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Fighting *sub rosa* corruption

Tools to use against an ambush at trial by defendant's corrupted evidence

To avoid being ambushed in trial it is necessary to aggressively pursue surveillance evidence (aka "*sub rosa*") from the beginning to the end of every personal-injury case. The reason is that the classic use of *sub rosa* to expose an allegedly dishonest plaintiff has evolved into a corrupt practice of using advanced video editing technology to make a truly injured plaintiff appear to be not injured, or less injured.

Especially with catastrophic-injury cases, the defense industry's regular use of *sub rosa* now involves editing and manipulating video to create a false or inaccurate appearance of the plaintiff being less injured. For example, it has become common for the defense to hire a private investigator to engage in hundreds of hours of secret *sub rosa* video over many days, weeks or even months, in hopes of recording the plaintiff doing some activity inconsistent with their claimed injuries or deficits. The investigator then takes the hundreds of hours of *sub rosa* video and edits it down to a few clips which are only a minute or a few seconds long. The videos are also edited to make it appear that the plaintiff is engaging in activities in an order or time frame that is highly distorted and inaccurate. In short, the *sub rosa* evidence is drastically edited to be taken out of context which creates a false impression of plaintiff's medical condition or need for future treatment. These are now typical defense *sub rosa* tactics.

The much more devious use of *sub rosa* evidence involves video that is manipulated. We have experienced in various recent trials that the defense has attempted to introduce video *sub rosa* of the plaintiff which was digitally sped up to make it appear that the plaintiff was walking faster than she claimed she could. Similarly, we have seen the video titled, angled or skewed to impact on the appearance of the video such as to make it appear that the plaintiff is walking up a hill when they were on a flat surface. These fraudulent attempts at creating alleged impeachment evidence by manipulating *sub rosa* video are unfortunately becoming more and more common.

Regardless of whether the *sub rosa* evidence is being taken out of context or being manipulated, this corruption cannot be tolerated. There are various tools of discovery or statutes which can be useful in the fight against the improper use of *sub rosa*. Also, objections on the grounds of foundation, authentication and/or the doctrine of completeness can pose significant problems for a defense attorney trying to use improperly edited *sub rosa* video. If you diligently fight to discover *sub rosa* evidence from beginning to end, you will often be able to either keep the evidence out of trial, minimize the harm it can cause, or in some cases use it to your advantage. The purpose of this article is to provide guidance to the plaintiff attorney on how to expose the *sub rosa* corruption, and use it to your advantage.

Sub rosa of the plaintiff is subject to discovery

California has long held that photographs and films of surveillance are subject to discovery and, further, that such evidence is not protected by the attorney-client or work-product privilege. (*Suezaki v. Superior Court* (1962) 58 Cal.2d 166.) The *Suezaki* case remains the leading authority in California on this topic. The California Judicial Council has confirmed this position recognizing the discoverability of *sub rosa* evidence as reflecting in Judicial Council Form Interrogatory 13 series. Form Interrogatory 13.1 specifically requires the responding party to identify the name, address and telephone number of the individual conducting surveillance; the time, date, and place of surveillance; and the name, address and telephone number of each person who has the original or copy of any surveillance photograph, film or videotape. Moreover, Form Interrogatory 13.2 requires the responding party to identify information for any written surveillance reports including the title, date, name of author, and identification of the person who has the original or copy.

Thus, you can easily begin aggressively conducting discovery of *sub rosa* evidence by serving form interrogatories that includes the 13 series. Every single piece of evidence requested by Form Interrogatory 13.1 and 13.2 is critical to successfully cross examine the defense private investigator and uncover the full extent of surveillance or any potential improper editing.

In addition to form interrogatories, it is necessary to also serve special interrogatories under Code of Civil Procedure sections 2030.010-2030.410, as well as inspection demands/requests for production under sections 2031.010-2031.320 seeking all forms of *sub rosa* evidence. In short, request the details of all aspects of the *sub rosa* by special interrogatories and all reports, documents, videotapes, bills, notes or correspondence should be the subject of requests for production.

If the defendant is an entity rather than individual, serve a person most qualified deposition notice under section 2025.230 with subject areas on *sub rosa*. Otherwise, simply notice the depositions of the individual investigators under sections 2025.010-2025.620 once you obtain information on their identities.

Be careful to evaluate the defendant's responses to requests for *sub rosa* evidence for any objections. If they are asserting objections, you must meet and confer for amended responses without the objections. If they refuse, you know they have *sub rosa* and you must file a motion to compel which asserts the law

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and arguments in this article to avoid being ambushed at trial.

It is important to note that *sub rosa* evidence is unique because it can be created literally at any time up to and throughout trial. For this reason, you cannot rely on discovery responses early in the case. It is necessary to serve supplemental discovery requests under Code of Civil Procedure section 2030.070 for all prior interrogatories or supplemental discovery requests under section 2031.050 for all prior requests for production as you approach the close of discovery.

