

SURVEILLANCE: PHOTOGRAPHING MINORS IN LITIGATED MATTERS

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CONTENTS

THE LEGAL SUPPORT INVESTIGATIVE SERVICE

Introduction

Caveat

Background

Legal Research

Trial Preparation

Conclusion

References

INTRODUCTION

There are many aspects of privacy laws that govern our investigative industry. This article is intended to address only one: surveillance video / photographing minors in public, whether intentional or incidental.

Specializing in Civil Litigation and Family Law Litigation for the past twenty-five years as a licensed investigator, there have been a handful of times while under oath that I have been asked by opposing counsel, “Why did you illegally record my client’s child”?

If you are not prepared to answer this question, it could reflect poorly on your professional knowledge, competency, and possibly tarnish your investigation as well as your client’s case.

CAVEAT

First and foremost, I am not an attorney and cannot give legal advice. You should always consult with the attorney in your assigned investigation.

This article is written from my perspective as a veteran licensed investigator and trained paralegal. It is intended to consolidate and direct you to the necessary tools via case law, codified law, industry periodicals, etc. to determine where you may stand when photographing or video recording minors in public.

Again, you should always consult with the attorney in your assigned investigation.

BACKGROUND

A colleague recently called, stating that opposing counsel accused him of illegally taking a video of the opposing party’s child. My colleague asked, “Is there a law that prohibits this? I always assumed if a person was in public, there was no expectation of privacy”.

In the early 2000’s, I was testifying at a videotaped deposition in a Civil Litigation case where I was asked the same question as an investigator for the defense. A couple of years later, I was testifying in a Family Law, child endangerment / custody matter where the opposing party accused me of illegally recording their child, as well.

Again, if you are not prepared to answer this question, it could reflect poorly on your professional knowledge and competency.

INCIDENTAL - Photographing of Minors in Public

In a Civil Litigation personal injury scenario, the middle-aged plaintiff stated he was immobile without the assistance of a walker. Our extensive surveillance revealed his daily activity was vastly inconsistent with his claim of injury. His daily activity revealed riding and loading a bike in and out of his SUV, carrying large plastic storage boxes, refereeing sporting events, yard work, moving large trash bins to and from the street on trash day, etc. The “disabled” subject had two teenage minor children whom he was driving to high school as well.

Throughout the surveillance, I routinely documented all people and activity in front of the residence, which included the plaintiff’s teenage children. All video and photographs were full-body shots to include local surroundings, which is standard practice, with the exception of the initial zoomed-in facial shots for identification purposes at the beginning of the investigation.

During my videotaped deposition, the plaintiff’s attorney was going through routine questions: did you take this video, did you take that video, etc., then suddenly and aggressively asked, ***“WHAT GIVES YOU THE RIGHT TO ILLEGALLY PHOTOGRAPH MY CLIENT’S MINOR CHILDREN? THEY ARE NOT PARTIES IN THIS LAWSUIT!”***

I responded that, first and foremost, in California, there is no expectation of privacy when in open public view. Secondly, it is my policy to record all activity in public view in front of the subject’s residence. Ultimately, it’s up to the attorneys to determine the relevance of evidence.

Despite having two teenage children, the “disabled” plaintiff did all of the yardwork himself, moving large trash bins to and from the street, lifting storage containers, etc. The attorney quickly went back to his routine housekeeping questions.

INTENTIONAL - Photographing of Minors in Public

In the Family Law custody / child endangerment scenario, I was retained to document the activities of the father while exercising visitation with his 4-year-old child. The allegations were neglect, inattentive and possible substance abuse.

In one particular incident during the extensive investigation, I followed the father and his child to a local public beach. I chose a pier as my best vantage point to photograph and video record the subject with his child. Equipped with a digital camcorder and a DSLR camera with a 1000 mm lens, I was able to obtain very close, easily identifiable images of both, even though they were approximately 400 feet away from me.

There were several instances where the 4-year-old child was in the shoreline surf alone, while the father was approximately 125 feet away setting up the beach umbrella, cooler, towels, chairs, etc.

In the following two images, you can see the importance of documenting both the father near his beach setup, while the 4-year-old child was approximately 125 feet away in the water.



After the father rejoined his child in the water, I took a zoomed-out or wide-angle image to establish the distance and perspective between where the father was at the umbrella (green arrow) and the 4-year-old child was located in the water, indicated by the black arrow.



On cross-examination, opposing counsel was immediately aggressive with faux rage for “illegally” recording the respondent’s child. The attorney then went one step further, implying the surveillance on the public beach was illicit, nefarious, and abhorrent in nature.

The overdramatic display was intended to rattle me on the stand and for the judge's benefit, in an effort to get the photographic evidence and my testimony thrown out. After multiple sustained objections, the judge stepped in and allowed all evidence and testimony.

