binoculars on some occasions and "*trespassed upon claimant's property without his consent*." In addition, the investigators, "*watched claimant in his home by peeking through his windows*." Although the Louisiana court was supportive of an insurance company's right and obligation to conduct an investigation of suspicious claims against it, the court emphasized that such investigations must be, "*conducted within the legal bounds*." Here, the investigators conduct was beyond the legal bounds because they committed a trespass and violated Louisiana's peeping tom statute.

An Alabama jury found that investigators acted unreasonably and violated a claimant's privacy when they videotaped claimant's family moving about inside their home. To obtain the videotape, the investigators used high-power equipment while hidden in a nearby abandoned house. **Alabama Electric Coop., Inc. v. Partridge**, 225 So. 2nd 848 (Ala. 1969).

In a more recent case, **Association Services, Inc. v. Bobbie Smith** and **Association Services, Inc. v. Joann Pierce,** Georgia Court of Appeals, May 17, 2001, the Appeals Court affirmed a Superior Court decision allowing a workers' compensation claimant and another private party to sue and Insurer/TPA and a private investigator for invasion of privacy and conspiracy to invade privacy. The case did not change Georgia case law and is only cited for the proposition that factual issues are to be decided by the trier of fact (the jury) and are not subject to dismissal for summary judgment except where there is no genuine issue of material fact.

Despite the 100 years of development of the privacy tort since the Brandeis opinion, Andrew Hay McClurg stated in his article, Bringing Privacy Laws Out of the Closet (N.C. L. Rev. 1995) that a "lesson of modern privacy law in the tort arena is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed".

G. NAIC Model Privacy Act

In 1992, the National Association of Insurance Commissioners (NAIC) drafted the "***NAIC Insurance Information and Privacy Protection Model Act."*** Its purpose is to establish standards for the collection, use, and disclosure of information gathered in connection with insurance transactions by insurance institutions, agents, or insurance support organizations.

Section 3 of the Model Act is entitled "***Pretext Interviews***." It states that, "*no insurance institution, agent, or insurance support organization shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction*." ***Pretext Interview*** is defined as an interview whereby a person, in an attempt to obtain information about a subject, performs one of the following acts:

- **a. Pretends to be someone he or she is not;**
- **b. Pretends to represent a person he or she is not in fact representing;**
- **c. Misrepresents the true purpose of the interview; or**
- **d. Refuses to identify himself or herself upon request.**

Section 3 of the Model Act states, "*No insurance institution, agent, or insurance support organization shall use or authorize the use of pretext interviews to obtain information in connection with an insurance transaction; provided, however, a pretext interview may be undertaken to obtain information from a person or institution that does not have a generally or statutorily recognized privileged relationship with the person about whom the information relates for the purpose of investigating a claim where, based upon specific information available for review by the Commissioner, there is reasonable basis for suspecting criminal activity, fraud, material misrepresentation or material nondisclosure in connection with the claim*."

The Model Act clearly carves out an exception for those gathering information to use pretext interviews as long as they have "specific information"…that there is a reasonable basis for suspecting fraud or material misrepresentation. Although we have not found any case law to interpret the "specific information" requirement of this Act, we would propose that a professional investigator could equate the standard with "articulatable suspicion" and/or "reasonable and prudent man" found in other areas of the law.

With the exception of Minnesota, each of the states and the District of Columbia that enacted the Model Act has adopted the provisions stated above, including the exception for the investigation of fraud.

There are currently 20 states and the District of Columbia that have adopted all or part of NAIC's Model Act. These states include: Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Kansas, Maine, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Virginia, Washington.

Also, Arkansas, Iowa, Mississippi, New Hampshire and Utah are currently working on state legislation that would adopt provisions of the Model Act.

Minnesota Statutes Annotated 72A.493 - Obtaining Information by Improper Means

> *An insurer, insurance agent, or insurance-support organization must not obtain information or authorize another person to obtain information in connection with an insurance transaction by:*
>
> *1) pretending to be someone else;*
> *2) pretending to represent a person;*
> *3) misrepresenting the true purpose of the interview; or*
> *4) refusing to provide identification upon request.*

State legislation, the NAIC Model Act, and court decisions are a reflection of societal attempts to strike a balance between an insurers right to investigate and an individual's right to privacy. See, Figured v. Paralegal Technical Services Inc. 555 A.2d 663 (N.J. Super. Appropriate. Div. 1989); McCain v. Boise Cascade Corp. 553 P.2d 343 (Ore. 1975); Forster v. Manchester, 189 A.2d 147 (Pa. 1963); Tucker v. American Employer's Insurance Co., 171 So.2d 437 (Fla. Dist. Ct. Appropriate. 1965).

Our research failed to find any court decision specifically addressing the fraud and misrepresentation exceptions found in the NAIC Model Act or any of the states that have enacted the Insurance Information and Privacy Protection Act. We did find however, that although Indiana has no case law addressing pretext interviews, Indiana courts have determined that the tort of bad faith can arise after litigation has begun if bad faith was not an original part of the litigation. Since the claim for bad faith can arise after litigation in first party cases, an insured could allege that the use of a pretext interview constitutes misrepresentation by the insurer and may provide a cause for

a claim of bad faith.

Various jurisdictions have addressed the proposition that an insurer cannot insulate itself from liability for bad faith arising out of behavior of its agents or independent contractors. Some courts have determined that insurers can be liable for acts committed by independent adjusters or independent contractors because the duty to treat an insured with good faith and fair dealing is a non-delegable duty. Other states have held that insurers can be held liable for such acts even if the insurer had no knowledge that the investigator or agent conducted an interview using a pretext.

We recently read an article in a private investigation trade magazine, in which a self-reported private investigative expert was giving advice to the readers on how to use a pre-text to illegally obtain entry to a private community protected by locked gates and security. Whereby, the investigator could obtain the necessary information and/or photographic documentation for his client's assignment. All professional investigators and adjusters have to remember that their responsibility is to gather information in an unbiased, legal, and ethical manner so that their *evidence* will be admissible in court. Otherwise, the unscrupulous investigator or adjuster [and their employer] could be subjected to civil and criminal actions, including large punitive awards for bad faith.

We are not proposing that pretext interviews never be utilized, however we do offer a few simple guidelines to be included in your decision-making process: (1) never perform pretext interviews on represented claimants or individuals with privileged relationships; (2) never impersonate members of actual organizations or people; (3) never impersonate police, fire, clergy or other position protected by law; and (4) always perform investigations keeping in mind good faith and fair dealing. In light of the competing public interests reflected in the Model Act, state legislation, and court rulings, there still remains very little guidance as to when pretext interviews may be appropriate.

H. Privacy Today

Recently, one of my Regional Field Managers was giving a presentation to a group of adjusters at a major insurance company when out of the corner of his eye, he saw a woman's hand rise from the back of the room, accompanied by a furrowed brow and a slight frown. The manager had been yammering on for several minutes about electronic databases, information on the Internet, and how investigators combine these threads with direct observations in the field to solve cases. Standard

stuff, nothing unusual. He was supposedly preaching to the choir, a group of Claims Adjusters with piles of cases on their desks and a need to know this stuff, right now, if not yesterday. But the lady in the back wasn't worried about claimants or elaborate fraud schemes. "Why, she asked, should I have access to so much personal information, so easily? “Sounds like ‘Big Brother’ to me,” she noted cautiously.

George Orwell’s elaborate surveillance society as imagined in the novel 1984 seems tame by comparison with today’s reality. The tool to monitor our lives at all levels are available to anyone with a credit card, not just the government, which finds itself struggling to make laws that apply in new contexts. Suddenly, my manager found that the focus of his presentation had shifted. The topic of privacy doesn’t just affect us all because of our chosen business profession; it’s also personal because we're consumers also.

The manager asked how many in the audience have unlisted telephone numbers/addresses? About half of the hands in the room went up, including his own. Everyone is paranoid about having their credit information stolen, or being stalked by some wacko who built a dossier about you in 10 minutes from $39 worth of data searches on the Internet. But the other side of the equation is equally troubling, and of practical interest to us as Investigators: the ability to hide behind an electronic ether of multiple e-mail addresses, re-mailers and alpha-numeric screen names will make our jobs considerably more difficult. The group or individual intent on fraudulent activity will certainly benefit as public attitudes move toward greater restrictions on access to certain types of data.

Our ability to access even the most basic types of information (DMV records, SSN traces) is being challenged by lawmakers at the federal, state and local levels. In Pennsylvania, for example, the DMV is now requiring detailed explanations of exactly how the information being provided is to be used, and by whom. It is rumored that several sting operations attempting to ferret out unscrupulous re-sellers of the data are underway. The State of Kentucky requires that if you check a *public* criminal record on an individual and a criminal record in-fact exists then the government must notify the individual that you checked the record and what information you accessed. Other state legislatures have moved to restrict or block access to these records entirely. Despite this attitude, Investigators and Insurance Companies have a traditionally recognized need for and access to this information throughout the country. As a group, we must become more aggressive in challenging the refusal to release this information, while simultaneously guarding the established

privacy rights of those whose personal data is entrusted to us.

Most states have defined what *public records* are by statute:

> "Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the governor's office means any writing prepared on or after 1/6/1975.
>
> California Public Records Act - Section 6252 - "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.
>
> Florida Statutes Annotated - Section 119.011. -- The public doesn't generally make distinctions between "Investigators" and "Information Brokers". They're not interested in the fact that we have a legitimate reason to know whose car that is in the driveway of a claimant's residence or the civil and criminal backgrounds of individuals suspected of engaging in insurance fraud. What really matters is the way we defend our rights as professional and ethical users of this data, by fully comprehending its value, both economically and socially.

- Be mindful of the laws and regulations pertaining to the collection and dissemination of different types of data in your locality. Understand the players involved in their interpretation and implementation.

- Don't patronize Information Brokers who provide data to anyone with a credit card. Their behavior undermines the legitimate efforts of professional investigation companies.

- The degree of "publication" or "release" necessary to constitute an invasion of privacy is a function of the nature of the information disclosed. Therefore, insurance company adjusters, Special Investigators (SIU), private investigators employed on their behalf, and others, should exercise additional caution when handling claims that involve highly personal information, such as medical/mental health information and financial records.

- Take steps to safeguard the personal data in cases you work. Lock your filing cabinet. Keep a close eye on paperwork while in the field. Learn to archive and encrypt reports. Remove them from your hard drive to a floppy or zip disk.

- Recognize and respect the privacy interest that individual insureds and claimants have in personal information by (a) assessing the impact on the subject's privacy, in deciding whether to obtain and use personal information; and (b) obtaining and using only information that could be reasonably expected to support current or planned activities pertaining to the investigation or analysis of a pending claim.

- Don't give up easily when a records custodian says no, especially if you know you are entitled to the information being sought. Make your requests in writing and utilize the Freedom of Information Act and Open Records Laws of federal, state, and local

governments. Politely cite the appropriate regulation or statute, and ask for a refusal in writing.

