

Video Recordings in Forensic Examinations

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Video recordings of defense-retained experts' examinations are commonplace. Examiners' challenges in these situations are twofold: comply with an examinee's right to have the examination event recorded; and, preserve the examination's integrity by prohibiting the video-recording process from overly contaminating the exam and making a production out of it. This article provides insight on the video-recording event from both examiner and lawyer perspectives. Practical recommendations for examiners are offered.

Scores of research studies have definitively concluded that behavior is affected by observation (e.g., Cohen, 1979; Constantinou, 2004; Gelso, 1974; Laughlin & Wong-McCarthy, 1975; Goldstein, 1988); nevertheless, video recordings are becoming a standard feature of forensic examinations conducted on the request of defense counsel. Practitioners who choose to perform evaluations in an environment inclusive of videographers, cameras, special lighting and backdrops, digital equipment of all sorts, and recording interruptions—not to mention lawyers acting as stage directors—need to understand and effectively adapt to the aberration from the sanctuary in which they were trained to conduct clinical assessments and the environment in which they perform their non-litigation work.

A lawyer who retains an expert on behalf of a plaintiff will rarely video record an examination. If plaintiff's counsel desires to create visual images of his or her client to cull a point intended to be shaped into evidence, this objective can be better accomplished through vehicles such as a day-in-the-life video (a video depiction of an individual's life post injury), where censorship and control are absolute. Almost always, the party ordering the video recording will be plaintiff's counsel, the lawyer adverse to the lawyer who retained the examiner and is commissioning the pending examination.

In effect, a video recording of an independent or compulsory evaluation has the semblance of surveillance a defense lawyer conducts. Both, in this author's opinion, are usually unwanted, invasive, harassing, and unlikely to benefit the party who neither requested the recording nor sought to be recorded. Further,

through editing, editorializing, and misplaced critique, the recordings threaten to undermine the truth.

Video-recording issues have been subjected to several Florida district court rulings. In *B&L Service, Inc. vs. Concepcion*, 646 So.2d 802 (Florida 4th District Court of Appeals, 1994) the court determined when an expert agrees to testify for remuneration, the claim of privacy is relinquished. Plaintiff's entitlement to have a videographer, court reporter, or any other "third-party examiner" present during an examination were rulings that emerged from *Grooms vs. Service Max Delivery*, 953 So.2d 624 (Florida 1st District Court of Appeals, 2007) and *Bacallo vs. Dauphin*, 963 So.2d 962 (Florida 3rd District Court of Appeals, 2007). In this latter case, the district court qualified its ruling by stating, "A third party's presence, particularly an attorney's presence, during a medical examination is premised upon a requirement that the third party will not interfere with the doctor's examination."

This article reviews video recording from both examiner and lawyer perspectives. Recommendations for examiners follow.

Perspectives on Video Recording

The Clinician's Perspective

Regardless of a clinician's relationship with the subject of a forensic evaluation—whether retained by counsel representing the client or opposing counsel—most practitioners view the clinical assessment environment sacrosanct.

Whether you are a forensic expert, carpenter, lawyer, truck driver, judge, or working in any one of the more than 12,000 occupations recognized in the *Dictionary of Occupational Titles* (U.S. Department of Labor, 1991), most practitioners would likely be far less than enthusiastic to begin their work day tomorrow morning with a camera trained at them by a party who would be delighted to prove them less than competent, attempt to intimidate them, distract and disrupt while they attempt to perform their job as they routinely do, and attempt to develop—if not fabricate—evidence to use against them during formal proceedings.

Some practitioners find video recording insulting, laden with innuendo that she or he is being implicated as conniving and meriting “being watched.” Novice examiners sometimes become intimidated by the video-recording process and can succumb to boorish tactics propounded by lawyers and videographers, who sometimes act as proxy representatives of their lawyer employers.

Based upon this author’s experience, in most cases, and especially when experts are generally respected and recognized as competent practitioners in their communities, video recordings of forensic exams do little to aid fact finding. Conversely, they denigrate the clinical relationship and assessment process. By its very nature, a camera and camera operator interject a Hollywood ambiance, compounded when a lawyer is onsite, acting as a stage director. The examination environment can quickly devolve to a staged production, devoid of valid evaluation indices.

