

5 MISTAKES ATTORNEYS MAKE ASSIGNING SUBROSA

Getting the Biggest Bang for your Subrosa Buck

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Case Studies by Dennis Newitt, Esq.

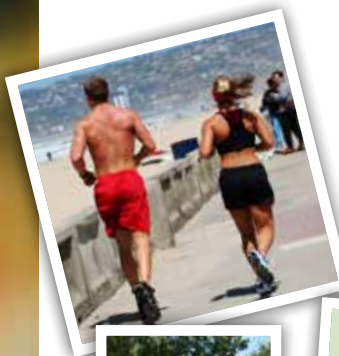


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5 MISTAKES ATTORNEYS MAKE

ASSIGNING SUB ROSA SURVEILLANCE

While the use of covert video can be a powerful tool to successfully challenge the severity of a plaintiff's injury, the process has a lot of moving parts. The desired outcome of this tactic depends on precise execution of several aspects.

Defense attorneys have many factors to weigh in deciding when and how to assign subrosa, not the least of which is how the client insurance company utilizes such tactics and how it might play out in trying to resolve the case.

In this whitepaper, Private Investigator Bruce Robertson draws on his 30 years of experience to shed light on aspects of the process that may not be on the attorney's radar when assigning subrosa.

Which aspects of subrosa present the biggest pitfalls and challenges? This paper identifies five key areas that require special attention.



1 | STRIKE WHILE THE IRON IS HOT

Deciding when to conduct sub rosa is a key decision in the life of a high stakes injury case. One mistake often made is waiting until the last minute to order the surveillance. While it's understandable that the insurance company may not want to spend the money until it looks like the case is headed for trial, the chances of success diminish as the time window narrows.

Closer to trial the plaintiff attorney will be more likely to school the injured party on the probability of sub rosa being conducted and it creates a specific window of time in which the plaintiff can alter their behavior to prevent a documented slipup. Also if good video is obtained there may not be sufficient time to follow up with additional documentation that it was not just a onetime occurrence on a "good day."

A better strategy would be to identify high risk cases early in the litigation process and authorize a background investigation and a few days of sub rosa to test the veracity of the case from an investigative point of view. This would also give the defense team important information as to what the probabilities are of successful sub rosa further down the road.



Another good time frame is to order the sub rosa before and after the deposition of the plaintiff. These timeframes can document activities which the subject claims they cannot do in close proximity to when the statements were made thus, taking away the excuse that the condition improved with time. For the same reasons other good opportunities include videotaping around doctors' appointments or medical exams.

CASE STUDY 1

As to when would be a good opportunity to capture video, I have found holiday weekends can be opportune times. Many folks will be going out locally and doing things, doing things around the house, or preparing to go out of town, so the activity level is more likely to show inconsistencies. Example: plaintiff motorcyclist sustained significant fracture injuries to leg, arm, and thumb.

Over a Memorial Day weekend, we were able to capture the subject helping friends move large pieces of heavy, bulky furniture into a pickup and unload it at a nearby location. We sprung the footage on plaintiff counsel at mediation and the case settled for substantially less than the very high demand.

Dennis Newitt, Esq.



2 | DON'T SKIMP ON THE DETAILS

Good communications is key to successful sub rosa projects. A mistake attorneys can make is to hastily assign a sub rosa project with basic info on the subject without taking the time to fill in the details. Investigators gather random bits of information to create a mosaic of actionable strategies. When assigning your sup rosa be sure to give the back story because you never know what small bit of information about habits, hobbies, info about family members, etc. may prove useful to the investigator.

Pick up the phone and call the investigator or case director with the details of the case rather than just an email. Doing this not only will provide more background, the investigator will have the opportunity to ask you questions. An important factor here is you may also be shielding the plaintiff's counsel's prying eyes from your thinking and strategy should the assignment email be discoverable in the future.

If there has been prior sub rosa on the subject it is important to make the investigator aware of this, especially if either the prior investigator got burned (discovered) by the subject or if the existence of the prior investigation has



been disclosed to the plaintiff attorney. This will inform the investigator in creating the best case strategy. In addition, it is important to provide good photos of the subject to avoid any possibility of embarrassment by misidentification of the subject.

Lastly give your investigator enough time to adequately document a pattern of activity. One day here or there is less than optimal. If good video is obtained, authorize additional days to prove it is not a "one off" event. When shooting video remind investigators not to keep turning the camera on and off since this can look like they are cherry picking activities, have them keep filming even if the subject is not performing helpful activities.

CASE STUDY 2

The plaintiff was a 40-ish Latino male who had a brother close in age that bore a very strong resemblance to the plaintiff. We did not know they lived at the same residence. The subrosa showed the subject performing physical tasks outside which were inconsistent with his claimed limitations. You guessed it: it was the plaintiff's brother captured on video, not the plaintiff. Needless to say, this was embarrassing... but we discovered this before disclosing.

Dennis Newitt, Esq.



3 | LAYING THE FOUNDATION FOR SUCCESS

One mistake lawyers can make in assigning sub rosa is to not authorize adequate background and social media investigations before any field work is conducted. The old days of just doing a basic background check for civil, criminal and perhaps driving violations are over. With so much valuable information available in social media it is crucial to take the best advantage of these “gifts” and dig deep to find them.