Here are some suggested resources to learn more about privacy and investigative searches:

www.privacytimes.com [Privacy Times]
www.privacyrights.org [Privacy Rights Clearinghouse]
www.epic.org [Electronic Privacy Information Center]
www.privacy.org [The Privacy Page]
www.irsg.org [Individual Reference Services Group - IRSG]
www.ftc.gov [The Federal Trade Commission]
www.townonline.com/privacyjournal [The Privacy Journal]

I. Other Federal Privacy Legislation

- Gramm-Leach-Bliley Act (Financial Modernization)
- Electronic Communications Privacy Act, 18 U.S.C. Section 2510
  -This Act was an amendment to the Federal Wiretap Act of 1968
- Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 (1994)
- Computer Matching & Privacy Protection Act of 1988, 5 U.S.C. Section 552a
  -This Act was an amendment to the Privacy Act of 1974
- Telephone Consumer Protection Act of 1991, 47 U.S.C. Section 227
- Cable Communications Policy Act, 47 U.S.C. Section 551 (1984)
- Children's Online Privacy Protection Act of 1998, 15 U.S.C. Section 6501
- Privacy Protection Act of 1980, 42 U.S.C. Section 2000aa
- Federal Records Act, 44 U.S.C. Section 3101
- Right to Financial Privacy Act, 12 U.S.C. Section 3401-3412
- Family Educational Rights & Privacy Act of 1974, 20 U.S.C. Section 1232g
- Video Privacy Protection Act of 1988, 18 U.S.C. Section 2710
- Driver's Privacy Protection Act, 18 U.S.C. Section 2721

There are hundreds of privacy legislation proposals pending before the federal and state governments. Many of these pending legislative bills are focused on protecting the collection and use of social security numbers, medical records, financial records, and other personal online records.

Two pieces of legislation of note is HR 30 introduced by Rep. James Leach (R-Iowa), which would make pretexting illegal, and Rep. Gerald Kleczka (D-Wisc.) has introduced HR 1450, which would tighten the rules on credit headers and Social Security numbers.

IV. COMMON SURVEILLANCE ISSUES

A. Surveillance of an Insured Premises

One court has found that it is not unreasonable for an insurance company to hire investigators to stake out an insured's home when the insurer had reason to believe the home would be the subject of arson. In **Shipley v. Tennessee Farmers Mutual Ins. Co.**, 1991 WL 77540 (Tenn. Ct. App. 1991), the insurer received an anonymous tip that the insureds, "*were having marital difficulty and their home was going to burn*." The insurer believed that this information was reliable and initiated a cancellation of the insured's homeowner policy. Because the cancellation process would take ten days, the insurer hired a security agency to "w*atch the house*." The insureds filed suit against the insurer for invasion of privacy, trespass, outrageous conduct, and defamation. The court dismissed the first two claims because it found that the security guards were independent contractors. The court also found that even if the insurers' actions were based on unsubstantiated rumor, they hardly constituted such "*atrocious and utterly intolerable*" conduct as to "*arouse the senses of a civilized society*" and therefore plaintiff could not support a claim of outrageous conduct. The defamation action was not dismissed because the insurer told the security company the factual basis for their assignment. The court found the statement to be defamatory, but ultimately dismissed the defamation claim for lack of any alleged harm.

B. Interviewing Neighbors

Investigators conducting the surveillance assignment must be discreet in the manner in which they obtain information from uninvolved persons and what information they may disclose during the course of their questioning. An example of an improper interviewing tactic was provided by the investigator in **Paul v. Aetna Casualty & Sur. Co.**, 831 F.2d 1064 (6th Cir 1987). The investigator spoke to some neighbors of an insured who had suffered a fire loss and asked them if they were

aware the claimant, "*had been involved in a grand theft auto ring, had committed criminal fraud, had committed arson, was involved in illegal drug trafficking*, *and had killed a man*." The claimant had once plead guilty to negligent vehicular homicide, but there was no factual basis for any other statements. The Appellate Court upheld a jury award in favor of the claimant based on invasion of privacy and slander. A similar result was reached in the case of **Dailey v. Integon Gen. Ins. Corp.**, 331 S.E.2d 148 (N.C. Ct. App. 1985) **appeal denied**, 336 S.E.2d 399 (N.C. 1985). In **Dailey**, an insurance investigator told sixteen neighbors of the insured that he had, "*determined this was a contract burning of the house and that it was done for insurance purposes*." Also, the investigator asked neighbors if they knew whether the insured had hired someone to burn his house down. As a result, the court found that the investigator, "*stirred up a lot of hate*" in the neighborhood.

Other examples of insurer liability for gross misconduct during investigative questioning includes **Green v. State Farm & Casualty Co.**, 667 F.2d 22 (9th Cir. 1982) and **Republic Ins. Co. v. Hires**, 810 P.2d 790 (Nev. 1991). In **Green**, an insurance adjuster posing as a state policeman interviewed the neighbors of an insured who had sustained a fire loss and implied that the insured had committed arson. In **Hires**, the insurance investigator conducted an extensive investigation of an insured who had sustained a burglary loss. The investigator spoke to many of the insured's neighbors and asked them if they had any information that the claimant had staged the burglary loss and if they were aware that the claimant's wife was having an affair with the neighbor whom had discovered the burglary. In both cases the insurer was found liable.

C. Surveillance with an Enhanced View

The few court cases that have been decided on the issues of magnified or enhanced view surveillance have been primarily limited to a specific case that was decided and have not provided any broad or sweeping guidelines on this issue. As we have seen, the courts can and will differ in their opinion of what is and what is not a violation of an individual's reasonable expectation of privacy when it comes to surveillance with an enhanced view. Enhanced or magnified view surveillance can take on several forms, including:

1. **Photographer taking an unnatural or contorted position;**
2. **Illuminating an otherwise darkened area;**
3. **Magnifying what is visible to the eye; and**

4. Magnifying what is otherwise not visible.

In general, the courts have not found that enhancing the view during surveillance is unlawful. There have been many instances in which the enhancement has proven to be legal and constitutional; however, not all enhanced views are permitted. The legality, and therefore the admissibility, is based on the position of the investigator and the location of the subject. The laws pertaining to view enhancing are still evolving. The creativity and ingenuity of those conducting the surveillance, along with technological advances in optical equipment, is responsible for much of the confusion and conflict in court rulings on the subject. The United States Supreme Court has not ruled specifically on whether optical equipment used for enhanced views during surveillance is legal, but they have considered the following factors in making decisions on the legality of enhancements:

1. **Position of the investigator;**
2. **Position of the claimant or subject;**
3. **The type of device used during the surveillance; and**
4. **The circumstances under which the view was obtained.**

Since the Supreme Court has not issued definitive ruling in this area, the lower courts have widely differing opinions on the subject. If there is uncertainty concerning the legality of enhanced view surveillance in a particular jurisdiction, investigators should seek guidance and opinion from a qualified local insurance defense counsel.

In **Sustin v. Fee**, 431 N.E.2d 992 (Ohio 1992), the court ruled that an individual utilizing binoculars only to view the curtilage of the residence. Hence, he did not use them to view inside the residence and therefore there was no invasion of privacy.

The court in **Pearson v. Dodd**, 410 F.2d 701 (D.C. Cir. 1969) held that liability for an invasion of privacy occurs when there is an intrusion upon the private, intimate affairs of the subject and when that intrusion is one which people would not reasonably expect to be subjected to. In deciding invasion of privacy questions, courts have found that a balancing test is required. The test applied is one that weighs the societal need prompting the intrusion against an individual's right to privacy and expectation of privacy.

The Massachusetts Supreme Court wanted to have as clear a line as possible drawn in privacy matters so that private investigators could know when they were approaching, or had crossed, the line. In a 1999 Massachusetts Superior Court case where they examined an investigator's use of enhanced vision in the process of surveillance**, Digirolamo v. D.P. Anderson and Associates, Inc**., 1999 WL 345592 (Mass. Super. 1999), they articulated this principle. The plaintiff complained that her privacy had been invaded when she was photographed and observed from the street on her fifth floor balcony. The court ruled the balcony is not "inside" of the apartment and therefore it does not give the protection afforded apartments and homes. It further noted that naked eye views into the house from a public area, like a street, are permitted, but only if they are strictly un-enhanced. The reasoning behind this is that people can take measures like closing window blinds in order to prevent people from seeing into their house. If they do not take such measures, they have thus given their consent to the possibility of public display. It should be noted that this court failed to address the fact that such an action might violate Peeping Tom laws.

Digital Photography

So you've completed your surveillance and you've made sure not to invade anyone's privacy. You have digital video and still images that reveal the plaintiff is not nearly as injured as he claims. It should be an open-and-shut case for your client, and with your success, you're all but guaranteed repeat business. But before you get a bruise patting yourself on the back, there are some things you should know about digital images in the courtroom. You are going to want to protect your credibility and integrity both inside and outside of the courtroom.

Digital photographic and video equipment has grown increasingly affordable in the past few years. The benefits of such equipment are enormous. It eliminates the costs and delays in film developing. Most cameras allow for immediate viewing of the photograph so that you might see if the picture needs to be re-shot. Pictures can be touched up (note not *altered*) by means of cropping, changing contrast, sharpening or softening the image, as well as other cosmetic touches. But with these benefits come problems.

In the 1980's, National Geographic was criticized when it was revealed that it had altered a photograph of the Pyramids for their cover. They were able to change the angle at which the photo was taken so that two pyramids could fit on the cover at once. In the 1984 presidential debates, ABC altered the video coverage of Walter Mondale and President Reagan to make them appear to

have better postures. Tom Hanks convincingly shook hands with President Kennedy in "Forrest Gump". George Lucas, in "Star Wars Episode One" used a technique where he could change the direction in which his human actors were looking. Digital alteration of digital photos is easily done with relatively inexpensive software. For about $100, anyone with a PC can change pictures. Whether the change is convincing or not is a different matter, but the means are there and a plaintiff's attorney can grab hold of this argument to try and counter your photographic evidence. For instance, William Sloan Coats and Gabriel Ramsey recently published an article in Practical Litigator advising litigators to "make every effort to emphasize the potential for misuse…" when digital photographs are offered into evidence.

Currently, the Federal Rules of Evidence treat digital images in the same manner as their traditional counterparts. Unless admitted by stipulation by both parties, the party offering the photo for evidence must be able to present testimony as to its relevance and authenticity of representation of the scene. Federal Rule of Evidence § 1001 and many state rules of evidence require that 1) the witness is familiar with the scene in the picture; 2) The witness provides a basis for familiarity; 3) The witness recognizes the scene in the picture; 4) The picture is a fair, accurate, and true representation of the scene. This is based upon the idea that a photograph is a representation of oral testimony. As a result, the private investigator will be asked to testify about what was seen when the photograph or video was taken. Therefore, it is important that the investigator remain impartial and unbiased. This applies primarily to the post-surveillance report which is available to the plaintiff through discovery. If there is evidence that a private investigator is biased, the plaintiff's attorney can use it against the defendant in the trial. In terms of state rules of evidence, many states use the Federal Rules of Evidence as the basis for their state rules, with some variation.

Courts have acknowledged the benefits associated with digital photography. These courts allow for certain digital enhancements of forensic evidence with the condition that the original is offered as well. This practice is most often occurs with photographs of fingerprints in order to make the fingerprint more visible in the picture. As early as 1998, Division 1 of the Appellate Court of Washington State recognized in State v. Hayden that digital enhancement of forensic photographs is a scientifically valid and accepted practice. In the years since the decision, courts in other states have accepted the reasoning put forth in Hayden.

