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# Law Does Not Support Videotaping IMEs Under Ordinary Circumstances

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In the recent New York Law Journal article, "Turning the Table: Cross-Examining IME Doctor Using Video of Exam," Ben Rubinowitz and Evan Torgan argue for the propriety of surreptitiously videotaping independent medical examinations (IMEs) performed by doctors retained by defendants to address plaintiffs' claims in personal injury actions. Further, they provide guidance to the plaintiff's attorney regarding the techniques of cross-examining such an expert when the plaintiff's attorney has such videotape evidence in hand. While the cross-examination techniques detailed are sound and skillful, they obscure the fundamental issue—whether such recording of IMEs should be permitted at all. They should not.

## Rules and Cases

Personal injury practice is adversarial, with abuses on the part of both plaintiffs and defendants. However, those practitioners who bend the rules to the breaking point are the minority—the exception. While such inequities must be addressed, they must be addressed within the confines of the current sound rules of practice, and the video recording of IMEs exceeds these bounds.

A plaintiff's attorney has unfettered opportunity to build his client's case during the pretrial stage. He can "suggest" that a plaintiff continue to receive treatment regardless of medical necessity; "steer" him to certain doctors who are well known for working with plaintiff attorneys to develop a case; "encourage" a plaintiff to undergo surgical procedures, which absent the secondary gain of litigation he might not undertake; and otherwise "control" the plaintiff's duration and course of medical treatment throughout the number of years a case is pending.

Contrast that with CPLR §3121, which permits a party, typically the defendant, to notice the plaintiff to submit to a physical by a designated physician, and Uniform Rule 202.17, which permits a defendant to have the plaintiff examined by a doctor selected to evaluate the plaintiff's medical condition only one time (with limited inapplicable exceptions).

> The relevant case law in New York makes clear that the practice of videotaping IMEs is generally disfavored, and requires that a proponent of such overcome a considerable burden.

Rubinowitz and Torgan analogize the use of undisclosed videotaping of an IME to a defendant's ability to surreptitiously videotape a plaintiff involved in a personal injury action. However, the videotaped surveillance of a plaintiff who places his medical and physical condition into issue by the commencement of a suit seeking monetary damages has been directly addressed by the Legislature in CPLR §3101(i), while there is no legislative provision for videotaping IMEs. Moreover, the analogy conveniently ignores the body of case law in New York which prohibits videotaping of IMEs even when it is attempted to be done on notice to the adversary, absent a showing of "special or unusual circumstances."[1]

Contrary to the authors' point that "there is a paucity of case law supporting or prohibiting such conduct," three out of the four Appellate Divisions, as well as several lower courts have ruled that the videotaping of an IME was appropriately prohibited.[2] The standard applied is whether the party seeking to videotape the IME can show that "special or unusual circumstances" warrant the examination being videotaped. The burden of proving "special or unusual circumstances" is extremely high; limited examples where the burden was satisfied include where the party being examined is incompetent or comatose and "unable to review the examination with his attorney or testify at trial as to the manner in which the examination was conducted."[3]

Such was the case in *Mosel v. Brookhaven Mem. Hosp.*, where the lower court began by cautioning, "[n]ormally, this court would not be inclined to permit videotaping of a physical examination of a plaintiff in a medical malpractice action." The facts of that case were, in the court's language, "unusual." The plaintiff had been semi-comatose for many years and was unaware of his environment and

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unresponsive to the actions of individuals in his presence. In allowing the IME to be videotaped, the court emphasized that, due to the unusual circumstances of the case, there was no likelihood that Joseph Mosel would be conscious of the actions of the examining physician and that he would not be able to testify at trial concerning the particulars of that physical examination.

Furthermore, it would be an inconsistent and illogical application of the law to allow plaintiff attorneys the ability to secretly videotape IMEs, while imposing strict requirements on parties who attempt to do the same permissively and with notice to all other parties. The relevant case law in New York makes clear that the practice of videotaping IMEs is generally disfavored, and requires that a proponent of such overcome a considerable burden. While there is no New York statute that directly addresses this issue, it does not follow that the existing body of case law which does directly address the issue, be ignored.

## City Bar Opinion

The New York City Bar opinion referred to by Rubinowitz and Torgan[4] (which addresses undisclosed taping of conversations, not videotaping, by lawyers) states that "[t]he fact that a practice is legal does not necessarily render it ethical." Relying on the same opinion, the authors proffer that undisclosed videotaping is ethical where the lawyer "has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good."

