NEW JERSEY DEFENSE

A PUBLICATION BY THE NEW JERSEY DEFENSE ASSOCIATION / WINTER 2016-2017

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PRESIDENT'S LETTER
CELEBRATING 50 YEARS

I recently had the opportunity to read a book called "The Last Days of Night." A very intriguing title, if I must say. The book is a fascinating re-telling of the "current war" and race to the light bulb. The book chronicles the convergence of historical giants Thomas Edison, George Westinghouse and Nicola Tesla, and their legal battles over America's electronic grid. The book also outlines the legal arguments each side used to demonstrate why one version of the electronic current was better than the other. AC vs. DC. It does a great job of weaving (mostly) historical facts with drama. Perhaps my favorite part is the fact the story is told from the point of view of Westinghouse's defense attorney, Paul Cravath. Yes, the very same Paul Cravath who is credited with developing the business system used in most modern day law firms.

I know hindsight sight is 20/20, but the legal argument over the use AC vs DC seems so trivial now. If they only knew there was room for both. Many times as lawyers, I feel that we get caught in the "current war." My way or the highway, My side is better than your side, My client is right and yours is wrong, etc. What seems most important is that as attorneys we be able to understand both "currents." Understanding both AC and DC improves the entire system. Understanding both allows us to help our clients see the forest through the trees.

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As we head into 2017, we want to encourage you to get involved. Remember, our seminars come with a free year of membership to qualified applicants. So join us for an event and we will help you understand "The Current War."

CHAD M. MOORE, ESQ.

THE NEW JERSEY SUPREME COURT PROVIDES GUIDANCE TO THE COURTS IN DECIDING REMITTITUR MOTIONS

BY BRIAN J. CHABAREK, ESQ.

On September 19, 2016, the Supreme Court of New Jersey ruled that trial judges should not rely on personal knowledge of other verdicts or comparative verdict methodology when deciding a remittitur motion. Cuevas v. Wentworth Group, 226 N.J. 480 (2016). In fact, the Supreme Court asserted, "[h]ere, we must give guidance to courts on the standards that will govern review of a jury's award of emotional-distress damages in deciding a remittitur motion." Id. at 499.

In Cuevas, the plaintiffs, two brothers, filed an action against their former employer under the New Jersey Law Against Discrimination (LAD) alleging race discrimination, a hostile work environment and retaliatory firings. The case was tried before a jury, and damages were awarded in the amount of $2.5 million, including $800,000 in emotional distress damages to one brother and $600,000 in emotional distress damages to the other brother. The only issue before the Supreme Court was whether the trial court properly denied a remittitur motion. Both plaintiffs alleged that they routinely "faced biting remarks that invoked racially demeaning stereotypes" and that many of the remarks were directed at the Plaintiffs during senior executive meetings. The plaintiffs also alleged that "the offensive remarks were made by or in the presence of senior executives in the company, including the company's president, the executive vice-president, the human resources officer, and … in-house counsel." Id. at 490. Subsequent to informing in-house counsel, both plaintiffs were terminated by the company on separate dates for the stated reason of performance related issues. Plaintiffs did not offer expert testimony concerning their emotional distress claims, however the Court commented on the fact that "in a LAD case, a plaintiff is not required to provide expert testimony or independent corroborative evidence…to support [an] award of emotional distress damages." *citing* to Tarr v. Ciasulli, 181 N.J. 70 (2004). That is, "[b]ecause of the special harm caused by willful discrimination in the workplace, 'compensatory damages for emotional distress, including humiliation and indignity …, are remedies that require a far less stringent standard of proof than that required for a tort-based emotional distress cause of action."[1] Id. at 511.

The Cuevas decision expressly rejected the prior Supreme Court decision in He v. Miller, 207 N.J. 230 (2011), which had held that a trial court judge could rely on both his or her personal knowledge of verdicts as a practicing attorney and jurist as well as comparative verdicts presented by the parties when deciding a remittitur motion.

Justice Albin delivered the unanimous decision of the Court in Cuevas and had previously dissented in the Court's decision in He. Notably, Justice Albin set forth in the dissent in He that, "I dissent because the majority has transformed the shock-the-judicial-conscience standard—formerly an objective test to be applied de novo by this Court --- into a subjective test, allowing a trial judge to overthrow a jury's verdict based on the judge's personal experiences as a trial attorney." He, 207 N.J. at 261 (Albin, J. dissenting).

In Cuevas, the Court indicated that "… [in He], the Court expressed approval of a trial judge relying on his own experience with personal-injury verdicts as a litigator and judge in determining whether a pain-and-suffering

award returned by a jury shocked the judicial conscience. … Although that approach may have been suggested by prior case law, …, we now conclude that a trial judge's reliance on her personal experiences as a practicing attorney or jurist in deciding a remittitur motion is not a sound or workable approach." Cuevas, 226 N.J. at 503.