In terms of use in the private sector, the practice of digital enhancement, as opposed to alteration,

could help in low-light situations or perhaps digital cropping of a photograph to rid the scene of extraneous and possibly distracting elements.

So what are some things that the private investigator can do to ensure the evidence he collects will be admitted? Steven Staggs, a forensic photography instructor, suggests that you:

1) Save the photograph in its original format and under the filename the digital camera assigns to it.

2) Instead of using floppy drives or hard drives, put the digital evidence on a writeable CD, not a *re*-writeable CD. This way the photograph cannot be altered once stored on this disk. If you prefer that others have access to the photographs you can save it on the hard drive or network drive in a password-protected folder with read-only access. Keep a record of who has the password. The fewer people who have access, the harder it is for plaintiff's counsel to suggest wrongdoing in production of the image.

3) Some programs allow for "digital watermarking" to ensure authenticity. While the initial investment in the software to do this might be high, it is worth the price to safeguard your evidence and professional reputation.

4) If any alterations are made to the file, such as light enhancement, be sure to save the original file. Some courts will require the file and corresponding testimony as to the process by which the photograph was enhanced.

5) Most digital cameras can Date and Time stamp files. Set your camera to do this. Keep in mind that anyone challenging the evidence can suggest the camera's calendar and clock were altered prior to taking the picture. If videotaping, include a shot of something with a date on it like a newspaper in a distribution box or on the newsstand.

These strategies will not completely insulate your evidence from a challenge, but they will make the plaintiff's attorney's job that much more difficult. Be warned, plaintiff's attorneys are trying to

formulate ways in which to successfully challenge digital photo and video. For the time being, all it means is that the investigator will have to be diligent in safeguarding his evidence. As with most technology, the law is unable to keep pace with the innovation. Each jurisdiction has its own rules of evidence, and while states try to model their rules on the Federal Rules of Evidence, there are differences. Additionally, the various circuits of the Federal Courts may develop standards for digital imagery that vary from the other circuits. It is always best to check with counsel with expertise in this specialized field if you have any questions.

E. Stalking

Over the past ten years, the phenomenon of "stalking" has caused many states to pass criminal legislation prohibiting such activity. While a state-by-state survey of stalking legislation is beyond the scope of this presentation, it is important that investigators conducting surveillance be aware of stalking statutes and to take the appropriate steps in their surveillance activities to prevent themselves from being on the wrong side of a criminal complaint. An example of a stalking statute is the one enacted in Pennsylvania. 18 Pa. C.S.A. Section 2709 states:

> **Stalking -** a person commits the crime of stalking when he engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either of the following:
>
> 1) an intent to place a person in reasonable fear of bodily injury; or
>
> 2) an intent to cause substantial emotional distress to that person.

The statute defines "course of conduct" as a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of the conduct. The statute defines "emotional distress" as a temporary or permanent state of great physical or mental strain. To convict a person of stalking, one must prove that the person acted with the intent to place the subject either in fear of bodily injury or emotional distress. In most cases, an investigator who conducts the surveillance properly cannot be found to have acted with intent to either injure or cause emotional distress to the subject. Most state statutes dealing with stalking contain this "intent" requirement.

The one instance where surveillance could result in a reasonable charge of stalking is from the previously mentioned surveillance tactic of "rough shadowing." The investigator who conducts a surveillance openly and blatantly could be found guilty of stalking if that surveillance is so blatant and open to have caused the subject to suffer substantial emotional distress. If such surveillance techniques excite speculation among neighbors or place the subject in a false light, a court may find a person guilty of stalking if the "victim" manifests distress in some physical manner.

It is important that investigators make themselves aware of stalking statutes. However, most surveillances, if conducted properly, do not pose a serious risk that the investigator potentially violating these statutes will form the requisite intent to cause emotional distress.

Cyber-Stalking

There is a provision in some stalking statutes relating to cyber-stalking. Recently, the Court of Appeals in California made light of this in **People v. Norman**, 75 Cal. App. 4th 1234 (1999). Here, Norman was stalking the famous movie director, Steven Spielberg. Norman was continuously going to Spielberg's residence while Spielberg was on vacation overseas, raising the question as to whether the stalking must be contemporaneous with the fear caused. The California Stalking statute provides:

> For the purposes of this section, 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements. . . For purposes of this section, the term 'electronic communication device' includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers.

Insurance investigators should be made aware of a potential claim of cyber-stalking and should verify whether the jurisdiction in which they work has enacted such a statute, or such a addendum to the standard stalking statute. Of course, the cyber-stalking provision is intended for sexual predators who are swarming the internet. But, the standard stalking statute is so intended to these types as well, but may be broadly applied to insurance investigators.

Recently the American Bar Association reported that many defendants accused of these types of computer crimes serve little or no jail time. Debra Baker, "*When Cyber Stalkers Walk*", 85 DEC A.B.A. J. 50 (December 1999).

F. Electronic Surveillance: Wiretapping

When conducting surveillance, an investigator must understand and adhere to the applicable state and federal statutes regarding the surveillance activities. Consequently, investigators must be wary of the methods used to conduct electronic surveillance. Unless an investigator is working in conjunction with law enforcement authorities and has obtained authority to conduct electronic surveillance (*e.g.*, by court order), an investigator who uses any electronic or mechanical device in their surveillance must be aware of the legal implications of their actions. If not, they may subject themselves and their clients to criminal and civil penalties.

In this section, we will highlight the requirements of the Federal Wiretap Act. However, investigators should be aware that most states have enacted their own version of the wiretap statute, which are often more strict than the Federal Wiretap Act. Therefore, an investigator must be familiar with the law governing electronic surveillance in any jurisdiction where he or she intends to operate.

1. What Constitutes Electronic Surveillance?

The Federal Wiretap Act is very broad as it relates to electronic surveillance. 18 USCS § 2510 provides various definitions for differing aspects of electronic surveillance. The statute defines a "wire communication" as any oral transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of a wire, cable, or other like connection between the point of origin and the point of reception. "Oral communication" is defined as any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation. "Intercept" is defined as the oral or other acquisition of the contents of any wire, electronic, or oral communication through the use of electronic, mechanical or other device.

Thus, the statute covers telephone, cellular phone, radio, or electronic mail communications. It also applies to any spoken communication of a person who has a reasonable expectation that such communication will not be overheard. The most obvious example is the ordinary wiretap placed on a phone line. Clearly, this wiretap is an interception of a wire communication. Another example of an interception of an oral communication would be the bugging of a subject's home, with the

subsequent recording of and/or listening to the subject's conversations conducted within the subject's home. Also prohibited is the use of sophisticated sound equipment on a video camera (a "shotgun" microphone) which can record conversations at a great distance because a subject may have a reasonable expectation of privacy in that conversation.

However, as noted above, not every oral communication is protected under the statute. For example, assume an investigator is conducting a surveillance operation while parked across the street from the subject's home. Then, the subject emerges from the house and shouts across the yard to his next door neighbor, "Harry, I just got a check from my insurance company for a million dollars and you know I was never injured in that accident!" If the investigator records it, such a comment is not likely to be considered an interception of an oral communication because the subject cannot reasonably believe he has an expectation of privacy in his shouted statement. Needless to say, cases of a subject screaming such incriminating information at the top of his lungs are few and far between.

2. What Conduct Is Prohibited by the Act?

The Federal Wiretap Act prohibits any person from intercepting, attempting to intercept, or procuring another person to intercept or to attempt to intercept any wire, oral, or electronic communication. It is also unlawful to use any electronic, mechanical or other device to intercept any wire, oral or electronic communication. Furthermore, it is unlawful for a person to disclose to any other person the contents of any wire, oral or electronic communication when a person knows or has reason to know that the information was obtained through the interception of such a communication. A violation of this Act subjects the interceptor to both criminal and civil penalties.

3. When Is an Interception Allowed?

The Federal Wiretap Act provides an elaborate scheme for obtaining court permission to perform wiretapping operations or other electronic interceptions. Such permission is granted almost exclusively to law enforcement officials pursuant to an investigation of criminal activity. In a case where investigators are cooperating with law enforcement authorities, the investigator should be sure that the law enforcement official in question has the appropriate authority to conduct the surveillance, especially if such surveillance would otherwise be in violation of the law.

The federal law also provides for another situation where the interception of a communication would be lawful. It is permissible for a person not acting under color of law to intercept a wire, oral or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, *unless such communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the Constitution or law of the United States or of any state.* Federal law has adopted the "one-party" permission rule. Therefore, under federal law, a person speaking on the phone with another person may record that conversation without the consent of the other person. Similarly, it is lawful for a person to wear a body wire and record a conversation with another person, even if the other person is unaware that the conversation is being recorded. However, such conduct is not justified if the communication is being intercepted for the purpose of committing a criminal or tortuous act.

Furthermore, as has been demonstrated above, invasion of privacy is a tort in many states. An investigator should not be surprised if, after making an electronic recording, he or she is accused of invading the privacy of the subject, thereby rendering such interception unlawful. Again, it is critical that an investigator be familiar not only with the federal law, but also the law of the jurisdiction where the surveillance is being conducted. Several jurisdictions have adopted surveillance statutes, which are more restrictive than federal law. Therefore, mere compliance with the federal wiretap statute may not be sufficient to protect an investigator from a state law claim. For example, some states (such as Pennsylvania) require that <u>both</u> parties knowingly give their consent to any electronic interception (such as the recording of a telephone conversation). Because the "one-party" permission rule does not apply in many states, electronic surveillance based on "one-party" permission could result in a state law invasion of privacy claim against the investigator.

4. What Are the Consequences of an Unlawful Interception?

There are three potential consequences of a violation of the Wiretap Act. They are:

1) <u>Intercepted communications are inadmissible as evidence</u>.

The Federal Wiretap Act provides that whenever any communication has been intercepted in violation of the Act, no part of its contents may be used as evidence in any trial, hearing, or other proceeding in or before any court or other authority of the United States, any state, or political subdivision thereof. Therefore, if a communication is obtained in violation of a statute, it will be useless to the

investigator because it will be inadmissible at court. Moreover, the Act incorporates the legal doctrine known as the "fruit of the poisonous tree." Under this doctrine, not only will the actual communication be excluded from evidence, but also all additional evidence will be inadmissible if it was obtained as a result of information derived from the unlawful interception.

2) Criminal penalties.

A violation of the Federal Wiretap Act is a federal crime, and is punishable as such under the United States sentencing guidelines, which may consist of a fine, imprisonment, or both.

3) Civil damages.

The Act also specifically provides for recovery of civil damages. A person whose communication is intercepted may recover appropriate relief, including preliminary equitable or declaratory relief, such as an injunction, actual and/or statutory damages (discussed below) and, in appropriate cases, punitive damages, attorney's fees and other litigation costs. In addition, the Act permits the court to assess the actual damages suffered by the subject, and any profits made by the violators as a result of the violation. The court may also impose statutory damages consisting of $100.00 per day for each day of the violation or $10,000.00, whichever is greater.

The statute of limitations on any civil suit under this section is two years from the date upon which the claimant first had a reasonable opportunity to discover the violation.

