



What the camera doesn't show

*The sub rosa camera can be made to lie
and you can expose it*



BY MILES B. COOPER

We were packing the last box for the trip up to Placer County when it arrived: Sub rosa¹, or surveillance, video of our client. We stopped packing to review it. Ten minutes of video shot over two separate five-day periods. Our client, with a neck injury, exhibiting a full range of motion as she got in and out of her car and turned her head to change lanes. Doing other things she said she had difficulty doing. A report accompanied the DVD.

The first sensation one gets is a tremendous sinking feeling. One of the best pieces of advice I've ever received: almost every piece of evidence can benefit you – you just need to figure out how. Some call this judo law. Others might call it rationalizing.

We showed the film to our client, who was a very active and social individual before the incident. She was part of a swing dance culture where she went out five nights a week to dance. As she watched herself drive home from work, go to McDonald's and eat in her car before going home by herself, she commented on the date on the video screen. "That was my birthday," she noted. We compared the film, report and her schedule and a pattern emerged.

The camera does not show the client in the house trying to recover the next day. It does not show the client's reportage to her doctor that she was trying out something she did before the accident only to find it caused her great difficulty. And it does not show what the camera operator chooses not to film. But sometimes the absence of activity can be an asset.

So how do you help the jury learn to distrust the investigator and focus on what the camera does not show? First, we ask a question one usually avoids on cross-examination: "Please explain." "Please explain to us how you conduct your surveillance." My partner, who has conducted a number of investigator cross-exams, suggests this. Cars with tinted windows. Hiding behind bushes. Following into stores. Cameras hidden in purses.

"Have you gone through people's trash?"

"Not here, but yes."

"And you control what gets filmed and not filmed?"

The longer the explanation the better. As the investigator explains, the jurors imagine this man hiding in their neighborhood. The sleazier the explanation the better.

Next, we compare the time spent following our client to the time actually filmed. In our case, the investigator spent 79 hours (or 4,740 minutes) waiting for her, watching her or following her.



He shot 10 minutes of video, or 0.2 percent of the time. He noted that she spent a majority of her time in her house by herself where he could not film. The only time he ever saw her leave the house were the three days a week that she went to work. That was where he helped prove our case.

The rest of the time our formerly active, social, dancing client stayed in the house by herself. Her friends and family had already testified that she no longer went out, aside from work and errands.

"You didn't film her dancing. Snowboarding. Hiking. Running. Going out with friends. When you were following her you didn't see her do anything but go to work, stop for an errand on her way home, and stay in her house?"

We also noted other oddities. The time stamp on the film in January showed some footage shot at 5:30 p.m. which looked like daylight. But the sun went down at 5:09 p.m.

"Can you control the lighting?" Yes.

"What else can you do with the editing software?"

"All sorts of things."

"You can shoot from different angles?"

"Yes."

"And you're told what the subject can or cannot do?"

"Yes."

"You can select angles to highlight activity?"

"Sure."

"Perhaps make it look like she's turning her head more?"

"Well, I wouldn't say that."

He didn't have to. The jury had already concluded the sleazy investigator had cherry-picked the footage and may have doctored it. They believed that the material not on tape was the real story and that the investigator had helped prove our case. The lesson



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learned? Look at sub rosa video closely. Evidence that you automatically assume is bad can yield hidden gems. You may just find your opponent has inadvertently helped your case.

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[Ed. Note: Back Story is an 800-word or less column that takes a point learned in the

practice – good, bad or entertaining – and shares it. Have your own back story? Submit it to us at editor@plaintiffmagazine.com]

¹ We've done this work for years without knowing why it is called sub rosa. So we looked it up. Sub rosa is Latin for under the rose. In ancient times a rose was hung over a meeting as a symbol of confidentiality. Somewhat romantic notion compared to the videos the defense shoot. But a cool concept for settlement talks. Mediators, you are on notice.