The Court in Cuevas went on to assert that, "[a] number of practical reasons caution against a trial judge injecting personal experiences of other verdicts into a remittitur analysis … The trial judge's personal experiences, as a litigator or on the bench, are not part of the record. Those experiences are not subject to testing through the adversarial process." Id. at 504. That is, the Court asserted that "[t]he grant or denial of a remittitur motion cannot depend on the happenstance of the personal experiences of the trial or appellate judges assigned to a particular case." Id. at 505.[2] The dissent in He also set forth that, "[w]hen a reviewing court considers whether a particular damages award shocks the judicial conscience, the test—however difficult to apply must be an objective one. The shock the conscience standard does not depend on the unique personal experiences of the particular judge who is presiding over the case." Id. at 267-268.

Additionally, "…the comparison of supposedly similar verdicts to assess whether a particular damages award is excessive is ultimately a futile exercise that should be abandoned. Rather, courts should focus their attention on the record of the case at issue in determining whether a damages award is so grossly excessive that it falls outside of the wide range of acceptable outcomes…what we have come to learn, perhaps too slowly, is that the facts and plaintiffs in every personal-injury or LAD case are fundamentally different and therefore a true comparative analysis is illusory." Id. at 506. The Court in Cuevas also asserted, "[w]e do not believe that having our trial courts review snippets of information about cases that are not truly compatible is a worthwhile use of judicial resources or likely to bring greater justice to either plaintiffs or defendants. We therefore disapprove of the comparative-case analysis in deciding remittitur motions." Id. at 509.[3]

Finally, the Court in Cuevas indicated that, "[a]lthough these awards are probably on the high end, like the trial court and the Appellate Division, we cannot say that they are so 'wide of the mark' so 'pervaded by a sense of wrongness' so 'manifestly unjust to sustain, that they shock the judicial conscience." Id. at 513. The Court in Cuevas set forth, "[i]n the end, a thorough analysis of the case itself; of the witnesses' testimony; of the nature, extent, and duration of the plaintiff's injuries; and of the impact of those injuries on the plaintiff's life will yield the best record on which to decide a remittitur motion." Id. at 510.

Thus, the Cuevas decision retained the standard for granting a remittitur motion, while removing from consideration the trial judge's personal experience as well as his/her review and comparison of other jury verdicts. The Court succinctly stated, "[t]he standard is not whether a damages award shocks the judge's personal conscience, but whether it shocks the judicial conscience." Id. at 486.

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[1] The Court did indicate, however, that in light of the fact that the Plaintiffs did not offer expert testimony concerning their emotional distress claims, that the trial court correctly did not charge the jury on emotional distress damages projected into the future. Id. at 512.

[2] The dissent in He also asserted that, "[t]he implication is that the grant or denial of a remittitur may depend on the sheer happenstance of whom a litigant draws as a trial or appellate judge." He, 207 N.J. at 268-69 (Albin, J. dissenting).

[3] Likewise, the dissenting opinion in He asserted, "…the majority defers to the judge's comparisons to other cases that were either not sufficiently similar to the present case or were inadequately detailed on the record to allow for a fair comparison." He, 207 N.J. at 261 (Albin, J, dissenting).

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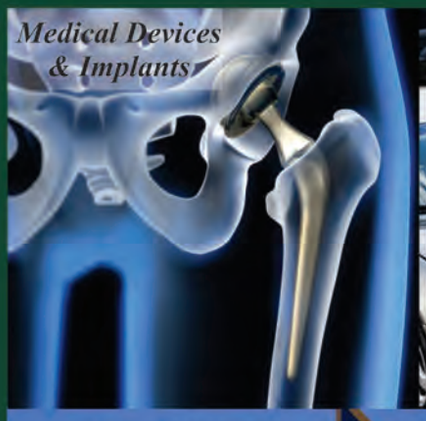

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USING VIDEO SURVEILLANCE OF PLAINTIFF'S: PITFALLS AND PRACTICE POINTS

BY: NATALIE S. WATSON, ESQ. AND RYAN RICHMAN, ESQ.

If a picture is worth a thousand words, then a video of a defendant skiing a black diamond mountain with his girlfriend on his shoulders is worth a million. Video surveillance can be the most effective evidence proffered by defense counsel at the time of trial. There are certain critical pitfalls and practice pointers to keep in mind as you collect and use surveillance.