The definition of electronic surveillance and interception of oral communications under the Federal Wiretap Act is very broad, and investigators must be extremely careful to remain within the legal boundaries when conducting such surveillance. In addition, investigators must be certain that they are familiar with the electronic surveillance statutes governing the jurisdiction in which they operate. Failure to comply with these statutes may result not only in the loss of otherwise probative evidence, but also may subject a careless investigator (and their employer) to criminal and/or civil sanctions.

G. Cases Addressing the Use Of Surveillance By The Press And Their Ramifications On The Use of Surveillance By The Insurance Industry

Surveillance through a hidden camera is a widely used tool of journalists. In fact, the issues that arise in lawsuits against media organizations and their reporters are often similar to those in lawsuits filed against insurance carriers and their investigators.

While media organizations and insurance carriers may justify their use of surveillance for different reasons (media: First Amendment and freedom of speech\insurance carriers: public's interest in exposing fraudulent claims), plaintiffs are using the same legal theories against both: trespass, invasion of privacy, bad faith, fraud, and intentional infliction of emotional distress. Therefore, court rulings and jury verdicts in media surveillance cases must be watched by the insurance industry for insight into what activities courts are interpreting as trespass, fraud and invasion of privacy torts. Jury verdicts are also an important insight into the public's perception of particular surveillance activities.

The two cases discussed below provide relevant examples of lawsuits filed against media organizations alleging torts which are often alleged against investigators retained by insurance carriers.

1. Food Lion v. ABC\Capital Cities

In December of 1996 and January of 1997, a North Carolina jury found in favor of a plaintiff supermarket chain, Food Lion, and against American Broadcasting Company (ABC) for $1,402 in compensatory damages and $5.5 million in punitive damages. Food Lion had sued ABC for fraud, trespass, invasion of privacy and other related torts.

This action arose after members from the food workers union contacted the ABC news program, *Prime Time Live,* with information relating to alleged unsanitary conditions at Food Lion supermarkets. When *Prime Time Live* expressed an interest in doing a story relating to these alleged conditions, members of the food workers union assisted two reports in their effort to get hired by the supermarket chain. With the aid of members from the food workers union, the two reporters created false identities and backgrounds along with supporting documentation and false

references. The reporters were eventually hired by Food Lion, and with their access to areas not open to the public, proceeded to surreptitiously record the actions and comments of "co-workers". Thereafter, in November of 1992, *Prime Time Live* aired a report anchored by Diane Sawyer, and supported by the audio and video footage taken by their undercover reporters, in which the Food Lion supermarket chain was portrayed as an unsafe place to purchase food. (For a complete recital of the facts see: **Food Lion, Inc. v. Capital Cities/ABC, Inc.**, 877 F.Supp. 811 (M.D.N.C. 1995)).

The *Prime Time Live* report described many unsanitary food handling practices at Food Lion such as: workers preparing sandwiches without gloves and altering expiration dates on deli products, old chicken tarted-up with barbecue sauce and, stinky fish rinsed with bleach. **Amy Singer, Food, Lies & Videotape, *The American Lawyer, 57 (April 1997).***

Food Lion challenged the broadcast as fabricated, biased and poorly researched. Id. at 58. Utilizing a tactic used by personal injury plaintiff attorneys when attempting to discredit surveillance videos, Food lion contended that ABC's report showed only a few isolated instances of employees violating company policy. Jurors also heard how ABC employees lied on Food Lion job applications, enlisted others to provide false references, and snooped around when they were supposed to be doing their Food Lion jobs. Id.

Speaking after the verdict, the jurors shed some light on how the public may perceive certain deceptive surveillance practices. The jurors said that they were more offended by the deceptive practices used by ABC than concerned about a journalists' right to do undercover reporting. Id. "They wanted to get into that company bad," explained juror Lois Marie Bozman, a 64-year-old housewife. "They lied. They made false references. It was all made up. To me, that's fraud." Id.

The Food Lion verdict should serve as a reminder to the insurance industry that today's juries may not tolerate unreasonable, deceptive and fraudulent surveillance practices.

Recently, the Food Lion trial court decision was reversed in part and affirmed in part. But, the major consequence of the reversal is that all but $2 of the award was reversed. **Food Lion v. Capital Cities/ABC, Inc.**, 194 F.3d 505 (4th Cir. 1999). This Court reversed the judgment that the ABC defendants committed fraud and unfair trade practices. The fourth element of fraud was specifically at issue on appeal, wherein the plaintiff must be injured by reasonably relying on the false

representation of defendants. *Id*. at 512. Food Lion sought to recover the entire sum of earnings it paid to Dale and Barnett, complaining that it was fraudulently influenced to pay their salary because of misrepresentations on the reporters' employment applications; therefore, Food Lion had to demonstrate that it paid their pay in reasonable reliance on the misrepresentations in order to receive fraud damages. *Id.* at 513-4. The appellate court found that the reporters were paid because they worked satisfactorily; they were not paid because of their misrepresentations on their applications. *Id.* at 514. Therefore, Food Lion cannot claim these payments to satisfy the injurious reliance element of fraud. *Id*. Regarding the UTPA claim, the court realized the reporters practiced deception in their misrepresentations on their applications, but the Court did not find these deceptions harmed the consuming public. However, the duty of loyalty and trespass were not reversed, leaving in place the nominal damages awarded on these two counts of $2.

IMPACT OF THE FOOD LION REVERSAL DECISION ON INSURANCE INVESTIGATION

"This recent decision sheds light on the issue of pretext investigations and how they may potentially expose insurers to tort claims including invasion of privacy and misrepresentation. Michael F. Henry & Kevin C. Rakowski, "*Pretext Investigations in Insurance Fraud Cases: What Can Be Learned from the Latest Decision in Food Lion*?", 6 No. 6 Mealey's Litig. Rep.: Ins. Fraud 26 (November 1999). The question becomes : "Does this decision signal a trend toward legally sanctioning the use of pre-textual investigative practices?" *Id*. The decision indicates the utilization of pretext investigations is not always apropos. *Id*. Insurance investigators should not regard this decision as blanket approval of pretext fact gathering routines to investigate possible fraud. *Id*. Although the Food Lion Decision suggests deceptive investigative practices may be acceptable in some situations, insurers and their investigators must use great care when considering such a course of action. *Id.*

2. Wolfson v. Lewis: 924 F. Supp. 1413 (E.D.Pa. 1996)

The District Court for the Eastern District of Pennsylvania enjoined the activities of two broadcast journalists for the syndicated daily television program *Inside Edition*. The journalists conducted harassing surveillance on the plaintiffs while preparing a story on the high salaries paid to

executives of U.S. Healthcare. **Wolfson v. Lewis,** 924 F.Supp. 1413 (E.D.P.A. 1996). The plaintiffs' complaint alleged that the defendants engaged in, "tortuous stalking, harassment, trespass, intrusions upon seclusion and invasions of privacy." Id. at 1415.

Defendants Paul Lewis and Steve Wilson are award winning journalists who work for *Inside Edition*. Plaintiff Richard Wolfson is the director of pharmacy and dental operations at U.S. Healthcare. Plaintiff Nancy Wolfson, Richard's wife, is the director of the health education department at U.S. Healthcare. After the Wolfsons refused to grant *Inside Edition* an on camera interview, Lewis and Wilson attempted to take video and audio recordings of statement by the Wolfsons without their consent.

The surveillance tactics began in Pennsylvania, where the Wolfsons live, by closely following them in automobiles, while Mrs. Wolfson had her children in the car, and by parking on their street and videotaping their home. In fact, *Inside Edition* personnel were even on the Wolfson's driveway with video cameras and a microphone. When approached by a security guard, provided to the Wolfsons by U.S. Healthcare, the *Inside Edition* crew acted "very cocky" and even stated, "you are going to have to be a lot bigger than that to block out that house." Id. at 1427. Even though the Wolfsons were aware that the people following and filming them were from *Inside Edition*, they testified that they still were scared and felt threatened, especially because they had two young children.

To escape what they perceived to be a danger to themselves and their children, Mr. & Mrs. Wolfson hurriedly made plans to go to Florida to spend a few days at the home of a relative. Id. Mr. Wolfson testified that it was imperative to the well-being of his family to, "go to some other place where we believed we would not be followed or terrorized." Id. The home where the Wolfsons stayed in Florida is located on the Intercoastal Waterway. While the Intercoastal Waterway is public, the home had a small cove that was private and roped off from the Waterway.

Upon learning the whereabouts of the Wolfsons, the *Inside Edition* crew rented a motor boat and anchored a few feet from the rope which separates the public waterway from the home in which the Wolfsons occupied. On the boat was a television camera equipped with zoom lenses, a mounted microphone, a sound mixer, headsets, binoculars and a "shotgun mike." Testimony at the injunction hearing established that the "shotgun mike" was capable of picking up conversations of

people inside the home if the speakers were standing relatively close to an open window or door. Id. at 1428.

The Wolfsons filed an injunction seeking to prevent *Inside Edition* from further surveillance activities. A hearing was conducted, which included testimony regarding the above facts and additional details regarding the tactics of *Inside Edition* and its crews. Relying in part on the Restatement of Torts (2nd) § 652B, the court ruled that the defendants were enjoined from engaging in conduct, with or without the use of cameras and sound equipment, which invades the privacy of Richard Wolfson, Nancy Wolfson and their children. The court specifically precluded *Inside Edition* from intruding, frightening, terrorizing or ambushing the Wolfson family. Furthermore, the court found that the conduct of *Inside Edition* amounted to a persistent course of hounding, harassment and unreasonable surveillance, even though it was conducted in a public or semi-public place.

The **Wolfson** decision, although relating to the activities of reporters and not investigators, clearly conforms to existing case law regarding the conduct of investigators hired by insurance carriers. The **Wolfson** decision further illustrates how the invasion of privacy, and other unreasonable intrusion-type torts, can be triggered by over aggressive, intrusive or harassing surveillance, even when the subject is aware of the investigators presence and is in a public or semi-public place.

H. High Profile Wiretapping Case: Gingrich Becomes Victim of Scanner Eavesdroppers

Much to his chagrin, former House Speaker Newt Gingrich helped make the American public more aware of state and federal wiretapping statutes after a cellular telephone conversation between himself and his lawyer was intercepted and recorded by a Florida couple in December of 1996.

John and Alice Martin, a retired couple active in the Democratic Party, said they were Christmas shopping when they heard “familiar” voices on the scanner in their car. Recognizing one of the voices to be that of Gingrich, the Martins said they decided to tape the conversation to preserve a piece of history for their yet to be born grandson. The Martins soon realized that they had recorded a conversation between Gingrich and others regarding the strategy Gingrich should employ in responding to ethical complaints against the Speaker. The Martins turned the tape over to their local Democratic congresswoman who advised them to give the tape to Democratic congressman James McDermott, a ranking Democrat on the House Ethics Committee. Thereafter, the contents of the tape were published in the *New York Times.*

The Martins soon became aware that they were facing state and federal felony prosecutions for recording a phone call without the permission of all participants. The FBI announced that they had opened a criminal wiretapping probe of the incident, stating that a person who intentionally intercepts electronic communication or intentionally discloses the contents of such communication can be punished by five years in prison. However, the punishment could be limited to a fine of up to $5,000 if the violation was a first offense, was not for another illegal purpose or commercial gain, and did not involve unscrambling the message.