The Lawyer’s Perspective

In my experience, lawyers generally perceive little potential to advance their case’s theories from an opposing expert’s examination. Conversely, from a plaintiff lawyer’s perspective, a defense expert examination threatens to develop evidence that undermines his or her theories. Quashing this evidence and/or, if possible, capitalizing on the examination event become challenges that inspire creativity and resourcefulness among plaintiff lawyers who would prefer that the examination not occur.

In this author’s opinion, there are several reasons lawyers make video recordings of examinations, including:

- To make a record of the event in case a question or dispute about what transpired occurs. This seemingly benign, noble motive, which is the superficial pretense lawyers typically present to the court and to juries, can be a ruse for other motives.
- To ensure that an examination has been properly conducted. For example, if standardized testing is administered, ensuring instructions were prop-

erly provided and time limits were correctly implemented.

- To intimidate an expert and disrupt an examination’s rhythm. A camera’s presence and the implication that an examiner cannot be trusted to conduct a fair, competent examination without external validation and safeguards can be daunting and is foreign to most practitioners, especially those who have proven themselves accomplished in their specialties and honor codes of ethics.
- To control an expert, possibly causing examination errors. Video recording—including its contextual, logistical, and technical elements—is unnatural to clinical practice, and the aberration introduces opportunities to force an examiner misstep that a lawyer can later exploit.
- To develop evidence to be blended with other evidence, intended to punctuate a plaintiff lawyer’s theory. In a case involving a questionable mild head injury, for instance, a lawyer ordered videotaping of a lengthy neuropsychological examination in an attempt to develop visual evidence of a plaintiff becoming unusually tired as the exam progressed. The overarching aim was to juxtapose this image with assertions that the plaintiff acquired fatigue-related problems via a closed-head injury.
- To review and critique by an opposing expert, hired by the plaintiff lawyer. Technical criticisms—whether or not valid—about methods of inquiry, assessment methodologies, and interpretations of examination data can serve as grist for cross-examination.
- To show to focus groups and mock trial participants. This allows a lawyer to gauge an opposing expert’s effectiveness.
- To show to future examinees the lawyer on the side opposing the examiner represents. The video recording can serve as a tool to prepare and rehearse future examinees for examinations you conduct.

Of course, there are potential perils a lawyer who commissions a video recording can encounter. An examinee’s crass comments and behavior that does not reflect well, for example, can contribute to creating unintended, harmful evidence. In my experience, plaintiff lawyers often can successfully claim a video recording as work product, thereby exempting it from discovery by opposing counsel.

Recommendations for Examiners

Regardless of audacious lawyer behavior or unexpected chicanery that may be on the periphery of a video-recorded examination, above all, experts should maintain poise and professionalism. They should not lose focus of what they are attempting to accomplish—a thorough, objective evaluation.

Maintaining focus and aplomb can be challenging when lawyers are testing experts' mettle and goading them while they attempt to perform their job. Remember: behind-the-scenes chiding will likely not be privy to those who view the video recording; however, what will be broadcast are recorded verbal and nonverbal messages experts communicate.

Viewers of the exam likely will not have insight into how one may have been prodded and provoked before and during their exam; how they react on a video recording, on the other hand, will be preserved for others to see, and for opposing lawyers to extort and use to discredit the expert and his or her opinions. Anything less than a professional presentation detracts from experts. Developing a formal position statement that articulates one's views on video recording helps to communicate policies and rationale, and to fortify the legitimacy of the parameters one sets on video recording. The Appendix presents an example of a practitioner's position on video recordings of exams.

A position statement is most effective when sent in advance to counsel planning to record an exam. In the absence of an objection to the examiner's position voiced before an exam and/or a court order altering the parameters of what a position statement specifies, an examiner can more strongly assert a basis for proceeding with the exam as he or she customarily does, without deviating from standard procedures, when last minute objections arise.

When unforeseen conflicts arise and become contentious or seemingly irreconcilable, experts should seek guidance from lawyers who retained them to perform the exam. As much as possible, experts should stay out of the fray after explaining the basis for their positions; allow the opposing lawyers to argue the merits of what the expert proposes and to negotiate a resolution. Of course, the expert sometimes may need to yield and make reasonable compromises. Occasionally, when opposing lawyers cannot resolve a dispute about how an examination is to be recorded, a hearing before the court becomes necessary. Regardless of how a dispute about video recording is resolved, it is imperative that examiners accept an agreed resolution with dignity and move on unfettered when conducting the examination.