WHEN TO HIRE AN INVESTIGATOR TO CONDUCT SURVEILLANCE

Obviously, not every case calls for the time and expense of having an investigator spend long (billable) hours stalking a plaintiff. To contain surveillance costs, see if the plaintiff has unknowingly been conducting surveillance for you by posting compromising videos or photographs on social media. Be sure to view only those materials that are publically available, using a secretary, paralegal, or other non-attorney to view the pages. Having someone else review for photographs will prevent you from becoming a witness in your own case. Through initial, free due diligence online, you may find a treasure trove of helpful materials.

If your case involves high exposure, consider retaining an investigator to conduct surveillance, videotaping when that investigator notes that the plaintiff is engaging in physical activity. We recommend having your investigator tail the plaintiff to and from IMEs and depositions, in addition to general day to day monitoring. In some instances, you will be able to get video of a plaintiff gingerly walking into an IME with a cane, only to go for a long shopping venture without any difficulty only an hour later.

WHEN TO DISCLOSE THE VIDEO SURVEILLANCE

Obviously, one of the most compelling aspects of video surveillance concerns the element of surprise. There has been a split, however, in the required timing of disclosures under Federal and state law in our jurisdiction.

Disclosure Under New Jersey Rules of Court

The New Jersey Court Rules require the defendant to reveal and produce any surveillance videotapes that would be used to rebut the plaintiff's claims for damages at any time before trial. As discussed below, we recommend making sure that any such productions are made no later than 20 days before the discovery end date.

Rule 4:10-2 (a) provides that parties "may obtain discovery of any matter, not privileged, which is relevant to the subject matter involved in the pending action" including electronically stored information or other tangible things and that it is not grounds for objection that "the examining party has knowledge of the matters as to what discovery is sought." Rule 4:18-1(a) provides that any party may serve on the other party a request to produce, inspect, or copy any designated documents, including sound recordings, photographs, and electronically stored information or any designated tangible things that contain information within the scope of Rule 4:10-2 and that are in the possession or control of the party receiving the request. Furthermore, Form C interrogatory No. 9 generally requires that a defendant reveal if any videotapes were made with respect to anything relevant to the subject matter of the complaint, and to provide copies or make the videotapes available for inspection or copying. These rules have been discussed by New Jersey State and Federal courts with respect to the discoverability and timing of production of surveillance tapes depicting the plaintiff both during and after the accident giving rise to the claim.

The first New Jersey case addressing the timing of disclosure with respect to video surveillance tapes of the plaintiff in a personal injury case is Jenkins v. Rainner, 69 N.J. 50 (1976). In Jenkins, the Supreme Court held that the defendant's surveillance tapes depicting plaintiff's physical activities were not rendered non-discoverable under the work-product doctrine, that the plaintiff demonstrated a substantial need for the surveillance tapes, and that defendant would be permitted to further depose the plaintiff as to her injuries prior to producing the tapes. Id. at 60. In that case, the plaintiff was injured when the bus she was a passenger in collided with the defendant's vehicle. Id. at 53. During the deposition of a private investigator who defendant had listed in its answers to interrogatories, the plaintiff discovered the existence of surveillance tapes depicting plaintiff engaging in physical activities and taken after the accident by the investigator. Ibid. The plaintiff filed a motion for the production of the tapes, which the trial court denied, and the issue was appealed to the New Jersey Supreme Court.

The Court first found that the surveillance tapes were not rendered non-discoverable under the work product doctrine. Id. at 55. The Court then explained that while the

tapes were "documents and tangible things . . . prepared by the adversary for trial," Rule 4:10-2(c) required the plaintiff to demonstrate a "substantial need" for the tapes. Id. at 56. The Court explained that "essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts." Ibid. The Court then reasoned that the plaintiff had an interest in ensuring that the camera was not being used as an "instrument of deception," and that the plaintiff should be entitled to challenge the authenticity and accuracy of the camera and videotapes. Id. at 57. The Court also noted that if the tape was "unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished." Id. at 57-58. Thus, the Court found that the plaintiff had demonstrated a "substantial need" for the videotapes and the defendant should be required to produce them. Id. at 158.

Lastly, the Court acknowledged the right of an adversary to interrogate the plaintiff after the videotapes had been created. Id. at 59. The Court noted that in Jenkins, the tapes were made after the plaintiff had already been deposed, and that the defendant should be entitled to re-interrogate the plaintiff about the specific activities filmed. Id. at 60. The Court indicated that "[a]s a general proposition, and always subject to the discretion of the trial court, any demand for surveillance motion pictures should be accompanied by a consent to be deposed after the movies have been taken and before the films must be presented for the adversary's examination." Ibid. The Court explained that such was the norm, and there would be instances that would compel deviation from this general rule. Ibid. As a result, the Court held that the defendant was required to produce the surveillance tapes after he was afforded an opportunity to further depose the plaintiff. Ibid.