Again, be sure to keep a close eye for responses to the supplemental discovery that include newly asserted objections to prior discovery requests for *sub rosa* evidence. If such objections are asserted, you know they have *sub rosa* and you must file the motion to compel this evidence or you are risking being ambushed at trial. Please contact author for sample *sub rosa* discovery and motion to compel.

Sub rosa evidence is not protected by the attorney-client privilege or attorney-work-product doctrine

Defendants will often object to requests for *sub rosa* evidence on grounds of attorney-client privilege or attorney-work-product doctrine. Both of these objections are misplaced and without merit. The California Supreme Court, in *Suezaki*, specifically addressed and dismissed both these objections.

The *Suezaki* Court explained that surveillance evidence does not constitute a confidential communication for purposes of the attorney-client privilege and further, that transmission of the evidence to the attorney, even where the parties intend the matter to be confidential, "cannot create the privilege if none, in fact, exists." (*Suezaki*, 58 Cal.2d at pp.175-177.) *Suezaki* further stated that the films plaintiff sought were "not a graphic representation of the defendants, their activities, their mental impressions, anything within their knowledge, or of anything owned by them" but instead were the "representations of the plaintiffs, not of the defendants." (*Ibid*.) Thus, attorney-client privilege objections to discovery requests for *sub rosa* evidence are without merit.

The absolute work-product protection of any writing reflecting an attorney's impressions, conclusions, opinions or legal research theories afforded under Code of Civil Procedure section 2018.030(a) was deemed to not apply to *sub rosa* of a plaintiff. (*Ibid*.) Similarly, defense counsel cannot establish that *sub rosa* evidence is exempt from discovery based on the qualified work-product protection under section 2018.030(b). The party seeking discovery must show that there is good cause for the production of the evidence being sought, while the party claiming the statutory protection has the burden to prove that it applies and must do more than merely state that they want something protected. (See *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 66.) The *Suezaki* Court determined that the work-product objection was without merit because good cause indeed existed for the production of the *sub rosa* evidence in order to (1) protect against surprise; and (2) prepare for an examination of the person who performed the surveillance. (*Id*. at p.171.) Thus, neither objection should preclude discovery of *sub rosa* evidence.

Good cause exists for *sub rosa* discovery to prevent trial by ambush

As noted by the *Suezaki* Court, in addition to good cause existing for the discovery of *sub rosa* evidence in order to prepare the attorney to cross examine the investigator who did the *sub rosa*, good cause also exists for the production of *sub rosa* evidence to avoid trial by ambush and unfair surprise. In California, pretrial discovery procedures are designed to eliminate the need for guesswork about the other side's evidence, with all doubts about discoverability resolved in favor of disclosure. (See *Glenfed Development Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113.) Courts have construed the discovery statutes broadly, so as to uphold the right to discovery wherever possible. (See *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 377-378.)

Moreover, even where the discovery statutes require a showing of "good cause" to obtain discovery, the term is liberally construed to permit, rather than to prevent, discovery wherever possible. (*Id.* at 377-378.) As noted in *Norton v. Superior Court* 24 Cal.App.4th 1750, courts are to be broad-minded in considering relevancy and provide the party seeking discovery substantial leeway. Errors should be made in favor of granting discovery rather than in denying it. (*Id. at* 1761-2.) These laws of discovery are meant to preclude trial by ambush and unfair surprise in trial. (See *Associated Brewers Dist. Co. v. Superior Court* (1967) 65 Cal.2d 583, 587; *Campain v. Safeway Stores, Inc.* (1972) 29 Cal.App.3d 362, 366.) It is clear that California follows a liberal standard of discovery and favors a finding of good cause for the discovery of *sub rosa* evidence to avoid trial by ambush as well as to encourage settlements.

Indeed, the visual and extremely powerful impact *sub rosa* can have on a jury further establishes good cause for its discovery. Lastly, good cause exists for the discovery of *sub rosa* evidence in order to establish foundation and authentication under Evidence Code sections 402-3, 1400-1402 and prevent improper video editing as set forth below.

The deposition of the *sub rosa* investigator

If you aggressively pursue *sub rosa* evidence as explained, you will identify the private investigator hired by the defense to conduct *sub rosa* on the plaintiff and get the chance to take the private investigator's deposition. The secretive strategies used by these investigators are nothing short of shocking. They stalk the plaintiff at home or at work while concealed within a van or car. They place miniature video cameras in grocery carts or suitcases to follow the plaintiff around public places. They even use cameras in their belts or clothes. Jurors generally don't like these secretive methods of surveillance so get the details. Check all documentation or billing relating to the *sub rosa* to confirm all dates and times of *sub rosa* conducted to get the true context. Most importantly, get

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the details of the chain of custody of every piece of original video and how the final product was created. Establish if editing or manipulation was done and how.