On April 25, 1997 the Martins accepted a plea bargain which called for them to pay a fine of $500 each and cooperate with the government in its investigation into how transcripts of the tapes ended up in the *New York Times.*

While this story provides an amusing anecdote for this seminar, it should also serve to remind insurance carriers and investigators that they must have a comprehensive understanding of the appropriate state and federal wiretapping laws before they record any conversations without the permission of all parties to the conversation.

I. Child Photo Laws

Insurance carriers and investigators should be aware that some states are considering enacting "Child Photo Laws." While the primary purpose of the proposed legislation is to protect minors from being photographed or videotaped for child pornography, the broad language of some of the legislation may expose insurance carriers or investigators to civil or criminal liability. The legislation often forbids investigators from photographing a minor while in the process of investigating an adult, regardless of whether the photograph or videotape was taken intentionally or unintentionally.

All carriers and investigators should ascertain whether this type of legislation has been proposed, or has been enacted, in any of the states where they conduct surveillance activities.

J. Voyeurism

A voyeur videotaped a woman in her house by installing hidden surveillance equipment in her bedroom. Weiss, "*Voyeur Prompts DA to Propose Peeping Tom Law*", New Orleans Times-Biscayne, January 10, 1999. Videotaping was not against the law, surprisingly. The Chief Deputy did not feel it was illegal either because TV stations do it. *Id*. In Florida, there are in the works statutes against Video Voyeurism. Nearly a dozen states have passed laws making video voyeurism an element of simple burglary, and thus a felony. *Id.* Voyeurism, by its very nature, involves watching others, without interacting with them. Clay Calvert, "*The Voyeurism Value in First Amendment Jurisprudence*", 17 Cardozo Arts & Ent. L.J. 273 (1999).

V. DISCOVERABILITY OF SURVEILLANCE MATERIALS

Today, it is virtually impossible in most jurisdictions to surprise a plaintiff at trial with incriminating video surveillance evidence of a plaintiff's post-injury activities. Unfortunately for defendants, the majority of jurisdictions now require defendants to fully produce all surveillance materials to the plaintiff during the pre-trial discovery phase of litigation, and in some cases the video must be produced whether or not the defendant intends to use the video at trial.

The advantages of videotape surveillance materials to defendants in personal injury litigation matters are threefold. First, the videotape can aid the defense attorney in understanding the extent of a plaintiff's alleged injuries. Second, the videotape can be offered as substantive evidence at trial and third, footage of the plaintiff's physical activities, which he or she allegedly cannot perform, can be used to impeach the plaintiff's version of his claimed injuries.

There are several different types of state and federal laws on pre-trial discovery of surveillance materials. There are also many potential pitfalls that can occur when conducting post-injury surveillance of a personal injury plaintiff.

A. The Set-Up Method

Picture the scene at trial: a personal injury plaintiff sits on the witness stand testifying to a sympathetic panel of jurors about the extent of his alleged injuries and their devastating impact on his life. The plaintiff explains in excruciating detail the restrictions in his activities he has faced after

the alleged injuries- he can no longer work, run, lift, climb or play with his children. After the plaintiff finishes his detailed sob story, the defense attorney stands up and approaches the plaintiff with a look of disgust.

Defense counsel begins the cross-examination by questioning the plaintiff's conviction that the plaintiff is telling the truth. The plaintiff answers, "Of course, I would never lie." The defense then produces the smoking gun: a post-injury surveillance videotape of the plaintiff playing golf, lifting heavy boxes, bungee jumping, basically doing everything but lift a car off a small child. Confronted with such concrete evidence that the plaintiff fabricated the injuries, the plaintiff can only sit there in complete embarrassment and shame. The plaintiff is surprised and chagrined at the truth being dramatically exposed in court.

B. Reasons Behind the Changing View

Traditionally courts would permit this sort of court room surprise, where the plaintiff gives inconsistent statements regarding the extent of the injuries only to be surprised at trial with post-injury surveillance materials gathered on behalf of the defendant. In the past, courts generally permitted the introduction of surveillance materials at trial, because of its strong impeachment value, without requiring the defense to produce the surveillance video before the trial began or even informing the plaintiff of its existence.

This was possible because federal and state courts classified surveillance videotapes as attorney work product, which means that the materials were generally immune from pre-trial discovery. In other words, the surveillance videotape was considered to be no different than a privileged correspondence or memorandum because it contains the attorney's strategies, work product and unique assembly of information regarding the case.

Two strong public policies drove courts to the conclusion that videotaped surveillance need not be turned over to the opposition prior to trial. First, courts reasoned that plaintiffs had no right to perjure themselves on the stand. Second, the plaintiff possesses the knowledge of the contents of the defendant's videotape and the extent of the alleged injuries. Who better to know the daily activities of the plaintiff, than the plaintiff ?

However, recent balancing of the defendant's interest in a videotape's "surprise value" and the plaintiff's interest in receiving all relevant information before trial begins has fallen in the plaintiff's favor. The trend in the federal system and in most state courts is to require the possessor of the surveillance materials to inform the other parties of its existence, and to physically produce the video before the start of trial.

In the majority of courts today, the videotape described in the above scenario would not be admissible because the plaintiff was not given a chance to view the tape prior to trial. In some states, such as South Carolina, courts will even sanction a lawyer for not disclosing the existence of surveillance video if the court views the omission as "willful."

Most courts now interpret the discovery rules in their respective jurisdictions to eliminate any element of surprise for numerous reasons. Courts are increasingly concerned that a videotape may be misleading to the jury because it represents only a limited snapshot of the plaintiff's activities. Also, the element of surprise at trial is viewed as not appropriate with the recent liberalized spirit of discovery rules. As such, courts require open and free access to information in the possession of the opposing party. Furthermore, discovery before trial allows the plaintiff to preview the tape for authenticity and deceptive practices. For example, special angles, lighting and editing can cause an emergency situation to look commonplace. As a result, many courts now hold that each party is entitled to all relevant information before trial begins in order to eliminate surprise, encourage settlement and promote the "speedy determination of cases."

C. It Isn't All Bad News

However, the new developments in case law are not completely detrimental to defendants. In most jurisdictions, disclosure can be postponed until after the plaintiff's testimony has been taken at deposition, hence preserving the impeachment value of the defendant's prize surveillance video. In addition, despite the recent nationwide trend from a pro-defendant to a pro-plaintiff disclosure, many states still have not yet fully developed its laws in this area and have therefore left much room for dispute. Furthermore, a few jurisdictions do not require a defendant to produce the surveillance materials as long as the video evidence will impeach a plaintiff's testimony at trial.

D. New York Takes a Clear Stand

Some states have a fully developed and detailed body of case law on the subject that clearly favors full disclosure. In fact, New York has even gone so far as to codify its court's decisions by mandating the discovery of all video surveillance materials prior to trial. This statute states, in pertinent part, "[T]here shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof…There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use." CPLR Section 3101(d)(1)(i).

The New York statute was enacted in part due to the New York case of *DiMichel v. South Buffalo Ry.Co*., decided in 1992. The New York Supreme Court warned of the dangers of deceptive videotapes and required the defendant to produce a videotape of plaintiff within a reasonable time before trial, but only if the defendant planned to use the videotape at trial. The New York legislature codified DiMichel with CPLR Section 3101(d)(1)(i) but added a caveat. Now, disclosure under the New York discovery statute includes outtakes which juries may never view, as well as related memoranda. Although, the statute fails to mention a time frame in which the defense is required to turn over the video, at least one New York State court has interpreted the statute as requiring disclosure before the deposition of the plaintiff.

Recently, the Appellate Division of the New York Supreme Court held that discovery of surveillance tapes was not dependent on whether insured's deposition had been taken. **Rotundi v. Massachusetts Mutual Life Insurance Co**., 702 N.Y.S. 2d 150 (N.Y.A.D. 2000), 2000 WL 19951 (N.Y.A.D. 3 Dept.) Here, an insured, who sued for wrongful termination of disability benefits, was entitled to immediate disclosure of surveillance tapes, regardless of whether insurer had taken insured's deposition. *Id.* Video surveillance materials are subject to full disclosure. *Id*. The insurer relied on a prior holding in **DiMichel v. South Buffalo Ry. Co.**, 80 N.Y.2d 1, where the Court of Appeals held:

> Such surveillance tapes were held to be discoverable prior to trial to permit plaintiff to ascertain or verify their authenticity. However, to combat the danger that so viewing the tapes will enable a plaintiff to tailor the trial testimony accordingly, the Court of Appeals determined that surveillance films should be turned over only after a plaintiff has been deposed. Rotundi at 1.

However, subsequently, the Legislature enacted CPLR 3101(i), which provides as follows:

> There shall be full disclosure of any films, photographs, videotapes or audio tapes, including transcripts or memoranda thereof. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. *Id.*

In the plain language of the statute, the Legislature makes no mention of timing of the full disclosure. Therefore, "had the legislature wanted to limit the disclosure of surveillance tapes until after depositions. . . it would have included language to that effect." *Id.* at 2. The Legislature did not codify DiMichel, here. Therefore, it appears that, in New York, by requiring disclosure of video surveillance materials in advance of depositions allows the opportunity for a plaintiff to tailor his/her trial testimony.

E. Louisiana's Stance

The Louisiana Court of Appeals held that the trial court did not abuse its discretion in finding a surveillance tape was tendered too late and that admitting it would unfairly disadvantage the plaintiff who sought timely discovery in advance of trial. **Mier v. Martin**, 1999 WL 1259635 (La. App. 3 Cir. 1999). Martin attempted to present a surveillance tape of Mier's physical actions after an accident. The significance of surveillance tapes in personal injury actions has been crucial to determine a plaintiff's credibility. *Id.* at 3. Admission of tapes is within the trial court's discretion. Here, the trial court refused to enter a second tape because the defendant "forgot" to send it to the plaintiff by the end of the discovery period.

F. Post-Trial Admission of Surveillance Tapes?

The Supreme Court of Appeals of West Virginia denied granting a new trial in case where a surveillance tape was proffered after the trial. **Gerver v. Benavides**, 1999 WL 1188900 (W. Va. 1999). After trial, the jury returned a verdict finding that the defendant had been negligent in his treatment of Gerver. After judgment was entered, defendant Benavides filed a post-trial motion on the ground of fraud because of a video surveillance tape showing Gerver performing non-strenuous activities, such as lifting a chair, operating a weedwacker, etc., which Gerver performed after the trial. The lower court held that the credibility is the linchpin to plaintiff's case and ordered a new trial. But, none of these activities contradict plaintiff's testimony. Also, a new trial based on newly-

discovered evidence will be refused when the new evidence is offered solely to impeach a witness. Rather, this court requires proof of intentional deception/misrepresentation by clear and convincing evidence.

G. Federally Speaking

One of the leading federal court decisions dealing with the pre-trial discovery of photographic surveillance documentation is *Snead v. American Export-Isbrandtsen Lines Inc*., 59 F.R.D. 148 (E.D. Pa. 1973). In Snead, the plaintiff requested disclosure of "any surveillance film." The court ruled that, according to Rule 26 of the Federal Rules of Civil Procedure, the plaintiff did have the right to disclosure of the defendant's surveillance films in order to allow the plaintiff to properly prepare his case. However, the court appropriately considered the interests of the defendant and ruled that the defense may conduct pre-disclosure depositions prior to answering plaintiffs' interrogatories. This ruling, in effect, allows a defendant in federal court to record and safeguard a plaintiff's testimony and subject it to impeachment-but only at a pre-trial deposition.