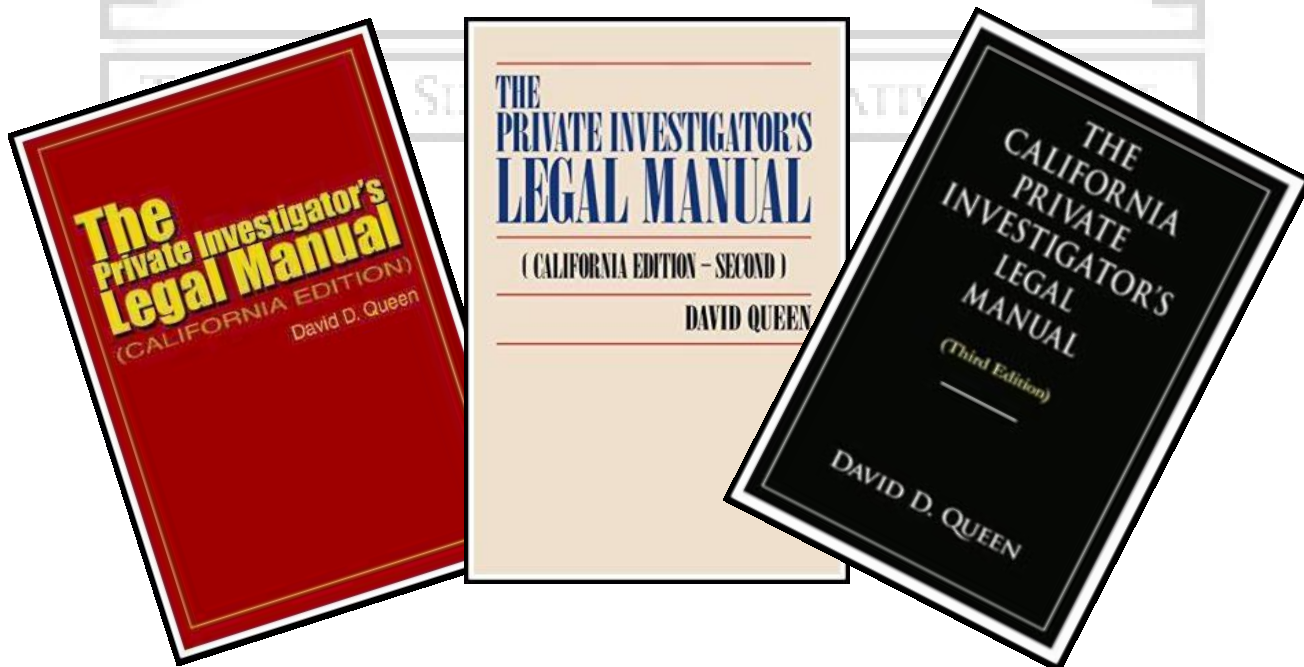
In both cases, the video evidence helped my clients prevail. Afterwards, while I appreciated the support from my attorneys, I was seeking something more tangible to stand on when testifying in the future, preferably codified law or case law to support my position.

LEGAL RESEARCH: Reasonable Expectation of Privacy

At the time of this writing, I can find no codified California laws or legal citations that afford or extend additional privacy protections to minors than adults, when in public and in public view of strangers. In my opinion, as a seasoned investigator, it would appear that minors in public view fall under the same Reasonable Expectation of Privacy parameters as an adult. With this in mind, there are multiple examples of case law and legal theories that address visual surveillance in public view and the Reasonable Expectation of Privacy.

Most of the case law or appellate law derives from criminal court appeals for violation of 4th amendment rights and civil torts for intrusive investigations. While conducting the legal research, it quickly became apparent that I had to distinguish traditional surveillance methods from modern digital tracking (GPS) and archived electronic data (cell tower records) since the separate issues often became muddled in the courts under the broad-brush of "surveillance".

My first reference is The Private Investigator's Legal Manual, California, 3rd Edition (2011), written by former United States Attorney, David Queen. Mr. Queen has 35 years of experience as a federal prosecutor, defense attorney, and licensed investigator.



Mr. Queen's books cover a vast range of topics, referencing codified laws, case laws, and legal theories that govern the California Licensed Investigator industry.

Mr. Queen created a 5 point guideline in determining if the surveillance is illegal. Located in chapter 9.10.1, entitled Visual Surveillance, page 151 states, "Generally, observing or photographing someone in a public place is perfectly legal, largely because the subject has no reasonable expectation of privacy. Nevertheless, either form of surveillance can be legal or illegal depending on a number of important factors."