Preempting and circumventing problems that arise once a video-recorded exam has commenced is not always possible. Agreements can go awry and unforeseen complications invariably arise, causing examiners to make on-the-spot decisions on (among other things) how to preserve the integrity of an examination, remain reasonable, and not irritate the court by setting limits on recording procedures that could be perceived as trite. Too often, complications related to video-recording issues occur during practitioners' hurried schedule inclusive of commitments beyond the pending litigation assignment.

Complications arising from the video-recording process—especially those emanating from calculated, lawyer-engineered stunts and coordinated in the midst of an examiner's daily routine—can force an examiner to make a less-than-fully-thought-out decision on how to reconcile a pending video recording dilemma. A jury viewing a snippet of a clinical interview, for example, is likely to look askance at a seemingly peeved examiner who (especially with lawyer suggestion) appears to be interrogating a suspect rather than benevolently attempting to elicit information from a victimized individual. What the jury likely will not have the benefit of considering in this example is the thunderstorm of provocation that precipitated the examiner's uncharacteristic demeanor. Whether or not the examiner's demeanor is justified is immaterial absent this information, which, to be sure, the opposing lawyer will craftily work to keep from a jury's purview. Again, a formal position statement serves as a touchstone when lawyers and their proxies test and/or violate an examiner's limits.

Comprehensive, objectively stated documentation of what occurred is a powerful armament to provide perspective on events—both on and off camera—that transpire during the course of an examination. This documentation can also prove valuable when a video recording is not broadcast and the examiner is charged with providing contextual information about the examination environment. Also, of course, video recording viewers do not have full knowledge of what went on during an examination unless it is recorded elsewhere.

The following excerpt from an examiner's report provides an example of information documented to describe an attorney's involvement during a recorded examination.

Mr. Lawyer, counsel representing Mr. Examinee, was present during my exam; as he requested, a videographer video recorded it. By medical transport service, the examinee, Mr. Examinee, lying in a gurney, arrived at my office; two aides wheeled him.

Before my exam and at the beginning of it, I presented my position statement on video recording to Mr. Lawyer; he indicated he did not plan to comply, and he instructed the videographer to be in the exam room at all times, panning the camera from me to Mr. Examinee.

Although Mr. Lawyer was made aware of my position on video recording before my exam, he made no announcement of his intent not to comply until I was about to begin my exam. Initially, he rearranged my office furniture and positioned the videographer to sit directly to my left, between 4 and 5 feet away from me. Again, Mr. Lawyer noted the videographer would remain there during my full clinical interview, panning the room. I expressed that this arrangement was unacceptable to

me, and Mr. Lawyer told me that he did not intend to yield. Accordingly, I sought input from defense counsel, who requested my exam. The staging arrangements Mr. Lawyer imposed and locating the defense lawyer delayed the start of my exam.

Eventually, I located the defense lawyer, and he participated in a conference call with Mr. Lawyer and me. In the spirit of cooperation, I agreed to proceed with my exam with the videographer positioned behind me, knowing that he was panning the room as Mr. Lawyer directed.

Once my exam started, the videographer sat behind me, panning the camera while I interviewed Mr. Examinee, who lay in a large gurney in front of my desk. Mr. Lawyer sat directly in front of me, seated behind Mr. Examinee. Mr. Lawyer was using a laptop computer and had several documents spread out on a desk in front of him.

Mr. Lawyer and the videographer were also present during the testing portion of my exam. Because they insisted on being present, which deviates from standardized protocol, Dr. France from my office was also present during the testing. Appendix X includes several photos showing the examination environment; Mr. Lawyer refused to be included in any photograph.

The examiner included the following statement in the concluding comments of her report:

Many irregularities were associated with my exam of Mr. Examinee. It is interesting to note that I was initially scheduled to examine him in his home, and his lawyer requested the venue be changed to my office, 40 miles away. While he came to my office lying in a gurney, accompanied by two aides, Mr. Examinee informed me his last visit to a doctor's office, also in September 2009, was in a wheelchair. Mr. Examinee did not request any accommodations before presenting at my office for my exam. There was a manipulative quality associated with Mr. Lawyer's behavior, and the amount and nature of his involvement in my exam was highly unusual. Clearly, the recording was a staged, lawyer-engineered production event rather than an effort to obtain information communicated during the exam. I believe Mr. Lawyer violated Judge King's order in which plaintiffs counsel was instructed to avoid being a distraction and not interfere with the examination process. In addition to Mr. Examinee, five others were present at various times during his exam: Mr. Lawyer, two aides, Mr. Examinee's mother, and the videographer Mr. Lawyer hired. Interestingly, the videographer also recorded nonexamination events including Mr. Examinee being loaded into a medical transport vehicle in my parking lot. Obviously, Mr. Lawyer's production-director role in my exam was apparent to his client and likely affected his participation in it.