Timing can be important to authorizing this kind of background research. Earlier on in a case the plaintiff will likely be less guarded in what they post on social media so it can propitious to assign a background on social media as soon as the defense team becomes aware of a high stakes case that has the potential to go the distance.

In addition to the usual social media sites such as Facebook, Instagram, Twitter, Pinterest, and Flickr, other less obvious sites that can yield helpful intelligence are Meetup, LinkedIn, ClassMates and personal YouTube pages. These sites and others can often reveal hobbies, sports activities, planned events, favorite hangouts, work schedules and vacation plans.



If this data is mined prior to the case heating up into a possible full-fledged legal battle the chances of success are higher.

Other intelligence developed in this pre-surveillance process can include satellite photos of the subject surroundings to determine the best setup on the home and likely routes in and out of the neighborhood. In cases where sitting near the subject's house is not possible or advisable investigators can identify “choke points” where the subject has to pass by can be identified.

CASE STUDY 3

Doing the social media background investigation can yield really valuable information without need of sub rosa. Example: the college student plaintiff slipped and fell on wet steps on campus and sustained a claimed significant back injury. However, he posted photos on his Facebook showing him zip lining in Costa Rica. Oops.

Dennis Newitt, Esq.



4 | STAYING ON THE RIGHT SIDE OF THE LAW

Making sure you and your investigator are on the same page when it comes to the legal and ethical parameters of sub rosa investigations can be sometimes overlooked. Paramount is the need to adhere to ethical restrictions concerning communication with persons represented by counsel. Any tactic that could be interpreted as entrapment should be avoided.

When conducting sub rosa investigations investigators also need to be aware of laws such as the trespassing and anti-stalking statutes. In addition, in California there are privacy laws such as an anti-stalking law and an anti-paparazzi law, which bans the use of cameras or camcorders to view the interior of any area of the occupant home where they have a reasonable expectation of privacy.



Other laws that need to be kept in mind are the ADA (Americans with Disabilities Act), the FCRA (Fair Credit Reporting Act), the GLBA (Gramm Leach Bliley Act) and local and state privacy laws. Among other things, these laws restrict what records can be accessed and how they are accessed.



CASE STUDY 4

Some personal information on social media websites can only be viewed if one becomes the target's "friend", by "friending" someone. However, this raises serious ethical considerations. As is well known, a lawyer may not contact another party to a lawsuit directly, if that party is represented by counsel.

Also, when dealing with a person who is not represented by counsel, a lawyer may not state or imply that he or she is disinterested, and if the unrepresented person misunderstands the lawyer's role, the lawyer must make reasonable efforts to correct the misunderstanding. What is clear

from the foregoing is that a lawyer may not "friend" a represented party on Facebook to gain access to the possibly relevant information that may be found there.

It may be possible however for an attorney, provided that they do not misrepresent themselves in any way, to "friend" a friend of the plaintiff, and discover whether further information becomes visible as a result, while still staying within ethical boundaries. This approach has not yet been tested or examined by the State Bar, but may very well be deemed unethical.

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5 | KNOW WHEN TO HOLD THEM...

A possible problem area of sub rosa investigation relates to this question: is surveillance and communication with your investigator discoverable under work product or attorney client privilege? In most cases, it is considered discoverable. The attorney who does not disclose it runs the risk of the judge precluding entering it as evidence at trial. Another consideration is whether and when to disclose the footage to up the stakes in settlement talks.

Attorneys who use sub rosa investigators often end up having their investigators being deposed. Part of this process is turning over the investigator's file to the opposing counsel. This factor needs to be kept in mind by both the investigation agency and the attorney as the case proceeds. You want to make sure that no embarrassing material ends up in emails or as part of a file contents.



When it comes to trial, the defense team and the investigator need to form a well-oiled partnership when it comes to presentation of the video in trial. Does the investigator have a well-documented surveillance report to refer to? Is the video ready for display and are there backup methods of presentation? Is the investigator prepared for the withering assault from the plaintiff attorney about the “sneaky underhanded tactics they used to invade and spy on their client’s privacy and impugn their integrity?”

CASE STUDY 5

Another consideration on timing: if the plaintiff served supplemental discovery before the cutoff and surveillance was done in between the initial interrogatories and the supplemental, of course defense is obligated to disclose the information. If appropriate, the strategy may be to wait to assign the sub rosa until after the supplemental responses are served. Then, a party is not necessarily obligated to disclose the surveillance if used purely for impeachment.

Dennis Newitt, Esq.



CLOSING THE DEAL

It is always exciting and rewarding to get the knock-out sub rosa video that will help you win your case.

To make it all come together successfully, the defense lawyer and private investigator need to work in tandem to avoid the many pitfalls that need your attention in the process.

And while a picture is worth a thousand words, a poorly handled sub rosa project can end up obscuring the picture you want to paint.

FEEDBACK

Your feedback is appreciated!
Please [click here](#) to email your comments or feedback



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3 | **BONUS: Get our one-page 5 Mistakes "Cheat Sheet".**

- Reduce the risk of your team making any of these subrosa mistakes by getting our free one page "5 Mistakes" summary. [Click here to email us](#).



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