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## SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

BY EDWARD M. SPIRO

### *Timing, Lies and Videotape*

**F**EW PIECES OF evidence are as potent as an audiotape of the harassment claimed by a plaintiff in an employment discrimination suit or videotape of a personal-injury plaintiff engaged in physical activity that he swore at his deposition he was unable to do. But the uniquely probative nature of taped evidence raises difficult questions about when, during discovery, such tapes must be produced.

Courts have grappled with how best to resolve the competing interest of the tapeholder in preventing the taped party from tailoring his or her testimony to conform to the tape and the taped party's interest in avoiding surprise at trial and in preventing misleading editing or downright dishonest alteration of the tapes. Some courts require that tapes be turned over immediately upon request, while others have permitted a delay in their production until after any depositions whose outcome might be influenced by the content of the tapes. The courts are also split as to whether the timing of production should turn on the purpose for which the tape was made or to which it will be put in the litigation.



Recently, the New York Court of Appeals held that in state court, revisions to the CPLR now require that tapes be turned over without delay.<sup>1</sup> But New York federal courts remain divided on this issue, with the most recent pronouncement, by Southern District Judge Alvin K. Hellerstein in *Perkins v. Memorial Sloan-Kettering Cancer Center*,<sup>2</sup> ruling that even tapes that go to the heart of the issues in the litigation need not be disclosed until the relevant depositions are complete.

Disputes over the timing for disclosure of tapes tend to concern tapes generated in two distinct situations. Often the tapes at issue are surreptitiously recorded (generally audio) tapes made by plaintiffs in employment discrimination cases prior to the inception of litigation. These tapes are frequently intended to document unfair or improper treatment or harassment and invariably contain statements by one or more of the defendants or their agents as well as the plaintiff bearing

directly on the plaintiff's claim. The second major category of tapes are surveillance tapes recorded by defendants in personal injury actions for the purpose of documenting and possibly refuting plaintiffs' claims of injury or the extent of their damages.

#### **New York State Approach**

In its 1992 decision in *DiMichel v. South Buffalo Railway Co.*,<sup>3</sup> the New York Court of Appeals initially charted a middle course between a plaintiff's desire for access to surveillance tapes and a defendant's preference to retain them until trial, holding that plaintiffs were entitled to pretrial access to such tapes, but only after they had been deposed. It reversed that course in its recent decision in *Tran*, holding that CPLR §3101(i), which mandates the "full disclosure of any films, photographs, video tapes or audio tapes," overruled that aspect of *DiMichel* permitting delayed disclosure of surveillance tapes. The court found that although this provision was silent on the question of timing, the structure of the amended statute indicated that the Legislature had not intended to codify *DiMichel*, which had been decided only months earlier.

The Court of Appeals observed that *DiMichel* was predicated on the premise that surveillance tapes were entitled to a qualified privilege under CPLR §3101(d), which is akin to the work-product privilege, and permits access to materials prepared in anticipation

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**Edward M. Spiro** is a principal of Morvillo, Abramowitz, Grand, Iason & Silberberg and the co-author of "Civil Practice in the Southern District of New York, 2d Ed." (West Group 2003). **Judith L. Mogul** assisted in the preparation of this article.

of litigation or for trial only upon a showing of substantial need and undue hardship. It reasoned that, by requiring “full disclosure” of all tapes, the amendment eliminated the qualified privilege that had previously attached to surveillance tapes. Because the qualified privilege was one of the two competing interests that informed the *DiMichel* timing rule, the court concluded that that rule “lost its statutory moorings when the Legislature removed videotapes” from its purview. The court recognized that its reading of CPLR §3101(i) reintroduces the danger that plaintiffs will tailor their testimony, but cautioned that the Legislature’s “pointed recasting of the relevant discovery provisions and its mandate for ‘full disclosure’” removed its authority to permit delayed production of surveillance tapes under §3101(i).