Notably, in Dong v. Alape, 361 N.J. Super. 106 (App. Div. 2003), the Appellate Division held that the trial court erred in permitting the defendant to present at trial a surveillance tape of the plaintiff, which was not disclosed until the first day of trial. In Dong, the plaintiff suffered multiple injuries after he was involved in a car accident with the defendant. Id. at 124. Plaintiff's answers to interrogatories and medical reports asserted that he suffered significant injuries to his left knee, and that the plaintiff used crutches and subsequently a cane for the first year after the accident. Ibid. During his opening statement, the plaintiff's attorney described plaintiff's injuries and indicated that he walked with a limp. Id. at 125. At the afternoon session the same day, the defendant's attorney notified the plaintiff and the court that he was in possession of a videotape that showed plaintiff walking in public without any discernible limp. Ibid.

The trial judge initially ruled that the defendant would not be permitted to use the videotape during trial because it was not produced during discovery. Ibid. Then, after a renewed request to use the video by defense counsel, the trial judge permitted the parties to brief the issue. Ibid. During argument, the trial judge rejected the defendant's contention that the plaintiff had not requested the videotape through discovery, since the plaintiff had propounded Form C Uniform Interrogatories requesting any videotapes photographs or electronic recordings containing anything relevant to the claim. Id. at 126. The trial court also rejected the argument that the videotape was not relevant until plaintiff's opening statement when the limp was first alleged. Ibid. The judge then found that the plaintiff would not be prejudiced by the admission of the tape, since it was unclear what the plaintiff's counsel would have done differently if he knew the tape would be admitted. Ibid. On appeal, the Appellate Division reversed, noting that the plaintiff put on his entire case with the understanding that the tape was inadmissible, and had he known it would be permitted, he would have adjusted his presentation. Ibid. The Appellate Division also found that the trial judge's reversal of his own decision placed the plaintiff at a distinct disadvantage, and gave the jury the impression that the plaintiff was scrambling to engage in "damage control." Id. at 127. As a result, the court found that the tape should have been excluded at trial. Ibid.

A September 3, 2015, Appellate Division case shows that the New Jersey courts continue to apply Jenkins for the general rule that a defendant is not required to provide surveillance video until after a plaintiff's deposition. In Mernick v. McCutchen, No. A-3683-14 (App. Div. Sept. 3, 2015), the Appellate Division reversed a trial court order that required defendants to produce a surveillance video taken of plaintiff before her deposition was taken, based on Jenkins. Although it is important to note that Mernick is an unpublished case, it is useful for its language explaining the applicability of Jenkins.

The Mernick court noted that there have not been any New Jersey courts since Jenkins that have addressed this exact issue, but found "the reasoning in Jenkins unassailable" even though many years had passed, and noted that the approach taken by the Jenkins court in terms of serving the purposes of discovery while protecting work product has substantial support in federal court decisions. Mernick, supra, at *8. In a footnote, the court also acknowledged the federal case law treating discovery obligations differently depending on the intended use of the surveillance evidence:

> These courts frame the distinction as one between substantive evidence — used to prove a fact in issue — and impeachment evidence — offered to discredit a witness or reduce the effectiveness of his or her testimony. See Newsome v. Penske Truck Leasing Corp., 437 F. Supp. 2d 431, 434-35 (D. Md. 2006). If a court finds that a piece of evidence is substantive, it generally orders that the evidence be produced immediately. Babyage.com, Inc. v. Toys "R" Us, Inc., 458 F. Supp. 2d 263, 265-66 (E.D. Pa. 2006); Jerolimo v. Physicians for Women, P.C., 238 F.R.D. 354, 357 (D. Conn. 2006). But see Walls v. Int'l Paper Co., 192 F.R.D. 294, 299 (D. Kan. 2000). On the other hand, if a court finds that a piece of evidence is impeachment evidence, it

will delay ordering production of the evidence until after deposition. See Donovan v. AXA Equitable Life Ins. Co., 252 F.R.D. 82, 82-83 (D. Mass. 2008); Martino v. Baker, 179 F.R.D. 588, 590 (D. Colo. 1998); Ward v. CSX Transp., 161 F.R.D. 38, 40-41 (E.D.N.C. 1995); Corrigan v. Methodist Hosp., 158 F.R.D. 54, 59 (E.D. Pa. 1994).

[Id. at *10 n.1.]

