

There Is No Battle Over Surreptitious Taping of IMEs

New York Law Journal (Online)

June 16, 2014 Monday

Copyright 2014 ALM Media Properties, LLC All Rights Reserved Further duplication without permission is prohibited

New York Law Journal

Length: 641 words

Byline: Timothy R. Capowski and Tiffany A. Miao

Body

On June 3, the Law Journal published a column, "[New Battleground: Secretly Recording IMEs](#)" by Robert D. Lang.

There is no battleground with respect to the law on surreptitiously videotaping IMEs. This office previously responded to both Law Journal articles cited by Lang that address this topic: "[Turning the Table: Cross-Examining IME Doctor Using Video of Exam](#)," by Ben Rubinowitz and Evan Torgan, (Oct. 28, 2013) and "[Law Does Not Support Videotaping IMEs](#)," by Alice Spitz (Nov. 20, 2013) in our letter, "[Videotaping Medical Exams](#)," published on Nov. 27, 2013.

What Rubinowitz and Torgan promote in their article and what Lang seems to indulge is the erroneous perception that this area of the law is unclear, and as such, there is no prohibition against surreptitiously videotaping an IME.

In fact, Spitz in her article properly observes that there can be no paucity of case law supporting or prohibiting such conduct where three out of the four Appellate Divisions, as well as several lower courts, have ruled that the videotaping of an IME was appropriately prohibited.

Spitz is correct; however, specifically in terms of surreptitious recordings of IMEs, the law is abundantly clear. No New York court has ever permitted the surreptitious recording of a CPLR 3121 examination.

The rule against stenographic, audio or video recording of CPLR 3121 physical examinations has been settled law for nearly 60 years in New York, and there are numerous decisions applying it. New York federal courts have likewise disfavored the recording of these examinations. In fact, where the law mandates that a plaintiff seeking permission to overtly record an IME must obtain prior court approval and satisfy the high standard of proving special and unusual circumstances, it cannot be seriously maintained that the surreptitious recording of an IME is then condoned.

As recognized in all of the many decisions, the policy behind the prohibition involves the court's concern about turning the examining room into a hearing room. Importantly, in any instance in which the court grants permission for a recording of a CPLR Article 31 discovery device; i.e., a deposition, there are clear procedural and operational safeguards in place. See, e.g., [22.NYCRR. §.202.15](#).

Consistent with this, in the only two instances found where the video recording of a CPLR 3121 examination was permitted (due to the plaintiffs incompetent state), the courts, recognizing the need for safeguards, explicitly outlined the relevant rules under [22.NYCRR 202.15](#) that would govern the recording. See [In re Campbell, 177 Misc.2d.59,62.\(Sup.Ct.1998\)](#); [Mossel v. Brookhaven Mem. Hosp., 134 Misc.2d.73, 77-78.\(Sup.Ct.1986\)](#).

Obviously, the surreptitious recording of an IME by either side inherently negates any such safeguards and instead turns the examining room into an amateur medical documentary and runs the further risk of becoming an extra day-in-the-life presentation from the plaintiff or a surveillance video from the defendant.

Policy underpinnings aside, there exists no debate and no battleground on this point. The suggestion that one exists is contrary to settled law.

In the interest of full disclosure, this office is appellate counsel to one of the main defendants in the case mentioned in the Rabinowitz article, *Bermejo v. Amsterdam & 76th Associates*, Index No. 23985/09 (Sup. Ct. Queens Cnty. [Hart, J.]), where an appeal related to this topic has been taken and awaits calendar for oral argument before the Appellate Division, Second Department. However, the specific issue discussed here, whether the surreptitious video recording of a CPLR 3121 physical examination of a plaintiff is permissible in the first instance, is not in dispute in *Bermejo*.

Timothy R. Capowski

Tiffany A. Miao

Capowski is a partner and Miao is an associate with Shaub Ahmuty Citrin & Spratt.

Classification

Language: ENGLISH

Publication-Type: Newspaper

Subject: WITNESSES (74%); DECISIONS & RULINGS (71%); DEPOSITIONS (70%); APPEALS (70%); APPELLATE DECISIONS (70%); LAW COURTS & TRIBUNALS (70%); TESTIMONY (70%); CROSS EXAMINATIONS (69%); APPROVALS (65%)

Industry: PERIODICAL PUBLISHING (71%)

Geographic: NEW YORK, USA (92%)

Load-Date: June 13, 2014

About Notes

About This Document

Source Information

[New York Law Journal](#)