

# The Hidden Camera Conundrum: A Media Lawyer's Perspective

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**D**ecisions about undercover reporting and hidden cameras were probably never easy. They're certainly not now.

Of course, these techniques present ethical issues and balancing dilemmas. Are we being fair? Will the act of going undercover or using hidden cameras distort the situation? Does the technique develop meaningful information or just sensationalize the story? Reporters and news directors have always had to navigate the turbulent waters of these ethical questions, and always will.

The legal issues, one might expect, would be more cut and dried. Either you can do it or you can't: *Section so-and-so of article such-and-such reads as follows, and here are the statutory limitations or qualifications. Don't cross this particular line in the sand.* You may disagree with the law, but legal certainties give you a level of comfort about what to expect.

But today we have few simple legal certainties in this area. Even when viewed solely from a legal standpoint, undercover reporting techniques raise many issues of balancing, judgment, discretion and prediction of the attitudes of judges, juries and public opinion. Once we get past a few simple channel markers, both journalists and their counsel enter a legal sea as choppy and uncharted as the ethical one.

Against this background, prepublication legal review in an undercover reporting situation can consist less of a traditional "legal clearance" (with the comforting certainty that term implies) than of a mutual Socratic dialogue.

Let's listen in on such a review, between cru-

sading reporter Sandra Woodstein and her station's outside media counsel, Dudley Kibosh.

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**Woodstein:** You know how corrupt the politicians are in this state. Well, the businesspeople are just as bad. I've got a great lead about a business firm, BadCo, that's breaking every environmental law in the book. I want to get a job with BadCo and secretly videotape the company's misdeeds. Can I do it?

**Kibosh:** Sandra, first I need to know if you've considered the ethical issues. Have you done your spadework and established a factual basis for this story and a need for this kind of investigation? Are you researching and producing the story fairly? Have you considered the privacy concerns of BadCo and its officers and employees? Have you tried to develop the information by traditional means?

**Woodstein:** You know my news director, Earnest Fairnews. He wouldn't let me call you if I hadn't already covered all of that ground—and covered it well. We've combed the courthouse and other public records, talked to sources and tried surveillance and other techniques. This looks like the only way left, and we've planned it so that we'll limit our undercover videotaping, and certainly what we use on the air, to acts of serious public importance, taken or approved by top executives.

**Kibosh:** Let's check, to begin with, that we're not



in a “two-party consent” state, where every party to a recorded conversation must consent to the taping. And we have to check out quirks of local laws (like restrictions or prohibitions on use of wireless microphones) and make sure we comply with the federal eavesdropping law, which prohibits recording for criminal or tortious purposes. Before you go any further, you have to clear those hurdles.

*Woodstein:* No problem there, Dudley. But when you bring up my purposes and ask if I am acting criminally or tortiously, aren't you missing the point? My purposes are pure: I'm exposing misconduct and working for truth and justice. What about my First Amendment protection? The laws about eavesdropping shouldn't apply to journalists.

*Kibosh:* Nice try, Sandra, but courts won't accept a First Amendment excuse for breaking eavesdropping laws or similar laws of general application, like trespass and fraud. About the best I can do is argue that where those laws are ambiguous, they shouldn't be stretched to cover your conduct. But a First Amendment immunity from those laws just won't fly, at least based on current precedents and today's legal atmosphere.

*Woodstein:* I can handle that, I suppose. How about hidden camera work? If I can audiotape conversations in a one-party consent state, I can certainly videotape without consent, too, right?

*Kibosh:* Here's where we begin to enter uncharted waters. It makes sense that if you can record audio without consent, you can record video without consent as well. But is it free from doubt? No. The problem is that we have moved from the certainty of anti-eavesdropping statutes to the fuzziness of common law privacy claims. Few statutes cover hidden photography, but even where there are none, the subjects who are videotaped could bring claims against you alleging intrusion or public disclosure of private facts.

*Woodstein:* Well, when those claims are brought, do the media win or lose?

*Kibosh:* I was afraid you'd ask that. I have to give you a lawyerly answer: it depends. In one landmark case, in which a reporter pretended to be a patient in need of medical treatment, the reporter's hidden photographs in the doctor's home office were judged to be an unjustifiable invasion of privacy. That's the famous case of *Dietemann v. Time* from 1971. But when hidden photography is done in a business office, and deception isn't used to enter, it is usually considered permissible.

*Woodstein:* Good. I'm safe if I do it in a business office.

*Kibosh:* Did I say you were *safe*? I wish there were a clear safe harbor in this sea of uncertainty. The trouble is, I don't know which way the wind is blowing—and I'm worried that it may be blowing in the wrong direction. You and I usually focus on privacy as an information matter: Is the information that you obtain and broadcast public or private? What someone says or does in the course of a business doesn't seem very private or personal, so recording it and reporting on it shouldn't logically give rise to a “public disclosure of private facts” claim. But some people, including some judges, look on privacy as a matter of personal autonomy. One judge who took this view (in a dissent, in *Sanders v. ABC* in the California Court of Appeal in 1997) asserted that even in a workplace, workers have an “autonomy right” to be free from photographic intrusion. What if the wind is blowing his way? Our law could evolve in the direction of “autonomy” privacy—maybe even beginning with the case of *Plaintiff v. Sandra Woodstein*.