However, recent changes to Rule 26 of the Federal Rules of Civil Procedure require that certain information must be provided without awaiting a discovery request. Because of a lack of case law addressing the issue, it is currently unclear whether surveillance materials are included as part of the information that must be provided without awaiting a specific discovery request.

After *Snead* and its progeny, defendants must carefully consider the extent to which they engage in or authorize the use of surveillance materials. A defendant may designate an investigator "as a person with knowledge of relevant facts." If so, any photographic or videotape or electronic recordings will be subject to disclosure during the discovery phase of litigation. Only highly trained and experienced investigators should be utilized to conduct surveillance of another party, otherwise a general discovery request may lead to a more specific demand for any written comments or reports by an investigator. The comments or reports must be carefully crafted so as not to indicate any bias on behalf of the investigator. Otherwise, a biased comment in an investigator's report could support the plaintiff's argument that there was a predilection to recording the subject out of context or in an unflattering light. In addition, the investigator could actually be doing a great disservice to the defendant/client if he obtains videotape, photos or audio recordings of the plaintiff that show plaintiff in a light that is consistent with the alleged injuries because plaintiffs may be

entitled to the surveillance videos and reports even if the defendant does not intend to use the materials at trial.

This was the subject in the federal case of *Fisher v. National Railroad Passenger Corp*., 152 F.R.D. 145 (1993). In an issue of first impression, the court was asked to decide whether surveillance tapes of a plaintiff which were prepared on behalf of the defendant and the investigator's written reports regarding the surveillance activities, were discoverable even though the defendant did not intend to introduce the evidence at trial. The defendant attempted to prevent the disclosure of the videos and reports, arguing that the materials were "attorney work product" and therefore protected from discovery. Plaintiffs sought to obtain the videos and reports from the defendant, arguing that the information contained therein may contain substantive evidence necessary to prepare his case.

The court applied a balancing test to determine whether to order the production of the surveillance materials to the plaintiff. Specifically, the court engaged in an analysis of Rule 26(b)(3) of the Federal Rules of Civil Procedure, which states, "a party may obtain discovery of documents and tangible things…prepared in anticipation of litigation or for trial by or for another party…only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Because both parties agreed that the films and reports were prepared "in anticipation of litigation," and that the plaintiff would be unable to obtain the materials by other means, the videos and reports were considered protected as attorney work product. The plaintiff therefore had the burden of showing that he had "a substantial need of the materials to prepare his case."

The *Fisher* court had to balance the value of broad discovery with the corresponding need to prevent undue intrusion into the attorney's preparation of the case. Factors considered by courts when engaging in such a balancing test include the importance of the protected materials to the party seeking discovery; the degree to which the protected material reflects the thoughts and mental impressions of an attorney; the impeachment value of the material sought; and whether the party seeking discovery knows, or is merely surmising, that the materials sought contain impeaching material.

The court ultimately found that the non-evidentiary surveillance materials were not discoverable because the plaintiff was unable to meet the burden of showing special circumstances that would justify an exception to the work product rule. Nonetheless, every case, and video is different and investigators and defense attorneys must be extremely careful and selective in the way they obtain surveillance materials because a court may require full disclosure-even if the defendant does not intend to use the tape or investigator's report at trial.

VII. LIMITING LIABILITY FOR THE UNREASONABLE CONDUCT OF YOUR INVESTIGATOR

IS THE CARRIER LIABLE, OR IS THE INVESTIGATOR ON HIS OWN?

Insurers must be aware of their potential liability for the unreasonable surveillance of an investigator they have retained. Although many cases can be defended on the theory that the investigator was an independent contractors, carriers and self-insureds may face liability if they are negligent or reckless in their supervision of the investigator's activities. **Jan Ritchie & William Foley, <u>The Legal Ramifications of Surveillance</u>, W.A.D. News, 2 (Nov. 1990).**

To determine if liability attaches to an insurer who retains an investigator that subsequently acts tortuously, it must be determined whether there is an agent\servant relationship between the investigator and the insurer, or whether the investigator was simply an independent contractor. Usually, an employer is vicariously liable for the torts of its servants but not for the torts of the independent contractors. **<u>Insurers Liability For Its Agents</u>, FICC Quarterly, 439 (Summer 1990).** A "servant" is defined as, "a person employed to perform services in the affairs of anther, whose physical conduct in the performance of the service is controlled, or is the subject to a right of control, by the other." Conversely, an investigator may be classified as an independent contractor if the carrier is concerned only with the result of the investigator's performance and not with the manner in which the investigation is conducted.

In order to determine whether an investigator is an agent or an independent contractor, the courts examine the parties agreement, the nature of the work performed, the skill required to perform the work, the distinct occupation or business of the party so engaged, which party supplies the tools or

equipment, which party provides payment, whether the work is part of the hired party's regular business activities, and whether there is a right to terminate the relationship at any time. **The Legal Ramifications Of Surveillance.** Commonly, insurance companies and self-insureds do not direct the manner in which the investigator conducts surveillance. In most instances, the investigator supplies his own tools and equipment, e.g., video cameras, vans, etc. In such cases, the investigator is considered an independent contractor and the insurance company or self-insured is protected from liability for the investigator's acts.

Hawkes v. Private Investigations Services and Commercial Union Insurance Company, arose out of certain alleged actions performed by a private investigator on behalf of Hawke's workers' compensation insurer. Hawkes alleged that the private investigator, on two occasions, gained access to his home under false pretenses. Hawkes sued the investigator, the investigation agency and the insurance carrier for invasion of privacy, intentional infliction of emotional distress and negligent infliction of emotional distress.

Commercial Union filed for summary judgment claiming (1) that Maine's workers' compensation act provided the employer's workers' compensation carrier with the same immunity from suit as the employer itself; and (2) Hawkes claims are covered by the release he signed when he settled the workers' compensation claim.

In response to the first argument, Hawkes claimed that if the actions of the private investigator went beyond mere surveillance and constituted independently actionable torts, Commercial Union has stepped outside its role as insurer and has therefore forfeited its immunity. The Court denied Commercial Union's motion for summary judgment; if the actions of the investigator go beyond surveillance directly related to his claimed injuries, the carrier could, indeed forfeit its immunity.

Three years after the alleged intrusions took place, Hawkes signed a release relating to his workers' compensation claim. The release included the concluding statement, "This is a final release and settlement of all claims under . . . the Maine Workers' Compensation Act." The Court held that the release did not cover common law claims and specifically only related to workers' compensation claims. The court held that the release was too narrowly tailored to cover the claims against the investigator and the carrier for invasion of privacy and emotional distress.

The liability of an insurer for the torts of an investigator is often a question of fact, and therefore, subject to the particular prejudices of a given judge or jury. Consequently, carriers and self-insureds must be careful to monitor the techniques of their investigators and take precautions to ensure that the investigator is performing his/her duties in a reasonable manner. To protect itself from potential liability, the insurer should carefully instruct the investigator regarding the scope and means of the investigation, preferably by a telephone call and follow-up letter. Moreover, the insurer should require the investigator to sign an indemnification agreement. **[See Appendix G for a Sample Letter and Indemnification Agreement].**

It is also important to make sure that the investigation firm is properly insured and lists your company as an additional insured on its policy for general liability and errors and omissions. Additionally, the investigators must be covered by their own workers' compensation insurance.

VII. STRATEGIES PLAINTIFF ATTORNEYS EMPLOY WHEN DEALING WITH SURVEILLANCE EVIDENCE

Plaintiff attorneys are aware that surveillance is now a widely accepted and widely used tool by insurance carriers. Therefore, competent plaintiff attorneys address the possibility of surveillance with their clients at the earliest stages of litigation. These attorneys also take all appropriate steps to obtain the surveillance materials during the pre-trial discovery phase of litigation. In addition, they look with a vigilant eye for unprofessional, biased, unreasonable or possibly fraudulent surveillance investigators. This makes preemptive behavior extremely important for the party commissioning the surveillance to ensure that it is performed in a reasonable, competent, professional and ethical manner.

A. Initial Client Meeting

Seasoned plaintiff attorneys usually confront surveillance issues with their clients in the initial conference. The client is requested to specifically detail all activities in which they currently engage, or have engaged in, since the time of the injury. The attorney who does not want to be surprised later by videotape of his client participating in a wide variety of activities will press his client to make a complete and full disclosure of all his activities. This includes work, leisure, travel and domestic activities.

B. Discovery

Many plaintiff attorneys now include questions about defense surveillance practices in their standard interrogatories and request for production of documents. Although defense lawyers often object to the disclosure of surveillance materials, most jurisdictions have found these items to be discoverable. **(see Part VI supra.)**

In response to objections to this disclosure, plaintiffs will often argue that there is a substantial need to inspect the surveillance materials to assess the kind and quality of the surveillance evidence. **Stewart M. Casper, Looking Fraudulent Surveillance In The Eye, *Trial* 137, 138 (January 1993).** Plaintiff attorneys will argue that surveillance evidence can be easily abused and can distort the status of the plaintiff's condition. Id. Therefore, plaintiff attorneys contend that inspecting the actual materials is critical in order to allow them to rebut their accuracy and authenticity. Id. Because plaintiff attorneys are often unaware if surveillance evidence exists at the time the

plaintiff's deposition is taken, they may remind their clients to be completely truthful and avoid the temptation to exaggerate the extent of any physical limitations.

C. Trial

Plaintiff attorneys, often as early as voir dire, will often remind jurors that photos or videos are not always accurate and that they must wait to hear the plaintiff's testimony regarding the activities depicted in the photographs or videos before formulating any decision. They also remind the jurors that the plaintiff tried to go back to work or participate in certain activities and this should not lead to the conclusion that the plaintiff was able to continue the activities without significant pain. Plaintiff's counsel will attempt to mitigate the effect of the surveillance materials by addressing the content of the evidence during direct examination. This is often accomplished by having the plaintiff testify in a general way about the activities he or she has attempted since the accident.

The most powerful weapon a plaintiff's attorney has against surveillance evidence is a skillful cross-examination of the person conducting the surveillance. The goal is to portray the surveillant as under-trained, ill equipped and ignorant of the invasions of plaintiff's privacy.

Plaintiff's counsel will also attempt to get the surveillant to concede that the surveillance materials depict only a very selective and limited time frame and obviously cannot depict the thousands of hours that have not been recorded since the time of the alleged injury. Plaintiff's counsel will also focus on any editorializing found in the surveillant's notes or videotape. This information is often used to argue that the surveillant is biased.

Even if the surveillance evidence appears to be professionally prepared and the plaintiff does not dispute the accuracy of its content, plaintiff's counsel may still address the following issues on his or her cross-examination of the surveillant:

1. the circumstances of retention;
2. the fee arrangement;
3. prior employment by a specific defense counsel or insurance carrier;
4. the number of times surveillance was conducted on the plaintiff; and,
5. the duration of each period of surveillance.