### Federal Court Approaches

In contrast to the New York State Court of Appeals, which has provided clear guidance to the lower state courts on the timing for production of tapes, the U.S. Court of Appeals for the Second Circuit has yet to rule on this issue, leaving the district courts to develop varied solutions to this problem. Some New York federal courts have focused on whether the tapes at issue will be used primarily for impeachment purposes, in which case production may be delayed until after the taped party’s deposition, or for substantive evidence, requiring immediate disclosure of the tapes. Other courts permit delayed production of all tapes without consideration of the purposes they serve.

### Impeachment or Substantive Evidence

Those cases that focus on the nature of the evidence contained in the tape whose production is sought draw a

clear distinction between surveillance tapes, whose use is often, although not universally limited to impeachment evidence, and tapes made prior to the commencement of litigation, which are far more likely to contain substantive evidence. Even where tapes are made in anticipation of litigation, the work-product doctrine will not completely shield them from production: the party seeking the tapes will either be able to show a “substantial need” because the taped activity cannot be replicated<sup>4</sup> or the tapes will constitute statements of a party, which can be obtained without the required showing of need. In contrast to the New York state approach, which rested its now-defunct delayed production rule on the qualified privilege imparted by the work-product doctrine, most federal courts according special timing for disclosure of surveillance tapes do not mention the work-product doctrine, focusing instead on whether the tapes at issue are confined to impeachment material or contain substantive evidence.

Southern District Judge Louis L. Stanton explained the rationale for delaying disclosure of impeachment surveillance films in *Daniels v. National Railroad Passenger Corp.*<sup>5</sup> He noted that the liberal disclosure encouraged by the federal discovery rules must take into account the need to protect the value of surveillance tapes to be used for impeachment of a plaintiff who exaggerates his injuries. By requiring disclosure of such tapes only after a plaintiff has been deposed, the plaintiff will be able to review the films for authenticity and otherwise prepare effectively for trial, while avoiding the possibility that the plaintiff or other witnesses will tailor their testimony in light of what the tapes reveal.

### The ‘Brannan’ Case

Southern District Judge Denny Chin

offered impeachment surveillance tapes even greater protection from disclosure in *Brannan v. Great Lakes Dredge & Dock Co.*,<sup>6</sup> when he held that tapes made after the plaintiff’s deposition need only be disclosed before trial if the plaintiff agreed to a second deposition to lock in his testimony concerning the extent of his injuries at the time the tapes were made. The defendant successfully employed a risky strategy in that case by delaying surveillance until after the plaintiff’s initial deposition. Another court may have disallowed a second deposition of the plaintiff, particularly where the defendant opted not to question the plaintiff concerning the extent of his injuries at the first deposition.<sup>7</sup>

These courts limit protection from immediate disclosure to impeachment evidence, affording no delay in production to tapes that contain substantive evidence. In *Giladi v. Albert Einstein College of Medicine*,<sup>8</sup> Judge Chin refused to permit the plaintiff to delay production of a taped conversation with his co-workers until after their depositions. Noting that the tape had value beyond serving as impeachment material, he held that this was not “one of those ‘occasional’ cases warranting deviation from the general rule of liberal pre-trial disclosure.” Although the substantive nature of taped conversations made to document a plaintiff’s claims is more apparent than for a surveillance tape, courts have not assumed that surveillance tapes are limited entirely to impeachment purposes. Thus, in *Bachir v. Transoceanic Cable Ship Co.*,<sup>9</sup> Southern District Magistrate Judge Henry Pitman left it to the defendant in possession of surveillance tapes to determine what use they would be put to, ordering that tapes that would be used only for impeachment be turned over after depositions and requiring pre-deposition disclosure of any tapes that would be put to broader use. The court also rejected the defendant’s

contention that it need only produce those tapes that it intended to use in some fashion at trial, holding that all tapes in the defendant's possession must be disclosed pursuant to the time restrictions outlined earlier in its decision.