The Private Investigator's Legal Manual: California Edition

The answers to the following questions determine whether the surveillance is illegal:

1. Where is the investigator located when conducting the surveillance?
2. Where is the subject located during the surveillance?
3. Does the subject have a reasonable expectation of privacy?
4. Does the equipment used to conduct the surveillance create an unreasonable intrusion?
5. What type of activity is being observed?

In both cases I referenced, I was legally located in a public place where anyone in public could observe the same actions from my viewpoint. Additionally, the minors in question were in public view for anyone to observe. There was no trespass, nor was there an expectation of privacy.

I was using magnified lens settings in both cases when the subjects were in public view, which is common and acceptable when following established law. The imagery taken did not intrude into a private setting, or where there may be an expectation of privacy. Optically Aided Surveillance was addressed by the courts in *People v. Arno* (1979).

People v. Arno (1979) 90 Cal. App. 3d 505, 508

OPINION

(1) the use of optical aids in the nature of binoculars, telescopes and the like is not itself determinative of the admissibility in evidence of the product of the observation

(2) the primary determinative factor is the presence or absence of a reasonable expectation of privacy of the person whose conduct, property, or documents is observed

(3) reasonable expectation of privacy in the context here involved is tested by the extent to which the person has exposed his conduct, property, or documents to public view by the naked eye;

(4) if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious vantage point without the optical aid, there is no unconstitutional intrusion

There are always common-sense exceptions to consider, especially when the court could view the recording as Offensive in Nature. Example: a claimant with an injured back at a public park, bending over to pick up their toddler, is a great opportunity to document questionable activity. Conversely, if the claimant in the same setting was changing the toddler's diaper or breastfeeding, you obviously do NOT want to keep the camera lenses zoomed in. In my humble opinion, you can still record that same public activity while zoomed out without as much clarity.

Much of the current privacy law evolved from the 1967 case of Katz v. United States, 389 U.S. 347 (1967), where the **Reasonable Expectation of Privacy Test** was adopted due to law enforcement violating 4th Amendment protected rights. The case originated out of law enforcement's warrantless use of an electronic listening device to wiretap an enclosed public phone booth.



The government argued Katz was in public; therefore, he had no expectation of privacy. The defense argued that when Katz went inside the phone booth and shut the door behind him, there was an expectation of privacy (audio) that he would not be overheard, even though he could be easily seen in public view.

While KATZ was centered on the unauthorized wiretapping of a public phone in a public setting, the case established the basic ground rules for the **Reasonable Expectation of Privacy Test**.

Katz v. United States, 389 U.S. 347 (1967)

In Katz, the **Reasonable Expectation of Privacy Test** had two requirements:

- (1) **Subjective expectation of privacy**: a certain individual's opinion that a certain location or situation is private which varies greatly from person to person
- (2) **Objective expectation of privacy**: legitimate and generally recognized by society and perhaps protected by law.

Thirty-two years later, case law more specific to video surveillance further defined the Reasonable Expectation of Privacy in public.

In *United States v. Bucci*, (2009), Bucci was convicted of trafficking drugs from his residence. On appeal, one of Bucci's arguments was that his 4th amendment rights were violated when law enforcement mounted a warrantless camera on a utility pole directly across the street from Bucci's residence.

The static camera had no remote capabilities to change view or magnification; however, it allowed law enforcement to monitor activity across the street in front and around Bucci's residence, as well as his driveway and in his garage when the garage door was open.

<u>United States v. Bucci, 582 F.3d 108 (1st Cir. 2009)</u>
<p>OPINION: <i>"Bucci has failed to establish either a subjective or an objective expectation of privacy in the front of his home, as viewed by the camera.</i></p> <p><i>We focus here only on the lack of a reasonable objective expectation of privacy because this failure is so clear.</i></p> <p><i>There are no fences, gates or shrubbery located in front of Bucci's residence that obstructs the view of the driveway or the garage from the street. Both are plainly visible.</i></p> <p><i>An individual does not have an expectation of privacy in items or places he exposes to the public."</i></p> <p><i>See Katz v. United States, 389 U.S. 347</i></p>

The 2009 Bucci opinion helped eliminate some of the grey area of conjecture for the private investigative industry by further defining the expectation of privacy in what a person exposes to the public view.

Further reinforcing the 2009 Bucci decision regarding expectation of privacy in public view is the 2020 case of *United States v. Moore-Bush*, No. 19-1582 (1st Cir. 2020). Moore-Bush was convicted of arms violations and narcotics trafficking from his home. The Moore-Bush appeal was nearly identical to Bucci, where law enforcement used a warrantless camera mounted on a pole across the street from the defendant's residence, for surveillance purposes.

The Moore-Bush defense argued their position of an illegal search/surveillance was consistent with the recent decision in *Carpenter v. United States* (2018), where law enforcement relied on access to confidential 3rd party (cell provider) historical digital cell records and cell tower triangulation for tracking the defendant's movements without a warrant.