While documenting in writing noteworthy events associated with video recording is always recommended, photographs related to the video recording can also prove invaluable in memorializing information the examiner may wish to communicate. Figure 1 presents a photograph an examiner took to document the video-recording environment in which an examination was conducted; the photograph was included as an appendix to the examiner's report, along with detailed elaboration about video-recording events.

"A picture is worth a thousand words" may be apropos when attempting to describe what closely resembles a Hollywood production set, out of synch with a clinical setting. The image of specially placed lights, multiple microphones, video monitors, electrical cords and digital equipment strewn about, and a videographer wearing headphones and operating a high-tech control panel in view of the subject of an examination, for example, does much to dispel the notion that an examination was unobtrusively recorded by a discretely placed camera. This is especially the case when the photograph is supplemented by detailed information that opposing lawyers would rather obviate.

Below is an excerpt from an examiner's report in which an opposing attorney's examination behavior is noted. In addition to documenting the lawyer's overboard involvement as a producer of a staged event, the examiner also documents offensive lawyer comments and behavior. The integration of these observations serves to help readers appreciate the degree of lawyer interference, coaching, and agenda—all which denigrated the examination and unfairly handicapped the examiner.

Before my exam, Mr. Client's lawyer, Mr. Attorney, requested that the exam be conducted over 2 days rather than 1 day. Further, the lawyer arranged for my exam to be videotaped and also recorded by a court reporter. Mr. Attorney was present during my exam, seated next to his client. Mr. Attorney objected to several questions I asked. At one point, he counseled me to be courteous to his client and allow him an opportunity to complete his responses. Mr. Attorney raised his voice to me several times; interestingly, he instructed the videographer not to microphone him.

Mr. Attorney announced at the beginning of my exam that the exam was court-ordered and that his client did not consent to participate in it. Mr. Attorney interfered with my exam on multiple occasions by, among other things, posing legal objections including "mischaracterizing his testimony, . . . asked and answered, . . . repetitious, . . . calling for speculation, . . . [and] compound question," throughout my 2-day exam.

Further, Mr. Attorney was quite active in directing the videographer during my exam. While sitting next to Mr. Client, he motioned to the videographer

about camera angles he desired. During the testing portion of the exam, Mr. Attorney arose from his seat and inspected the lens image while providing further direction to the videographer.

While testing was in progress, on July 24, 2008 (10:12 a.m.), Mr. Attorney announced, "Let the record reflect the witness is standing up at this time." Mr. Attorney made several commentaries of this type while testing was in progress. Photos of video-recording equipment set-up progress and Mr. Client exhibited pain behavior. For example, while Mr. Client was taking the MMPI-2 and began repositioning, Mr. Attorney intervened and said to his client, "Why did you stop?" Mr. Client referenced head pain and complained the questions were repetitive. Mr. Attorney interrupted the testing multiple times, mostly to inquire about communications the Spanish/English translator had with Mr. Client. Mr. Attorney was quite overt in making notes of Mr. Client's occurrences of pain behavior, along with referencing his mobile phone to record the corresponding time; this was all evident to his client.

Examining Mr. Client was challenging for many reasons. He often gave long, tangential responses

to my questions. Often, when I attempted to intervene, redirect him to my question, or summarize his statement for sake of clarification, Mr. Attorney objected aggressively and vociferously, posing objections such as "mischaracterization." These factors contributed to elongating the interview, diminishing my ability to establish rapport with Mr. Client, and making the examination environment quite tense. Obviously, Mr. Client was quite aware of the videotaping, which had a staged, production-like quality due to Mr. Attorney's direction and examination behavior.