The authors continue, "[t]hus, one may fairly conclude that if the attorney has reason to believe that the testimony will be perjurious, videorecording is permissible." However, the city bar ethics opinion advises against surreptitious taping by attorneys, stating, "[t]his Committee remains of the view, first expressed in [its earlier city bar ethics opinion[5]], that undisclosed taping smacks of trickery and is improper as a routine practice." And, further, that "[u]ndisclosed taping smacks of trickery no less today than it did twenty years ago."

The city bar opinion continues that, "[w]e also have yet to see any persuasive argument either in the ABA's recent opinion or elsewhere in support of permitting undisclosed taping as a matter of routine practice… Accordingly, while this Committee concludes that there are circumstances other than those addressed in our prior opinions in which an attorney may tape a conversation without disclosure to all participants, we adhere to the view that undisclosed taping as a routine practice is ethically impermissible. We further believe that attorneys should be extremely reluctant to engage in undisclosed taping and that, in assessing the need for it, attorneys should carefully consider whether their conduct, if it became known, would be considered by the general public to be fair and honorable." The opinion then concludes, "[f]inally, as we have made clear, merely wishing to obtain an accurate record of what was said does not justify undisclosed taping."

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If the secret videotaping of an IME, as in the case of Dr. Michael Katz[6] is condoned, there would be no safeguards in place which would stop the secret recording of IMEs by plaintiff attorneys from becoming the routine practice of every single IME in every single personal injury action. The use of secret taping as a routine practice, however, is precisely what the city bar proscribes as unethical. By way of reference to a particular physician's testimony in recalling the time his examination took place, the authors posit that to address the problem of "unethical behavior" with regard to the practices of certain physicians who perform IMEs, the New York legal community, and in particular the plaintiffs bar, is invited to engage in suspect and potentially unethical practices of their own. Certainly a skilled practitioner can cross-examine a doctor who performed an IME without resorting to unsanctioned and possibly unethical conduct.

Plaintiff attorneys have access to the IME both through their client's own description and testimony, and the attendance of representatives who are allowed to accompany the plaintiff to the physical examinations, whereas the defense never has access to the examinations by plaintiff's physicians. In permitting an attorney's presence but precluding a medical representative or a stenographer in an IME, the Fourth Department stated, "we repeat that examining rooms should not be turned into a hearing room with lawyers and stenographers present."[7] The unbalanced arena would be further distorted were plaintiffs permitted to videotape IMEs absent a showing on notice of special or unusual circumstances.

If the rules surrounding IMEs need to be revised, the revisions should not include the videotaping of IMEs, and should only occur after a full airing of the issues by both the plaintiff and defense bar, the medical community, and the bench, before being addressed by the Legislature.

1. *Lamendola v. Slocum*, 148 A.D.2d 781 (3d Dept. 1989); *McNeil v. State*, 8 Misc3d 1028[A] (Ct Cl 2005); *Sommer v. Pierre*, 2008 WL 2164256 (Sup. Ct. N.Y. County 2008); *Vivas v. Moujir*, 2010 WL 9438367 (Sup. Ct. N.Y County 2010).
2. *Savarese v. Yonkers Motors*, 205 A.D.2d 463 (1st Dept. 1994); *Lamendola v. Slocum*, 148 A.D.2d 781 (3d Dept. 1989); *Parsons v. Hytech Tool & Die*, 661 N.Y.S.2d 362 (4th Dept. 1997); *Mertz v. Bradford*, 152 AD2d 962 (4th Dept. 1989); *Sommer v. Pierre*, 2008 WL 2164256 (Sup. Ct. N.Y. County 2008); *Vivas v. Moujir*, 2010 WL 9438367 (Sup. Ct. N.Y County 2010).
3. *Mosel v. Brookhaven Mem. Hosp.*, 134 Misc.2d 73 (Sup. Ct. Suffolk County 1986).
4. The Association of the Bar of the City of New York, Formal Op. 2003-02.
5. The Association of the Bar of the City of New York, Formal Op. 1980-95.
6. *Bermejo v. Amsterdam & 76th Assoc.*, Index. 23985/09 (Sup. Ct. Queens).
7. *Mertz v. Bradford*, 152 AD2d 962 (4th Dept. 1989).

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