If the video *sub rosa* is harmful to your case, you must attempt to keep it out with the trial strategies addressed below. However, if the video *sub rosa* is helpful for the plaintiff's case because it accurately reflects the plaintiff's injuries or ongoing medical condition, or because it shows nothing helpful or harmful, the evidence can be used to your advantage. Confirm with investigator that he is an expert in exposing frauds or people faking injuries. Confirm that the investigator spent extensive amounts of time secretly videotaping the plaintiff and never saw the plaintiff engaged in activities that were inconsistent with the claimed injuries. Thus, get the defense *sub rosa* expert to confirm that he is an expert in detecting fraud and the plaintiff did not engage in any activities reflecting fraud. Such admissions can be very useful in combating the malingering or exaggeration defenses. On the other hand, if they attempt to deny these questions when the *sub rosa* evidence clearly confirms the plaintiff's severe injuries, they look ridiculous and biased.

Trial strategies for dealing with *sub rosa*

Even if you have aggressively pursued *sub rosa* evidence throughout the discovery period, you must continue to aggressively pursue *sub rosa* evidence in trial.

First, be sure to file motions in limine to preclude *sub rosa* evidence not produced in discovery in response to the multitude of plaintiff's requests made during the discovery period. If the defendant confirmed there was no *sub rosa* evidence in discovery responses, they should be precluded from springing it on the plaintiff in trial by surprise. Assert Evidence Code section 352 because trial by ambush is prohibited and it would be extremely prejudicial to the plaintiff to introduce evidence at trial that should have been disclosed during discovery.

Second, serve notices to appear and produce at trial pursuant to Code of Civil Procedure section 1987 (c) all forms of *sub rosa* evidence. Be specific in the requests and remember that section 1987(c) requests must be served no later than 20 days prior to trial. It is critical to serve section 1987(c) requests because it is common for the defense to engage in *sub rosa* during expert discovery or over the days leading up to, or during, trial. If objections are asserted, you must be ready to file a motion to compel at the final status conference or days leading up to trial on an ex parte basis. The motion should include arguments of foundation, authentication and the rule of completeness under Evidence Code sections 356, 402-3, 1400.

Third, be careful to notice if the defense inserts witnesses onto the trial witness list who are investigators. If you see investigators on the witness list, or individuals not previously identified, immediately ask the judge for an opportunity to depose these witnesses during trial because you were precluded the opportunity during the discovery period. Your chances of success are much higher if you had been previously requesting the identity of any *sub rosa* investigators from the beginning of discovery.

Fourth, if it appears that the defense is going to introduce *sub rosa* evidence which you have not had a chance to evaluate and you are about to be ambushed in trial, you must take immediate action. If you are about to be ambushed in trial and the *sub rosa* is about to come into evidence, do not hesitate to object on grounds of foundation, authentication and the rule of completeness under Evidence Code sections 356, 402-3, 1400-1401 and specifically request an Evidence Code section 402 hearing and/or section 403 hearing for the determination of foundational and other preliminary facts where authenticity is disputed.

The analysis at the sections 402/403 hearing is as follows:

- Evidence Code section 403(a)(3) provides that "the proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: The preliminary fact is the authenticity of a writing";
- *Sub rosa* video is a form of "writing" as defined by Evidence Code section 250;
- Authentication of a "writing" is required before it may be received in evidence under Evidence Code section 1401;
- Evidence Code section 1400 provides that authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.

Thus, in order to authenticate *sub rosa* evidence the defense must introduce evidence to prove it is what they claim it to be. The defense must meet this burden when you assert sections 402 and 403. The problem for the defense is that they cannot satisfy their burden, or even if they could meet their burden, they normally do not want to even try. This is especially true if there are hundreds of hours of *sub rosa* that have been edited down or if any *sub rosa* has in fact been taken out of context or manipulated. If the defense tries to produce any portion of the *sub rosa* videos, consider asserting Evidence Code section 356, aka the rule of completeness , which states that if part of a "writing" is given in evidence, the whole on the same subject may be inquired into. Thus, if the defense seeks to show the jury a very small portion of many hours of *sub rosa*, the doctrine of completeness would require showing the remaining portions of the video to put it in complete context. This forces the defense to produce all of the hundreds of hours of *sub rosa* evidence in order to show a few edited video clips that are usually minutes or seconds long.

If you go through this process the judge will usually lean in favor of limiting or

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excluding the *sub rosa* evidence for lacking foundation and authentication or because it would cause too much prejudice and undue delay under Evidence Code § 352.

At a minimum, using these strategies should give you an opportunity to know what you are up against, avoid trial by ambush and help you either keep the *sub rosa* evidence out of the trial or use it to your advantage.

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