In the conclusion of his report, the examiner wrote the following:

I would be remiss not to comment on Mr. Attorney's presence, interference, intimidating manner, aggressive behavior, and involvement in my exam—all of which denigrated the quality of information I was able to obtain. To say the least, his behavior was unusual and circumspect. The examination environment—including Mr. Attorney's hostile behavior toward me, interactions with Mr. Client, scathing commentaries during my clinical interview, interrupting during administration of in-progress standardized testing, and interference with standard

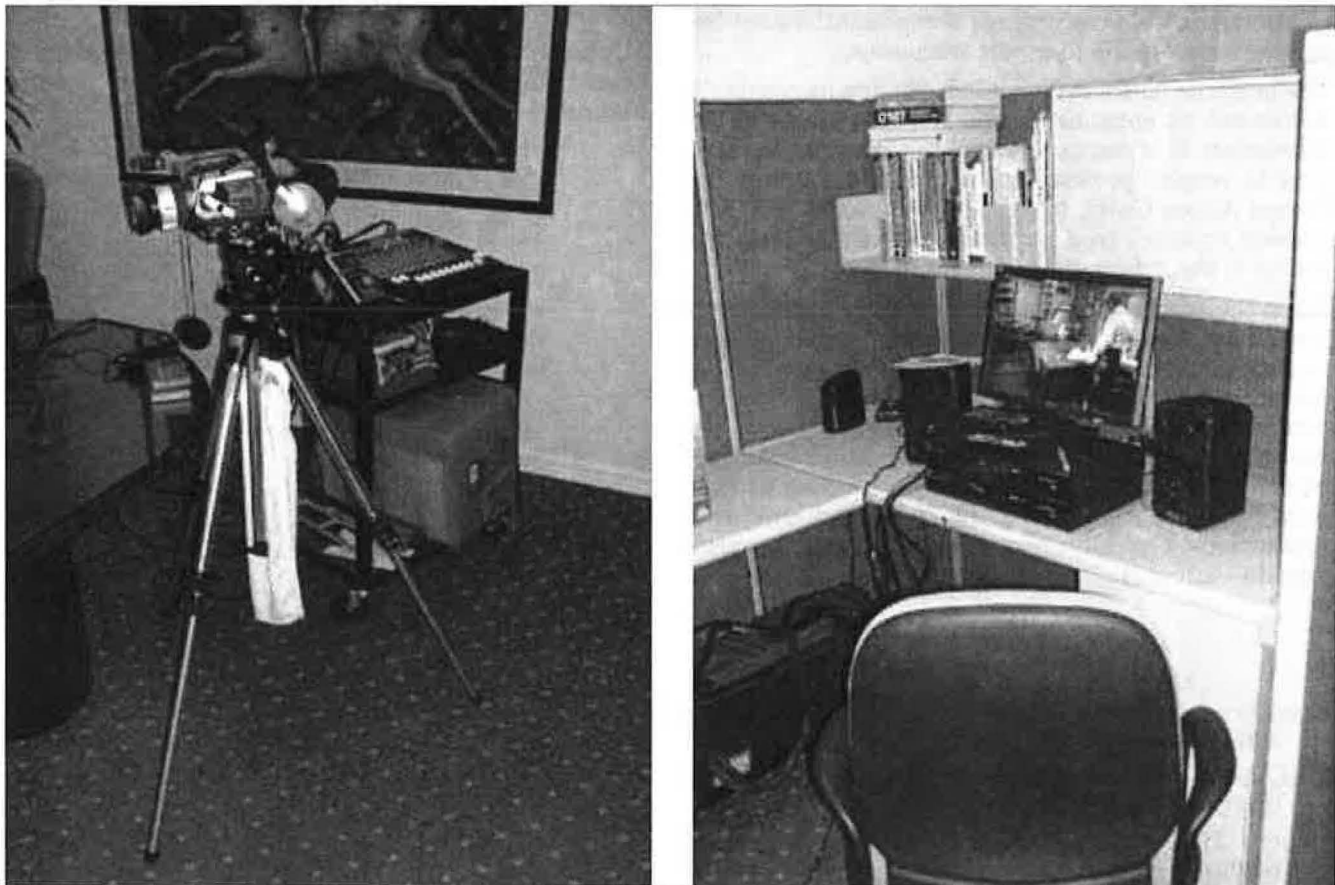


Figure 1. Photos of video-recording equipment set-up

examination procedures was beyond what I have experienced in approximately 25 years of work as an expert witness. Mr. Attorney's boorish behavior and interventions not only interfered with my examination protocol, it also prohibited me from completing my examination and testing in progress. It is important to note that Mr. Client's off-camera demeanor was more relaxed and congenial than his on-camera demeanor. Undoubtedly, his attorney's presence and involvement in my exam and the videotaping influenced Mr. Client's behavior. Within a reasonable degree of vocational rehabilitation probability, Mr. Attorney's behavior during my exam marginalized the validity of information I obtained.