D. Summary

Plaintiff attorneys are aware of the extensive use of surveillance. This has led them to develop comprehensive strategies to blunt the evidence's ultimate impact. Thus, defendants must work under the assumption that plaintiff attorneys will be well prepared to address surveillance issues. In practice, this should have a positive effect in that defense counsel and insurance carriers will be sure to retain professional and qualified investigators and plaintiffs will be less likely to exaggerate claims of physical impairment.

(The organization and content of this section was based in large part on Stewart M. Caspers's article Looking Fraudulent Surveillance In The Eye which was published in the January 1993 edition of *Trial Magazine*.)

APPENDIX

A. Suggested Guidelines For Video Surveillance

Each complaint or allegation regarding an insurer's surveillance of a claimant must be decided upon the individual merits of that allegation and a review of the particular laws in your jurisdiction. The case and statutes mentioned previously, however, allow us to conduct surveillance assignments utilizing the most effective and legal methods of surveillance. The following are a few helpful hints:

1. All surveillance, shadowing, trailing, or following must be conducted in a reasonable manner and must be conducted unobtrusively. One should never engage in any activity that is, or could be perceived, as harassment or torment of the subject.

2. The individual(s) conducting the surveillance must not enter upon the property of the person who is being surveilled.

3. When conducting surveillance, especially video surveillance, the subject must be in public view when he or she is being watched or filmed. Remember, whatever the investigator can view from a public place is not deemed private.

4. Although the investigator operating the camera may be hidden, it is not proper to invade the subject's privacy by shooting or peering through doorways or windows unless the subject is visible to the public.

5. The surveillance should be aborted if the subject becomes aware they are under surveillance.

6. Do not engage in any "tricks" or "schemes" that set-up the person being placed under surveillance.

7. Do not impersonate police, fire, clergy, public utility, government employees or any other person prohibited by law.

8. Always get good facial identification on tape.

9. Always conduct the surveillance in a reasonable fashion and with the thought in mind that everything you do will be scrutinized by attorneys, juries, and a judge.

10. Maintain constant objectivity and report and film inactivity as well as activity of the subject. If they look or act injured, document it.

11. When conducting interviews, never insinuate any wrong doing on the part of the claimant. Interviewing behavior must also be reasonable and ethical.

As a claims or investigative professional, you must always be very careful that the investigator you choose to conduct the surveillance is competent and well trained in the technical and legal aspects of their profession. In many cases, not only is the investigation/security agency liable, but the insurer hiring the agency also can be held accountable for the alleged violations of the claimant's

privacy. If there is a finding of intentional and malicious unreasonableness in the surveillance conducted, judgments for punitive damages can easily reach into the millions of dollars.

B. What To Look For In Choosing The Right Surveillance Expert

One of the first obstacles you will encounter once you have decided to utilize surveillance on a particular claim file is the selection of an appropriate surveillance professional. There are literally thousands of individuals and firms that promote themselves as competent, experienced, trained, and appropriately equipped handle a surveillance assignment. Your job is to ask the right questions to these firms and then select the best qualified. This section will add to your arsenal of knowledge in selecting the right individual and/or firm.

You should be able to answer the following questions from your preliminary inquiry:

1. What is the experience level of the investigator who will actually handle the surveillance assignment? Be careful of those who market only the experience of the president or another officer of the company. It is best to obtain the resumes of the investigators employed by the company so that you may choose the best qualified of those on staff. Why settle for second best or pay for them to "train" or "break-in" a new person on your assignment?

2. Does the firm have someone with the particular experience and background suited to handle your special needs? For example, rural vs. suburban vs. inner city assignments. Each may require a totally different tactic for successful completion.

3. Are the investigators well trained with the most up to date information on legal and technical procedures to conduct surveillance? Will they use this information? What is their history of performing effective, legal, objective, and ethical surveillance assignments?

4. What type(s) of surveillance vehicles does the company utilize? Each vehicle must be appropriate for the situation. Will more than one investigator or surveillance vehicle be need?

5. Does the investigator have the appropriate photographic and communication equipment to professionally and effectively perform the assignment? Does the company utilize industrial video equipment that will accommodate long range telephoto lenses for clear facial identification? Is the equipment in good working order and has the individual operating the equipment been appropriately trained in its use?

6. What is the company or individual's track record for success, quality of work, and quickness to report findings? What is the general reputation of the company or individual? How long have they been in business?

7. What is the investigator's experience in providing expert testimony in a deposition or in the courtroom?

8. What does the company or individual do to control costs? Obtain a copy of their fee schedule. When was it last amended? Are these "introductory" rates being quoted? Are there going to be "extra" charges?

9. Does the agency and/or individual carry sufficient professional liability insurance as required by most states? Obtain a copy of the certificate for your records. Do they have all the necessary and required local, state, or federal licenses or permits?

10. Is there a method to contact the surveillance investigator in the field with any last minute instructions, changes, or to provide new information?

11. Will the individual or company execute an Indemnification/Hold Harmless Agreement prior to engaging in any assignments? A sample of an indemnification agreement is contained in Appendix G.

C. Pre-Surveillance Investigations

A *preliminary investigation* is an absolutely critical component for an effective surveillance.

The following investigative steps should be completed prior to the actual surveillance:

1. Make certain the claimant is at the location given and not away on vacation or hospitalized.

2. Check the neighborhood and identify the house. Report and document all information necessary to prepare the case for surveillance.

3. Establish or verify the subject's physical description, relevant vehicular description and license plate numbers.

4. Determine if there are any other persons living in the residence who may be mistaken for the claimant.

5. Check for any other leads or information that will assist the surveillance team. Check to see if the subject is active or working.

6. Determine in advance if more than one investigator or more than one vehicle will be required to effectively complete the assignment.

D. Recommended Procedures For Surveillance Operations

1. Never conduct surveillance without first securing all available intelligence data on the subject.

2. All assignments should first have a reconnaissance of the location prior to the actual surveillance. Identify potential vantage positions. Photograph the area, including anticipated vantage position.

3. Thoroughly brief the individual who will conduct the surveillance. Give specific information on the subject and location along with specifics of the assignment.

4. Every effort should be made to conceal your cover. Avoid being detected by the subject or anyone else.

5. Make sure you remain in a public area. If you use private property with permission make sure to get a release in writing. People sometimes change their minds, or their story, when questioned later under oath.

6. All magnifications and enhancements should be limited to permissible standards for the area in which the surveillance is taking place.

7 Document the surveillance in writing, as well as photographically.

8. Remember that the success of the surveillance is a direct function of your advance planning.

E. Strategies For Using Surveillance Tapes

RULE 1: Never edit or tamper with the contents of the original tape. It must remain intact. However, it is suggested that you prepare and bring to trial a fifteen-minute version of the tape showing the physical activity highlights. The court should be offered both the original and the edited tapes as evidence.

RULE 2: When showing films to doctors, show the edited version and advise the physician it is an edited tape.

RULE 3: Inconsistency is the key word. If the tapes show that the claimant's allegations of disability are inconsistent with the taped physical activity, the credibility of the claimant is questioned.

RULE 4: Do not inform the claimant or his attorney 100% of the contents of the films immediately. In too many instances the claimants have redesigned their injury to fit the contents of the tape.

RULE 5: If the claimant's attorney requests the tapes through discovery motions, you could request a discovery deposition prior to disclosing the contents of the film. The majority of courts have accepted this strategy as a way to preserve the integrity and impeachment value of the evidence.

RULE 6: In those jurisdictions where thorough pretrial discovery is an accepted procedure, it is best to list not only the investigator as a witness, but also reveal the existence of the films.

RULE 7: The investigator who testifies on a surveillance case should be objective and impartial and not appear to have an "axe to grind."

RULE 8: The vast majority of claims involving strenuous physical activity on tape will settle prior to trial. The most significant value of the tape is that it will often cause the claimant to adjust his or her demand to a reasonable amount.

RULE 9: Instead of showing actual videotapes to claimants, you may want to show photos taken from tape.

["The Strategies and Legalities of Video Surveillance" by Bill Kizorek]

F. Laying the Foundation at Trial

The purpose and goal of the surveillance must be to conduct the assignment professionally and to gather information and evidence with the intent to present it to a jury in a court of law. The presentation of video evidence of a claimant's activities that contradict greatly the claimant's allegations of physical limitation can be very compelling and effective when shown to a jury. Thus, the old adage becomes most appropriate, "***a picture (especially a video tape) is worth a thousand words***."

If the photographs and videotape are to be used at trial, then the testimony of the person(s) who took the photos/video is required also. Generally, this person will need to testify to the following factors before the photographic evidence can be submitted to the jury:

1. The person was qualified to take the photos/video;
2. The person filmed a certain activity;
3. The person used certain photo equipment to film the activity;
4. The equipment was in good working order;
5. The person used proper procedures in loading and filming;
6. The person accounts for the custody of the film;
7. The developed film is a good reproduction of the activity;
8. The person can identify the film/photo as what he/she took.

   Imwinkelried, **Evidentiary Foundations**, (2d ed. 1989)

G. Sample Indemnity Letter and Agreement

LAW FIRM LETTER HEAD

April 6, 2004

MJM Investigations, Inc.
910 Paverstone Dr.
Raleigh, NC 27561

Re: Claimant:
Insured:
D/L:
Claim No.:
Our File No.:

Dear Investigator:

We have been retained to provide a defense to the above-referenced claim that is pending in Pennsylvania, and we are representing the insured as listed above. We request that your firm perform an investigation as to the activities of the above-designated Claimant for purposes of determining whether the Claimant is performing activities inconsistent with the nature of the claim being made.

We request that the investigation be performed in a reasonable manner and in as forthright an approach as is consistent with the circumstances and the rules of evidence. We anticipate the ultimate use of this product as evidence in this proceeding, and therefore request that no action be taken that would reflect inappropriately upon our client.

Further, we request that the Claimant, under no circumstances, be contacted or that any direct communication be initiated with the Claimant who is in fact represented by counsel. We further request that no sound recording of any type be made electronically of any oral communication by the Claimant in violation of 18 Pa. C.S.A. Section 5704(a).

Pursuant to our telephone conversation of this date, providing you with details regarding Claimant's date of birth, social security number, physical location, place of employment, if applicable, and physical condition. We have also provided information pertaining to the alleged injuries and impairments, restrictions, disabilities, and medical treatment. We would request that this information be kept confidential and that no disclosure of this information be made without prior consent of our office. We request that no improper utilization of this information be made to initiate any inappropriate electronic surveillance.

We hereby authorize you to proceed with surveillance based on this information for two days. Please provide our office with a report after the second day.

If you have any questions or require any additional information, please do not hesitate to call.

Sincerely yours,

WILBRAHAM, LAWLER & BUBA

By:_____
Edward J. Wilbraham, Esquire

EJW:slv
cc: Insurance Company

I/WE hereby accept the above-referenced surveillance and investigative assignment on the terms and conditions specified herein.