The Mernick court then held that "[a]dditionally, the federal approach of delaying production of work product surveillance material until after the deposition of the subject of the surveillance is favored by leading commentators." Id. at *9 (citing Charles Alan Wright, Arthur R. Miller, & Richard Marcus, Federal Practice and Procedure, § 2015 at 307-08 (3d ed. 2010) (citing Edward H. Cooper, Work Product of the Rulesmakers, 53 Minn. L. Rev. 1269, 1318 (1969))). The Mernick court also addressed the rationale of such a rule, reasoning that "[i]n delaying production rather than denying production, the court preserves the impeachment value of the evidence yet allows all facts to be known to all parties before the trial. Ibid. (citing Donovan v. AXA Equitable Life Ins. Co., 252 F.R.D. 82, 82 (D. Mass. 2008)).[1]

While the Jenkins case involved a situation where a deposition had already been taken and the deposition had yet to be taken in Mernick, the Mernick court found "no facts in the record that distinguish this case from Jenkins and would thus present a principled reason for a deviation in the general rule announced in Jenkins." Id. at *12. The court acknowledged that ultimately the court has discretion to depart from the general rule, but found that there was no reason to depart from Jenkins in this situation. Ibid.

Another relevant case useful for any discovery dispute concerning disclosure of video evidence is Kiss v. Jacob, 268 N.J. Super. 235 (App. Div. 1993), rev'd on other grounds, Kiss v. Jacob, 138 N.J. 278 (1994). In this personal injury action, the trial court's admission of testimony of surveillance witnesses and photographs and videotapes depicting plaintiff was not unfair surprise, although plaintiff contended that defendant's answers to interrogatories were amended only to reflect existence of photographs, not videotapes, and that defendant was obligated to provide videotapes in discovery; plaintiff made no request for experts' reports or videotapes, and existence of "photographs" was disclosed to plaintiffs' attorney, but he made no request to see photographs or to obtain additional information as to subject matter of photographs, nor did he inquire regarding information witnesses possessed. The Appellate Division reasoned that the trial court's admission of testimony of surveillance witnesses and photographs and videotapes depicting plaintiff was not unfair surprise. Thus, the Kiss case confirms that New Jersey state courts liberally permit video surveillance.

In sum, the general consensus in New Jersey state court is that if the surveillance tapes are generated after the accident or incident giving rise to plaintiff's injuries and generally possessed for their potential impeachment value, it is permissible to withhold production of the tapes until after the plaintiff's deposition. Jenkins, supra, 69 N.J. at 60. However, the tapes must be produced before trial; otherwise there is a substantial risk that the tapes would be declared inadmissible, as in Dong, supra, 361 N.J. Super. at 127. Best practices suggest that any surveillance videos be disclosed in accordance with the time permitted by the Rules of Court, i.e., 20 days before the discovery end date. For surveillance videos taken after that period, remember to include a certification that the information was not available before the close of discovery.

DISCLOSURE UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Though New Jersey state court and most federal decisional law recognizes the important impeachment value of video surveillance and, in turn, permits the disclosure of such surveillance after plaintiff's deposition, our District Courts have adopted a different approach. For example, Magistrate Judge Ann Marie Donio of the United States District Court for the District of New Jersey denied the defendant's motion requesting permission to defer the production of a surveillance videotape of the plaintiff until after the plaintiff's deposition in Gardner v. Norfolk Southern Corp., 299 F.R.D. 434, 438 (D.N.J. Apr. 17, 2014). In Gardner, the plaintiff motorcycle riders filed a personal injury action against the defendant railroad company for injuries they sustained when their motorcycle drove over the defendant's deteriorated railroad crossing. Id. at 435. The plaintiffs served interrogatories on the defendant requesting, inter alia, information concerning photographic, videotape, or any type of surveillance of the plaintiff and requesting the production of same. Ibid. The defendant objected to the requests and objected to the production of any information concerning the existence of surveillance tapes. Ibid. Thereafter, the defendant filed a motion for a protective order pursuant to F.R.C.P. 26(c) to defer production of surveillance materials until after the plaintiffs' depositions. Ibid.

The defendant argued that the production of the surveillance tapes should be delayed until after the plaintiffs' depositions to preserve any impeachment value the tapes might have. Id. at 436. The plaintiffs argued that substantive value of the tapes outweighed any potential impeachment value and the defendant should not be permitted to unilaterally withhold the materials until after the deposition. Ibid. Judge Donio cited to cases on both sides, noting that some courts permitted defendants to wait until after a plaintiff's deposition to release the surveillance tapes when they only possess impeachment value whereas others required the production of the tapes despite the fact that they were only for impeachment purposes. Judge Donio also noted that other courts at times weighed the surveillance material's substantive value against the impeachment value to be derived from delaying its production, in order to determine when the surveillance material must be produced. Id. at 436-37.