Other courts make no distinction between surveillance and other types of recordings or between those that offer impeachment as opposed to substantive evidence. In *Poppo v. AON Risk Services, Inc.*,<sup>10</sup> Southern District Judge Harold Baer permitted delayed production of audiotapes secretly recorded by an employment discrimination plaintiff, focusing not on the nature or purpose of the recordings, but on the danger that the defendants would alter their testimony to conform to the tapes. The court observed that "[s]ince biblical times the prospect of tailoring testimony and its ramifications has been understood and condemned." It went on to cite cases involving both surveillance tapes and tapes recorded prior to the inception of litigation for the proposition that courts in this circuit have addressed the threat of altering testimony by delaying production of recordings until after depositions. Significantly, the court also ordered that the deposition of the plaintiff need not take place until after the defendants had received and had an opportunity to review the tapes.

Judge Hellerstein's decision in *Perkins v. Memorial Sloan Kettering* is the most recent decision on this question and the first Southern District case since the New York Court of Appeals renounced the practice of delaying production until after depositions in *Tran*. The tapes at issue in *Perkins* were audio recordings made by the employment discrimination plaintiff of conversations she had with employees of the defendant.

Plaintiff acknowledged her obligation to produce the tapes, but sought to delay their production until after the depositions of the relevant witnesses. Judge Hellerstein recognized that courts are split on whether such delayed production is appropriate, noting that there is much to commend both views. Seeking to craft a solution that prevents a witness from delivering a contrived version of the events in conformance with the tape, while also neutralizing the tapeholder's advantage over those whose recollections are unaided by access to the recording, he directed that the tapes (along with any notes or transcripts relating to them) be placed in a jointly controlled safe deposit box until the completion of the relevant depositions. He concluded that this arrangement made the tapes equally unavailable to both sides, preventing each side from having an advantage over the other and protecting the integrity of the tapes in their current state.

The most thorough explication of the district court's broad authority to delay tape production until after depositions is actually found in a case from the District of Kansas. In that case, *Doebele v. Sprint Corp., et al.*,<sup>11</sup> the district court found that the Magistrate Judge had erroneously ruled that he lacked the authority to order delayed production of audiotapes that did not qualify for work-product protection. The district judge held that the authority to regulate the timing of disclosure was found in FedRCivP 26(c)(2), under which the court, "for good cause shown, ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including a requirement that discovery may be had only at a

specified time or only in a specified sequence. The court also relied on FedRCivP 26(d), which authorizes the court to enter an order governing the timing and sequence of discovery, noting that "[n]othing in Rules 26(c)(2) or 26(d) require[s] an initial showing of work product protection."

### Federal v. State Approaches

While the Court of Appeals decision in *Tran* resolves (however unsatisfactorily) the question of whether disclosure of tapes can be delayed, that decision, firmly grounded in the CPLR, should have no bearing on analysis of this question in the federal courts. Despite a lack of uniformity in the federal courts, they all appear to recognize that it is appropriate to delay the production of certain types of taped evidence until after the relevant depositions. This approach is preferable to the state practice mandated by *Tran*, inasmuch as it gives the fact-finder the benefit of untailed testimony, which is so meaningful in assessing credibility.



(1) *Tran v. New Rochelle Hospital Medical Center*, 99 NY2d 383, 786 NE2d 444 (2003).

(2) 2003 WL 1831246 (SDNY April 4, 2003).

(3) 80 NY2d 184, 604 NE2d 63 (1992).

(4) *Martin v. Long Island R.R. Co.*, 63 FRD 53 (SDNY 1974) (Weinfeld, J.).

(5) 110 FRD 160 (SDNY 1986).

(6) 1998 WL 229521 (SDNY May 7, 1998).

(7) See *Evan v. Estell*, 203 FRD 172 (M.D. Pa. 2001) (second deposition denied where defendant already had deposed plaintiff concerning her condition and defendant only notified plaintiff of surveillance video's existence following close of discovery).

(8) 1998 WL 183874 (SDNY April 15, 1998).

(9) 1998 WL 901735 (SDNY Dec. 28, 1998).

(10) 2000 WL 1800746 (SDNY Dec. 6, 2000).

(11) 2001 WL 392513 (D. Kan. April 10, 2001).

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