The 2018 Carpenter court considered the warrantless access to confidential 3rd party records an illegal search and tracking of archived GPS movements as a “form of surveillance”, violating the defendant’s 4th Amendment rights. The 2020 Moore-Bush defense argued that the 2018 Carpenter decision made the 2009 Bucci decision no longer controlling precedent.

The 2020 Moore-Bush court distinguished traditional or conventional surveillance techniques in open public view, from a warrantless archived GPS records search, accessing confidential 3rd party historical data records. The 2020 Moore-Bush court relied on “stare decisis” (Latin: “Let the decision stand”) when referencing Bucci (2009) in their opinion that there is no reasonable expectation of privacy in public view.

United States v. Moore-Bush, No. 19-1582 (1st Cir. 2020)

OPINION:

The panel noted that the Carpenter Court had described its holding as “narrow” and inapplicable to “conventional” tools of surveillance.

*Prior to Carpenter, the First Circuit had held in **United States v. Bucci** that pole-camera surveillance was not a search because there was no reasonable expectation of privacy in a home’s exposed exterior.*

Aside from re-establishing Bucci (2009) as a case precedent specifically for “conventional surveillance” in public view, Moore-Bush (2020) recognized and distinguished that there are different forms of surveillance where the law applies differently, unlike the Carpenter (2018) opinion that collectively broad-brushed all forms of surveillance under one legal umbrella.

TRIAL PREPARATION

As investigators, we have one shot at the brass ring when testifying, so it’s important to articulate pertinent facts, aside from the actions of the subject of investigation, especially when a litigant’s minor(s) are photographed.

Address the issue with your attorney in advance and be prepared to answer potential questions as to why the minor was photographed.

Here is a checklist of questions and/or details to be prepared for:

1. In California, it is a legally accepted practice to photograph anyone in public view where there is no expectation of privacy. (Make sure your attorney has the cited case law)
2. Was the recording a minor incidental which couldn’t be avoided, or intentional?
3. If intentional, what was the specific relevance to your case?
4. Were you legally located in a public area, accessible to the public, where any stranger could see the same thing? (to refute a physical trespass accusation)

5. Was the subject and/or minor located in public with no expectation of privacy?6. Did you commit an optical intrusion with magnified lenses into a private setting where there may be an expectation of privacy? Or did the magnified lenses merely enhance what you could already see in public?

7. Have your own Surveillance Best Practices established. One example I mentioned is that I document everyone going to and from the subject's residence, which may or may not become relevant evidence at a later date and time.

8. Advise counsel of Business & Professions Code 7539 – case confidentiality. Confidential investigative results are not disclosed publicly and are only used at the attorney's discretion in support of litigation.

9. On cross, ALWAYS wait a couple of seconds before responding to give your attorney an opportunity to object. You can't un-ring a bell.

CONCLUSION

Again, I could find no California codified law or case law that extends additional protections or more restrictive privacy rights to minors. Therefore, when applying Reasonable Expectation of Privacy in public view, there is no distinguishable difference in the expectation of privacy for a minor as opposed to an adult.

In closing, if suddenly questioned why you “illegally” recorded the subject's minor child, assuming you were within the previously mentioned legal parameters, you have detailed resources and a better understanding to aid you in giving an informed response.

RA/ra

THE LEGAL SUPPORT INVESTIGATIVE SERVICE

ABOUT THE AUTHOR

Randall Alexander has been a Legal Investigator and California state-licensed investigator since 1999, specializing in Civil Litigation Support and Family Law Litigation. Randall served several years in multiple capacities with the California Association of Licensed Investigators, where he was specifically recognized for “Exceptional Service” to the association and its members.

In 2008, Randall was recognized as a Subject Matter Expert by the Bureau of Security and Investigative Services, a division of the California Department of Consumer Affairs. He has testified in civil and criminal matters in both state and federal courts, as well as in a state administrative hearing.

Randall earned his Associate of Arts in Paralegal Studies from the Southern California College of Business and Law, an American Bar Association-approved program where he completed coursework in: Advanced Legal Research, Torts & Personal Injury, Civil Litigation, Business Law Contracts, Criminal Law, Family Law Litigation, Legal Procedures, and Advanced Legal Writing. Additionally, Randall completed undergraduate coursework in Administration of Justice.

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Katz v. United States, 389 U.S. 347 (1967)

Established Reasonable Expectation of Privacy Test

United States v. Bucci, 582 F.3d 108 (1st Cir. 2009)

Established no expectation of privacy from public view in front of / around home

United States v. Moore-Bush, 36 F.4th 320 (1st Cir. 2020)

Supports Bucci, distinguished traditional surveillance from data searches

California Business & Professions Code 7539(a)

Investigator report confidentiality