The judge concluded that the defendant gave "short shrift to whether the requested materials are relevant for substantive value," and rejected the "staggered production of discoverable surveillance." Id. at 437. The judge further explained that "because the surveillance evidence directly relates to Plaintiffs' physical conditions, it constitutes evidence relevant to the subject matter of this action, and discoverable pursuant to the standards set forth in Federal Rule of Civil Procedure 26." Ibid. Judge Donio further noted that allowing the defendant to delay the production of relevant evidence in that instance would "nullify the discovery process" and that the defendant had failed to demonstrate sufficient circumstances to defer the production of the tapes. Id. at 438. Accordingly, Judge Donio denied the defendant's motion and ordered the defendant to produce the tapes in two weeks. Ibid. This approach has been adopted by a minority of other District Courts, including the Eastern District of Pennsylvania. See, e.g., Mcdevitt v. Verizon Servs. Corp., No. CV 14-4125, 2016 WL 1072903 at *3-4 (ED Pa Feb. 22, 2016), report and recommendation adopted, No. CV 14-4125, 2016 WL 1056702.

Thus, while not binding on New Jersey state courts, it is important to be cognizant of the decision in federal decisions including Gardner, supra, 299 F.R.D. at 438, given that there is no clear precedent from the Third Circuit on this point. This is especially important when a tape is in existence at the time the interrogatories are propounded upon the defendant.[2]

ADMISSIBILITY AT TRIAL

Under federal and state law, if relevant and properly authenticated, video surveillance typically is proper. See, e.g., Blumburg v. Dornbusch, 139 N.J. Super. 433 (App. Div. 1976). Authentication typically includes: (1) evidence concerning the circumstances surrounding the taking of the video surveillance; (2) the manner and circumstances surrounding the development or storage of the video surveillance (i.e., on actual film or on DVD, etc.); (3) evidence in regard to the version of the film as shown to the court (i.e., confirmation that no edits have been made); and (4) testimony by a person present at the time the film was taken that the pictures accurately depicted the events as he saw them and as they occurred. See, e.g., Balian v. General Motors, 121 N.J. Super. 118 (App. Div. 1973). Accordingly, it is critical to make sure that the investigator who actually conducted surveillance and filmed the plaintiff is available to appear at the time of trial to properly authenticate the video.

By way of practice pointer, it is important to make sure that your investigator is well-versed in and can testify to the following issues arising out of video surveillance using modern equipment:

- Confirmation that any and all video images were correctly preserved and stored on memory-cards or other memory storage devices (USBs, etc.) or completely transferred, in native form, from a server or recording device to such memory-cards or memory storage devices;
- That the investigator has implemented and follows a policy for evidence compilation and maintenance that incorporates digital (and/or, if appropriate, traditional) video surveillance; and
- That the investigator is able to provide the information concerning admissibility, as set forth above, to allow for the authentication of the video.

CONCLUSION

To successfully capture and use video surveillance, it is critically important to be aware of the key discrepancies between federal and state courts and to be comfortable with the evidential principles of authenticity and relevance. Following these basic tips should help guard against the kinds of foot-faults that would prevent you from using such important evidence at the time of trial.

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[1] The court also addressed the issue of what the requirement of accompanying a request for surveillance films with a consent to be deposed after the films are taken but before they are presented entails. The court found that "[t]he mere consent to a later deposition after the film has been viewed by the plaintiff would not allow the benefit recognized in Jenkins, that is, the impeachment value of the film," and that only requiring that consent be given before discovery is produced was insufficient. Id. at *11.

[2] It should be noted that if the surveillance tapes depict the actual accident or incident giving rise to the plaintiff's injuries, a defendant will be required to produce the tapes in response to the initial interrogatories or document requests and prior to the plaintiff's deposition because of the inherent substantive value of the tape. See Herrick v. Wilson, 429 N.J. Super. 402, 409 (Law Div. 2011).

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AVOIDING VERBOSITY IN LEGAL WRITING

BY NATALIE H. MANTELL AND AMANDA M. MUNSIE

Whether you are writing a brief, a research memorandum or a client report, what you write, and how you write it, communicates your ideas to your audience. Are your sentences wordy and rambling, or crisp and to the point? Judges have full dockets to manage and countless briefs to read. Your clients and your colleagues are managing a multitude of cases. Why make them read more than they must? This article offers a few quick tips to identify, and then correct, verbosity in legal writing: (1) avoid using phrases when you can write effectively with a single word; (2) use the active voice; (3) tell your reader the most important point at the beginning; (4) use clear and simple sentence structure to convey even complex ideas; and (5) leave time for editing.

ELIMINATE UNNECESSARY WORDS

To create tighter prose, eliminate every unnecessary word, and chose your words wisely. Review each sentence to determine whether it can be shorter and more direct. Some words signal that you can write more effectively using descriptive verbs. For example, "of" may indicate that you are using a noun when a stronger verb formis available, or that the possessive is appropriate. Consider revising "analysis of" to "analyze," or "substitution of" to "substitute." Also, "the opinion of the court" can simply be "the court's opinion."