Conclusion

We practice in an era in which the media is rife with legal drama programming of all types, from bestselling fiction novels to court television programming. The synthesis of ever-advancing technologies, media-generated awareness of the legal system (real, sensationalized, and fictional) and the fusion of lawyers' greed and lust for "winning" (Shahnasarian, in press) has fueled lawyers' initiatives to invade the once off-limits province of a practitioner/client clinical relationship. Video recordings of examinations are becoming a way of life to expert witnesses.

The presentation of evidence is becoming increasingly influenced by nonsubstantive, lawyer-engineered intervention. It is not uncommon, for example, for lawyers to employ professional actors, members of the Screen Actors Guild, to read depositions at trial and present evidence to a jury more effectively than the source of the information ever could.

Video recordings of examinations are but one of many modalities lawyers use to advance their theories on a case and, correspondingly, fend off opposition. The examiner's challenge when confronted with a video-recorded examination is twofold: comply with an examinee's right to have the examination event recorded, while prohibiting the video-recording process from overly contaminating the exam and making a production—typically one inspired by a lawyer's agenda—out of it.

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Biography

Michael Shahnasarian, Ph.D., is the president of Career Consultants of America, Inc., in Tampa, Florida.

Appendix

Sample position statement on video recording examinations

I have been performing rehabilitation examinations for cases in litigation for approximately 20 years, and I respect the right of the subject of the examination to have the examination recorded. Additionally, I do not object to the presence of others, besides the examinee during my examination, provided the individuals do not interfere with the examination process and conduct themselves professionally. This includes not participating in the examination, remaining out of eyesight of the examinee while the examination is in progress, minimizing equipment-related interruptions, not interfering with the operations of my practice outside the examination room, respecting the privacy of other patients and individuals in my office, remaining in designated areas within my office when not in the examination room, and interacting with my staff professionally and courteously. Further, I request that any third party present abide by the 2007 Florida 3rd District Court ruling, which states, "A third party's presence, particularly an attorney's presence, during a medical exam is premised upon a requirement that the third party will not interfere with the doctor's examination (*Bacallo vs. Dauphin*, 963 So.2d 962)."

The examinations I conduct do not involve a physical examination. Information is gathered through a clinical interview and various forms and tests the examinee completes. The examinee is welcome to take breaks as needed, and my staff and I make every attempt to accommodate an examinee's requests.

If a videographer will be at an examination I conduct, I require 48 hours advance notice. My office space is limited, and my staff will need to ensure an appropriate examination room and additional space is available to accommodate the extra individuals in attendance. Also, I request that the videographer arrive at my office before the examination to set up equipment, so as not to delay the examination schedule.

I will make every attempt to accommodate those who are in my office to record an examination. This includes cooperating with videographers to make tape changes and to configure the examination room as requested to facilitate recording quality. Especially close coordination is necessary during portions of my

examination that involve the administration of timed tests; those recording the examination are not permitted to interrupt the process to change tapes or for any other reason. I request that only certified videographers perform the videotaping.

I prefer that the camera used to videotape my examination be unattended. Further, during portions of my examination when my staff or I are not present with the examinee (e.g., during standardized testing), I require that outside parties, likewise, remain out of the examination room. Of course, the unattended camera can continue running.

If an exam I conduct is videotaped, the videographer does not have the right to include me or my staff in the videotaping picture without obtaining prior consent. Of course, audio recording via the videotaping is permissible, and my staff will cooperate with wearing microphones and/or using other audio-recording equipment. The videotaping, however, is to be of the subject of the exam only, similar to the type of recording made when a deposition is videotaped. My rationale for this policy includes the following:

1. My staff and I have a right to privacy. We will fully cooperate with recording efforts that provide an avenue to verify that information I report comports with actual information and events that occurred during my exam—namely, by allowing all audiotaping and videotaping of the examinee.
2. The psychological literature is rife with empirical studies and analyses of how any outside observation affects an event (e.g., Hawthorne Effect, Yerkes-Dodson Law). A camera aimed at a nonconsenting professional attempting to perform his or her job, in particular, adds unnecessary stress, compromises the individual's ability to perform her or his job, and is a violation of privacy.

ABC Consultants, founded in 1986, is a respected practice that takes pride in its tradition of professionalism and courteous service to patients and others. We request that outside guests comply with the guidelines set forth in this policy statement so as to ensure the recording of an examination will respect the rights of all involved and maintain the integrity of my examination as much as possible.