*Woodstein:* Kibosh, I think I understand why media lawyers always talk about the “chilling effect.” I feel chilled just talking to you. But let's go back to the beginning of my undercover plan—it's okay for me to apply for and take a job with BadCo, isn't it?

*Kibosh:* That's been the general thinking, but things may be changing here too. In *Food Lion v. ABC*, an aggressive company won at trial in 1997 on creative fraud and employment tort theories by por-



traying the reporters' undercover jobs as deceptive. We don't know the long-term implications of *Food Lion*, but clearly, undercover jobs carry legal risk.

*Woodstein*: So I would be better off getting a current employee with whistleblower instincts to do the videotaping and recording.

*Kibosh*: Maybe. That's the general practice employed by British journalists, for example. But that technique often leads to its own problems, like suits against your employee ally for "breach of confidence"—the theory that he or she breached a basic duty of confidentiality or discretion implicit in the employment relationship.

*Woodstein*: Dudley, it sounds like every halfway-unusual news story leads to a lawsuit, and your side always loses. Don't you ever win? Aren't you supposed to protect us from these crazy theories?

*Kibosh*: Slow down, Sandra. Of course lawsuits are relatively rare—even, thankfully, over undercover reporting. Most prospective plaintiffs are deterred by all the hurdles they face—everything from our First Amendment defenses in libel and privacy cases to the practical consideration that the story is probably true and suing will only bring more attention to it. But that's kind of like saying that most other drivers on the highway drive safely. You still drive defensively, don't you?

*Woodstein*: Of course, and I want to practice defensive reporting, too—within reason. But how do I make choices in this "on the one hand, on the other hand" environment that you describe? It sounds like *nothing* is certain, and *everything* has risks!

*Kibosh*: It's a balancing act, isn't it? We look at what and whom you might be videotaping and balance the public interest in your reporting against the privacy (and other) interests that might be affected. If the situation is highly private—someone's medical treatment, for example—you tend to stay away from it. If the investigation is terribly important and the business is semipublic already (like unsafe conditions for children in day care) you feel more

free to do hidden videotaping. And just to keep it complicated, even taping in a public or semipublic area may be troublesome if it involves sensitive issues like medical treatment. Clear violations of law should be avoided, gray areas should be entered with care and forethought (if at all), and your conduct should be targeted wherever possible to traditional or proven paths. At every point, you are making pragmatic balancing judgments.

*Woodstein {Letting out a long sigh}*: What's the bottom line, Kibosh? Can I do it or not? You're the expert: You tell me.

*Kibosh*: Sandra, when it comes to the uncertainties of newsgathering law, and especially controversial techniques such as hidden cameras and undercover reporting, the legal experts can only take you so far. The people who matter are the judges and jurors who will decide your case. What will they think of what you did and why you did it? How broadly will they define the concept of personal privacy, and how precious will they hold that concept? Will they appreciate your objectives, your good faith and your attempts to obtain the information in other ways? All those things may ultimately matter more in your case than any simple rule that I give you now. And all those things are influenced by many intangibles, including the media's overall image in society and the overall impression that you and your story make.

*Woodstein*: Isn't this another way of bringing up what you asked me in the very beginning—whether we've thought through the investigation, whether we have solid grounds for conducting it, whether we have written and edited the story fairly and whether we were going undercover only because it was necessary?

*Kibosh*: Exactly. I can't guarantee you that doing everything fairly will mean you'll never be sued or face liability. But your story will ultimately be easier to explain and defend if you do two things: First, conduct a fair and well-thought-out investigation, one developed and carried out with sensitivity both to the importance of the story and to the privacy



concerns of others; and second, use techniques narrowly tailored to the needs of the situation.

Let's face it. Sandra and Dudley both have tough assignments. Innovative journalism of the type practiced by Sandra can be risky, but it is often socially beneficial and sometimes necessary. And in his legal practice, conducted in the anti-media backlash climate of the late 1990s, Dudley finds few easy answers or absolute defenses.

That's why prepublication review in undercover and hidden camera cases necessarily must be more than a search for simple answers. Journalists and lawyers need to engage in prepublication dialogues, sometimes even before the newsgathering begins, and they must focus on fairness as much as fine

legal points and on practicalities and public opinion more than journalistic convenience.

This focus on fairness and public sensitivities is necessary not only because these intangibles matter—and matter a lot—whenever any individual case goes to litigation. Each and every hidden camera news story will contribute to the public's evolving opinions. These attitudes, in turn, will influence the evolving breadth of journalistic freedoms as applied to the techniques of broadcast journalism.

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