In addition, think about whether you can substitute one word for three or four. Many phrases creep into writing when single words would be just as, or more, effective. Consider "here" instead of "in this case," or "in the present case," or "in the instant case." Can you use "now" or "presently" rather than "at the present time," or "if" instead of "in the event that"? Other common verbose phrases and recommended modifications include:

"During the course of" = "During";
"In order to" = "To";
"The fact that" = "That";
"A number of" = "Some" or "Many";
"In accordance with" = "Under" or "Pursuant to";
"Prior to" = "Before."

You can also avoid verbosity by revising negative sentences to include affirmative, active verbs. To spot negative writing, look for words like "not" or "no" and revise to the words they modify to the affirmative. For example, consider revising "the trial court did not consider appellate court precedent" to "the trial court ignored appellate court precedent" and "the plaintiff did not sustain her burden of proof" to "the plaintiff failed to sustain her burden of proof." The sentence makes the same point with fewer and/or more effective words.

USE THE ACTIVE VOICE

Using the active voice and avoiding the passive voice are common tips for strong writing. You may be familiar with these terms but unsure how to recognize passive voice or implement active voice. Here is a quick review. In the active voice, the subject is acting. In the passive voice, the object of the sentence is being acted upon by the subject. To quickly spot the passive voice, look for words like "was," "is," "are," "were," with a present participle (i.e., an "ing" verb form such as "being" or "writing") or a past participle (i.e., "has been" or "written"). "By," "on," and "upon" can also help you identify passive voice. If you see one of these words, consider flipping the sentence structure. Start the sentence with the actor then the verb, so the subject is acting, not being acted upon. Reading your sentence aloud can also help to identify the passive voice. Take these two sentences, for example: (1) the motion for summary judgment was denied by the trial court; and (2) the trial court denied the motion for summary judgment. The latter uses the active voice, which creates a clearer, more concise, and direct sentence.

The passive voice may be appropriate, however, and it may even help your argument. Sometimes, you may not be able to identify the actor, or you may want to de-emphasize the actor, or emphasize the action over the actor. For example, it may be more persuasive to write "the victim was shot in the leg" than "the defendant shot the victim in the leg." Unless you are purposely using the passive voice, however, write in the active voice to create clearer sentences.

DON'T BURY THE LEDE

Journalism's golden rule is just as important in legal writing: don't bury the lede. The lede, in journalism jargon, is the first few sentences of a news story. It entices the reader and includes the article's main points. An effective lede puts the most important thing first, in a way that hooks the reader.

In legal writing, start with the most compelling and important facts or arguments. Leave the less convincing arguments and non-essential details for later, or exclude them altogether. Sometimes, the most compelling argument involves a chronology. Other times, it does not. Whatever your strategy, pinpoint the key facts, players and issues. These principles apply throughout the entire written piece, not only at the beginning. Don't distract the reader with irrelevant facts or procedural history. For example, in appellate briefs, context is helpful, but an appellate court does not need or want all the facts, only those relevant to the appeal.

SIMPLE SENTENCE STRUCTURE

Short sentences with simple words can be direct, clear and strong. Basic sentence structure includes a subject, a verb and either an object, adjective or adverb. Tinkering too much with this structure creates complicated and unclear sentences. It could also trigger the passive voice. It may take numerous revisions to simplify your sentence. When rewriting, look for fresh, punchy words. Replace tired, long-winded legalese with plain English. Simple sentence structure also helps eliminate unnecessary words.

Your writing does not have to be simple, though, just because your sentences are. To add variety, use simple sentence structure to draft compound sentences (a sentence that contains at least two independent clauses), complex sentences (a sentence that contains a subordinate clause and an independent clause), or a combination of the two. A quick refresher: an independent clause is another name for a simple sentence. You can join independent clauses with a comma or a conjunction ("for," "but," "and"). A subordinate clause, or dependent clause, cannot stand alone as a complete sentence. It is dependent on the main clause to form a complete sentence. Consider this example: "because the parties agreed in writing" is a subordinate clause. To make it a complete sentence, add a main, or independent, clause: "The purchase price should be clear because the parties agreed in writing." It typically does not matter where the subordinating clause appears in your sentence, but if it is at the beginning, add a comma after it.

LEAVE TIME FOR EDITING!

It is often difficult to write clearly and concisely, without passive voice or complex sentences, in the first draft. The tips discussed in this article can help you write effectively and persuasively. Sometimes, though, it is easier to put your ideas on paper (or a computer screen) to get them into workable form. You can always edit, if you have time. During the editing phase, review your draft with an eye towards including important information at the beginning, eliminating unnecessary words, using the active voice, and drafting complex yet clear sentences with simple structure. Over time, incorporating these tips into your first draft will become second nature. Until then, make sure you leave time to edit to eliminate verbosity in your writing.