By:

Date:

INDEMNIFICATION AGREEMENT

WHEREAS _____, "the Undersigned" is an independent contractor which has agreed to assist _____ Insurance Company and their subsidiary and affiliated corporations in the investigation of claims referred to as the Undersigned, and

WHEREAS, the Undersigned hereby acknowledges that as an independent contractor it is solely responsible for its actions as well as those of its servants, agents, employees, assigns, successors, subsidiaries, attorneys and representatives, and

WHEREAS, the Undersigned warrants that it is insured under a blanket Errors and Omissions insurance contract with liability limits in the minimum amount of Five Million Dollars ($5,000,000.00) per occurrence, in full force and effect at the present time; the Undersigned further warrants that it will maintain such insurance coverage throughout the time it is assisting with the investigation of its specific claims assigned, and that the Undersigned hereby accepts sole responsibility of notifying within ten calendar days from receipt of notice if such coverage is due to be terminated, and

WHEREAS, the Undersigned by executing this agreement is certifying that it currently has met all requirements with respect to state statutes and acts concerning licenses and qualifications for the "Company" and its agents as a private detective agency.

The Undersigned, for and in consideration of agreeing to employ or accept the services of the Undersigned in connection with these specific claims assigned, and other good valuable consideration, the receipt, adequacy and sufficiency of which is hereby acknowledged, shall defend, INDEMNIFY AND SAVE HARMLESS _____ Insurance Company and all of its officers, directors, servants, agents, employees, assigns, successors, subsidiaries, attorneys or representatives of and from any and all manner of actions, suits, proceedings, claims and demands whatsoever whether known or unknown, in law or in equity, for contractual and/or extra-contractual damages, by reason of any cause, matter or thing whatsoever, arising from any acts or omissions of The Undersigned or its officers, directors, servants, agents, employees, assigns, successors, subsidiaries, attorneys or representatives in any way connected with the Undersigned's involvement with claims specifically assigned to it.

The Undersigned further agrees to indemnify the Company for any loss, cost, damage, liability expense, legal or otherwise reasonably incurred by the Company in connection with investigating or defending any actions, suits, proceedings, or demands of any kind whatsoever brought against the Company as a result of any acts or omissions of the Undersigned or its servants, agents, employees, assigns, successors, subsidiaries, attorneys or representatives in any way connected with the Undersigned's involvement with the claims specifically assigned to it.

The Undersigned also agrees, upon receipt of written notice from the Company, to undertake at it own expense the investigation and defense of any actions, suits, proceedings, claims or demands of any kind whatsoever brought against the Company as a result of any act or omission or the Undersigned or it servants agents, employees, assigns, successors, subsidiaries, attorneys or representatives in any way connected with

the Undersigned's involvement with the claims specifically assigned to it. In case any action, suit or proceeding brought against the Company by reason of any manner of claim or demand whatsoever with respect to which the Undersigned is obligated to indemnify and save harmless the Company, upon reasonable notice in writing from the Company, the Undersigned shall defend such action or proceeding at its own expense by counsel satisfactory to the Company, shall pay all costs and fees associated with the investigations and defense of any such claim, and shall pay and discharge any settlement, judgment or decree relating to any such claim. Moreover, the Undersigned hereby agrees that no action, suit, proceeding, claim, or demand of any kind whatsoever brought against the Company arising from any acts or omissions of the Undersigned of its servants, agents, employees, assigns, successors, subsidiaries, attorneys or representatives shall be settled without written consent of the Company.

It is understood and acknowledged that the Undersigned has had the opportunity and benefit of consulting and receiving the advice of counsel concerning the terms and conditions of this agreement, that the terms hereof are accepted by it and constitute the entire agreement regarding INDEMNIFICATION between the Undersigned and the Company, and that it believes its terms to be fair and reasonable under all circumstances, after having read it terms and that it intends to be bound hereby.

As used in this agreement Company includes its subsidiaries, affiliates, successors, and assigns.

WHEREAS the Undersigned, by executing this Agreement, is certifying that it currently carries the required Workers Compensation insurance for each state in which it is licensed to operate, and for each employee that would be entitled to this coverage in each state of operation. And further that it maintains this coverage throughout the time it is assisting with the investigation of its specific claims assigned.

This _____ day of _____ 19_____.

By:

Title:

Personally appeared before me this _____ day of _____ 19_____.

Who acknowledges that he is the _____ for _____ and that he is authorized by its Board of Directors to execute this Indemnification Agreement on its behalf and that he so executed it.

_____NOTARY PUBLIC

Residing at

My Commission Expires:

Fifty State General "Eavesdropping" And "Interception" Consent Requirements

CONSENT OF AT LEAST ONE PARTICIPANT REQUIRED

STATE	SPECIAL NOTES	STATUTE
Alaska	Crime to use eavesdropping device to hear/record any part of oral conversation without consent of at least 1 participant	Alas. 42.20.310
Arizona	Follows 18 USC 2511(2)(d)	Arizona Rev. Stat. Ann. 13-3005
Arkansas	Crime to intercept with/oral/telephonic communication without prior consent of 1 participant	Ark. Code Ann. 5-60-120(a)
Colorado	Follows approach similar to 18 USCS 2511(2)(d)	Colo. Rev. Stat. Ann. §§ 18-9-903 et seq. and 18-9-304 et seq.
Connecticut	Follows approach similar to 18 USCS 2511(2)(d)	Conn. Gen. Stat. Ann. Section 53a-187
Hawaii	Crime to intercept without consent of either sender or receiver, a message by telephone, telegraph, letter or other means of communicating privately	Hawaii Rev. Stat Ann Section 711-1111(d)
Idaho	Follows 18 USCS 2511(2)(d)	Idaho code Section 18-6702(2)(d)
Iowa	Unlawful for non-participants to intercept a communication	Iowa code section 727.8(1985)
Kentucky	Follows approach similar to 18 USCS 2511(2)(d)	Kentucky Rev. Stat. Ann. Section 526.010
Louisiana	Follows approach similar to 18 USCS 2511 (2)(d)	La. RS.15:1303(c)(4)
Minnesota	Follows approach similar to 18 USCS 2511 (2)(d)	Minn. Stat. Ann. Section 622A.02 sub. 2(d)
Missouri	Follows approach similar to 18 USCS 2511 (2)(d)	Missouri Stat. Ann. §542.402 sub. 2(3)
Nebraska	Follows approach similar to 18 USCS 2511 (2)(d)	Neb. Rev. Stat. 86-702(2)(c)
New Jersey	Follows approach similar to 18 USCS 2511 (2)(d)	.J. Stat. Ann. Section 2A:156A-4(d)
New York	Follows approach similar to 18 USCS 2511 (2)(d)	N.Y. Pen. Law Section 250.00 & N.Y. Crim. Pro. L. 700.05(3)

STATE	SPECIAL NOTES	STATUTE
North Dakota	Follows approach similar to 18 USCS 2511 (2)(d)	N.D.C.C. 12.0-15-02(3)(c)
Ohio	Follows approach similar to 18 USCS 2511 (2)(d)	Ohio R.S. 2933.52(B)(4) & 2933.53(F)(3)
Oklahoma	Follows approach similar to 18 USCS 2511 (2)(d)	Ok. Code 13 § 176.4(5)
Rhode Island	Follows approach similar to 18 USCS 2511 (2)(d)	R.I. Section 11-35.21(c)(3)
Tennessee	Follows approach similar to 18 USCS 2511 (2)(d)	Tenn. Code Ann. Sections 39-13-601 (b)(5)
Virginia	Closely follows approach similar to 18 USCS 2511 (2)(d)	Va. Code Ann section 19.2-62 (B)(2)
West Virginia	Follows approach similar to 18 USCS 2511 (2)(d)	W.Va. Code Section 62-1D-3(c)(2)
Wyoming	Follows approach similar to 18 USCS 2511 (2)(d)	Wyo. Code section 7-3-602.(b)(iv)
Wisconsin	One-party consensual interception is lawful unless done with purpose of committing a crime/tort or "other injurious act." See statutory provision at right which follows 18 USCS. 2511(2)(d). Beware non-admissibility into evidence of such interceptions	Wisc. Stat Section 968.31 (2)(c)

18 USCS 2511(2)(d) states:
It shall not be unlawful under this chapter for a person no acting under color of law to intercept a wire, oral, or electronic communication where such a person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or law of the United States or of any state.

CONSENT OF ALL PARTICIPANTS REQUIRED

California	Criminally and civilly actionable for person not acting "under color of law" to intercept "confidential communication(s)" without all participants' consent. See applicable statutory provisions at right for definitions of "under color of law" and "confidential communication(s)."	Cal. Penal Code §§ 631 (a) et seq. & 632 (a) et seq.
Delaware	Criminally and civilly actionable for persons not acting "under color of law" to intercept a communication without all participants' consent. But see Del. Code Ann. Title 11 section 1335 (a)(2,3) et seq.	Del Code Ann. Title 11 section 1335 (a)(4) et seq.
Florida	Criminally and civilly actionable for person not acting "under color of law" to intercept a communication without all participants' consent.	Fla. Stat. Ann. section 934.03 (2)(d)
Georgia	Criminally and civilly actionable for person not acting "under color of law" to intercept a communication without all participants' consent. But see provision at right whereby private citizen may intercept/authorize interception of his/her conversations	Ga. Code Ann. Section 16-11-62 (2)
Illinois	Criminally & Civilly actionable for person not acting "under color of law" to intercept a communication unless all participants consent. But see People v. Beardsley, 503 N.E.2d 346(1986) holding that the eavesdropping statute only intended to protect against surreptitious monitoring of private conversations.	Ill. Rev. Stat. ch. 720 section 5/14-2, ch. 725 section 5/108A-1
Maryland	Interception unlawful unless all participants consent	Md. Code Cts. & Jud. Pro. Section 10-402 (c)(3)
Massachusetts	Criminally & civilly actionable for person not acting "under color of law" to intercept a communication unless all participants consent.	Mass. Gen. Laws ch. 272 Section 99(B)(4)
Michigan	Criminally & civilly actionable for person not acting "under color of law" to intercept a communication unless all participants consent.	Mich. Comp. Laws section 750.539a-750.539c
Montana	Unlawful to record any conversation without knowledge of all parties to the conversation	Mont. Code Ann. Section 45-8-213 (1)(c)

Nevada	Criminally & civilly actionable for person not acting "under color of law" to intercept a communication unless all participants consent	Nev. Rev. Stat. §§ 200.610 et seq.
Oregon	Party to conversation may tape it only if all parties to it are "specifically informed" it is being taped. See exception for "public" or "semi-public" meetings.	OR. Rev. Stat. section 165.540(1)
Pennsylvania	All participants' consent required.	18 Pa.C.S.A. Section 5704(a)
Washington	Criminally & civilly actionable for person not acting "under color of law" to intercept a communication unless all participants consent.	Wash. Rev. Code section 9.73.030

SPECIAL CASE

Texas	Interception is lawful but recordings/other evidence obtained as a result may not be admissible in civil litigation	Tex. Penal Code Ann. section 16-02(c)(4)

[1] Wilkins v. National Broadcasting Company, Inc., 71 Cal.App.4th 1066, (Cal.App. 1999).
[2] 771 N.E. 2d 1276 (2002)
[3] Id. at 1282.
[4] 249 Ga.App. 629 (2001).
[5] Id. at 632.
[6] Id. at 633.
[7] Id.
[8] Id.
[9] Id. at 634.
[10] 759 So.2d 165 (2000).
[11] Id. at 166.
[12] Id. at 169.
[13] Id. at 172.
[14] Id. at 173.
[15] Id.
[16] Id. at 173.