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O'TOOLE'S COUCH

As a youngster, I grew up with all the television cowboys who dominated the small screen. Who could forget "The Lone Ranger" and Tonto on Saturday afternoons, or Matt Dillon of "Gunsmoke" Saturday evenings? My Dad's favorite was Richard Boone starring as Palladin in "Have Gun Will Travel." Many of the small screen heroes eventually went on to movie stardom, such as Steve McQueen in "Wanted Dead or Alive." Let's not forget the weekday cowboys whom we imitated with our cowboy hats and toy guns. These included Roy Rogers, Dale Evans and Gene Autry. My absolute favorite was Hopalong Cassidy and his horse, Bond (which is always a 20-question stumper). Cisco Kid and his sidekick, Pancho, were my brother's favorites.

Okay, enough of the small-screen walk down memory lane. Westerns came into their hey-day on the large screen in the fifties and sixties. Growing up on Chapman Place in Irvington, we were only two blocks from the Sanford Theatre. Nearly every Friday night, our family would walk to the theatre and see the double feature, which also included a cartoon and news-reel. The ticket price was fifty cents and ten cents for popcorn. My first recollection of a western movie is "Shane" starring Alan Ladd. After that, I was hooked. I'm going to present to you my top-ten westerns of all time. I'm sure we'll have some differences of opinion, but not many. So, here is my list counting down from ten:

10. "The Outlaw Josey Wales." For all of you Clint Eastwood fans, in this movie Clint teams up with Chief Dan George. Clint is out to get revenge against the Union officer who slaughtered his Confederate Company who had surrendered after the war.

9. "The Wild Bunch." Director Sam Peckinpah outdid himself with violence in this movie. Our heroes, William Holden, Ernest Borgnine, Warren Oates, and Ben Johnson take on a small Mexican army to get back their friend, Angel. Things don't work out too well for Angel or for most of the Mexican army.

8. "Butch Cassidy and the Sundance Kid." Even you younger readers should remember this one. Paul Newman and Robert Redford team up for their most memorable performance. While placed in the western category, it could also be classified as a comedy. The interplay between Newman and Redford is classic, especially when they are forced to jump from a cliff into the raging river below. Sundance says, "I can't swim," to which Butch replies, "Don't worry the fall will kill you." Katherine Ross adds a nice touch as the love interest with this duo.

7. "Shane." No surprise that I would pick this as one of my top ten. Alan Ladd is the good guy gun slinger who must shoot it out with the bad guys who control the town and terrorize Van Heflin and his family,

WESTERN MOVIES

including child star Brandon De Wilde. The movie ends with Brandon screaming Shane's name into the mountains as Shane rides away. The echo closes the movie credits.

6. "Gunfight at the O.K. Corral." Burt Lancaster is Wyatt Earp and Kirk Douglas is Doc Holliday. The music score is delivered courtesy of Frankie Laine, the master of the western ballad. The actual gun battle is more exciting than the one depicted in "My Darling Clementine," starring Henry Fonda.

5. "The Searchers." John Wayne stars as Ethan Edwards who must find his niece who was captured. This John Ford production was filmed in Monument Valley, Utah, which is also the scene for many other Ford/Wayne westerns.

4. "True Grit." You guessed it, I am a big John Wayne fan and this was his only Oscar performance. It is revealing to see the big man in poor physical condition, but John handles it well, proving he deserved his Oscar. He is joined by Glen Campbell on his adventures through this film. (John Wayne's character, Rooster Cogburn, generates a sequel with Katherine Hepburn.)

3. "The Unforgiven." This brutally real western is directed by Clint Eastwood who also stars in the film with Morgan Freeman and Gene Hackman. The movie won awards for Best Picture, Best Director and Best Supporting Actor for Gene Hackman. The violence is compelling and you get the feeling that this is a truer depiction of what the early west was like.

2. "The Magnificent Seven." Okay, this has to be one of everyone's favorite westerns. I'll save you the time of trying to remember the cast: Yul Brynner, Steve McQueen, Charles Bronson, James Coburn, Robert Vaughn, Horst Buchholz and Brad Dexter. (Yes, I can recite these without the use of online checking). The director of this firm was John Sturges, and the music was by Elmer Bernstein.

(Drum Roll Please……..)
The number one pick is –

"High Noon." I don't think there can be much doubt about this number one choice. Gary Cooper and Grace Kelly are the stars with Cooper winning the Oscar for Best Actor. For western aficionados, Lee Van Cleef has a supporting role in this film, and no one can forget the fantastic score by Dimitri Tiomkin, sung by the master, Frankie Laine. As the movie ends, we are left with "Wait Alone, Wait Alone, Wait Alone."

Hopefully, this article generates some discussion among our western fans. In the meantime, there's bacon and beans on the chuck wagon.

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