

# Keeping watch

With the number of fraudulent insurance claims rising, law firms will increasingly find themselves working with surveillance and investigation firms. **David Halstead** warns practitioners of the dangers of not ensuring that investigators use ethical methods

**THE DEMAND FOR** surveillance and investigations specialists to provide vital evidence during the legal process to tackle insurance fraud has never been greater. We are witnessing a rise in incidents of fraudulent claims in direct correlation with worsening economic conditions, encompassing opportunistic claims (including household, motor and personal injury); organisational fraud (from employer liability, sickness and absenteeism through to redundancy claims and threats to corporate data and intellectual property); and organised crime (particularly the current heinous 'crash for cash' phenomenon that is hitting regions across the UK).

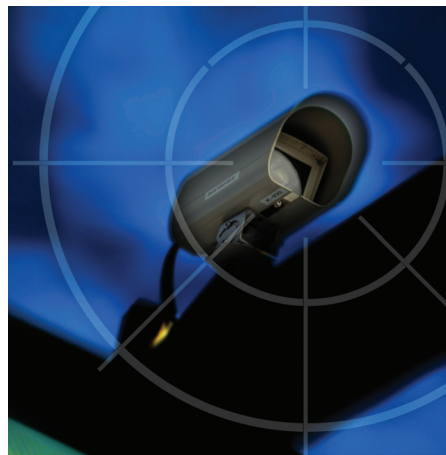
As case loads grow and legal firms look externally for investigation and surveillance support, it is imperative they ensure that their own exacting professional standards are mirrored by any potential third party partners. This can be an issue for procurers of such services from a previously unregulated industry with something of a reputation for less than professional principles.

Whether working with a regular panel of suppliers through insurer relationships or buying in support on a case-by-case basis, law firms must ensure that ethical standards are adhered to throughout all investigations and surveillance procedures. Ethical surveillance/investigation is not just about conforming to the controlling legislation, it also encompasses broader issues; for example, the ethics of deploying a tracking device on a claimant's vehicle without obtaining a client's permission first (not illegal, but risks reputational damage); or of filming a claimant kneeling/grieving at a graveside (again perfectly legal, but intrusive). Ethical surveillance/investigation includes respect both for the client's reputation and the target of surveillance.

Surveillance has long been accepted by both the civil and criminal courts as an effective, independent and objective means of securing evidence – provided that the surveillance is fairly and lawfully carried out. If the thread of integrity binds the process from start to finish, then it will hold together no matter what the challenge. Evidence will be admissible and reputational damage will be avoided.

## The role of ethical evidence to combat fraud

Input from reputable surveillance experts can provide invaluable evidence in a number of scenarios. Perhaps one of the most prevalent targets for opportunistic employee-related insurance fraud is that of an increase in claims an organisation receives during times of economic hardship.



While many of these might be genuine, evidence shows that the volume of fraudulent claims has risen. Companies may witness an increase in the incidence of employer's liability claims, particularly in the run up to redundancies. Claims for sick leave also tend to rise, with staff working elsewhere during this period of absence to maximise earnings. Systems for the early identification of increases in sickness and absenteeism should be in place. If there is reasonable suspicion that abuse is taking place, a short period of surveillance can have a dramatic curative and preventative effect.

Security is another area around which surveillance and investigation can minimise operational threats. Organisations need to be prepared for a higher incidence of staff fraud, burglary, thefts of intellectual property rights and stock during a recession – especially easily concealed, high-value items – as well as goods in transit. Surveillance and investigation operations to scrutinise potential culprits can accelerate the process and save organisations millions of pounds in stolen assets and market share.

Effective surveillance can also contribute towards significant savings relating to personal injury (PI) claims. Surveillance companies involved in PI claims work alongside clients to legitimise or repudiate claims for accidents taking place during the course of employment. One recent case involved a claimant making allegations that he could not work, walk for more than half a mile or squat and kneel. Subsequent surveillance filmed him playing a full round of golf. In another instance, a plant operator sustaining a serious back injury at work alleged that he could not work, sit for more than 15 minutes or walk for more than 100 yards without aggravating his injury. A short period of surveillance witnessed the claimant walking his dogs and working as a minibus driver.

Surveillance undertaken during cases such as these provides an impartial and objective assessment of an individual's day-to-day activities and routine. The evidence gathered is presented to the relevant medical experts to aid their evaluation of the claimant's true capabilities. Some surveillance companies may intentionally omit footage of the claimant if it is detrimental to their client's case – thinking that they are being 'helpful'. If they are caught out it can be hugely embarrassing for the solicitor and client involved.

## Identifying ethical principles

When selecting a surveillance partner, therefore, companies should be looking for clear evidence that the supplier puts the interests of the client before their own profit. Such evidence can be obtained by questioning the proposed supplier about how they intend to go about their task. Prior to any surveillance work, pre-surveillance checks should always be carried out. Contact details of the suspect should be confirmed and any business interests or relevant sports or hobbies traced. Relevant intelligence can also be found on social networking sites and blogs. Suspect identification is an essential, yet very sensitive, area. Get it wrong and the human rights of an innocent individual might be breached. Ethical surveillance firms will check out the obvious options first – does the instructing party have a photograph? Can the instructing party

identify from a video still? Detailed descriptions in the instructions will greatly assist in the identification process. Whatever happens, it is imperative that no deception is carried out – all personal data much be processed fairly and lawfully.

### Avoiding unethical tactics

Every step during a surveillance operation should be taken to avoid a compromise or embarrassment. Should such an event occur for any reason, then surveillance should be suspended and the client updated. Some surveillance and investigations companies have been known to use illegal methods to trace individuals – either buying the information from an insider or using ‘blagging’ methods to gain intelligence unlawfully. Such offences can be committed by those obtaining or receiving the personal information, potentially leaving solicitors open to prosecution.

Solicitors have a duty of care and ought to undertake a degree of due diligence on the suppliers that they choose to use. Solicitors should: carry out a financial check on the company; question whether original, handwritten, surveillance logs are compiled contemporaneously, or as soon as reasonably practicable after the event; enquire as to how the original footage is edited; check whether the chosen companies’ agents are vetted; find out how are they vetted; ask whether they are covered by professional indemnity insurance; and question the suppliers knowledge on the controlling legislation such as human rights, data protection, RIPA (where applicable), the Protection from Harassment Act, etc.

No ‘agent provocateur’ techniques should be adopted. In the past, unethical firms have been known to adopt ‘dirty tactics’ such as letting a claimant’s tyres down so that they can be filmed re-flating them – hopefully with a foot pump – to dispute any claim of debilitating injury.

There should be no conversation with a claimant other than is necessary to confirm identification, or when occasioned by the claimant. Nor should surveillance operators trespass on private property or carry out intrusive surveillance to secure footage of an individual inside their home, inviting allegations of invasion of property. As and when evidence is obtained that proves the instructing party’s suspicions are groundless, the client should be updated at once. Any footage taken during the course of surveillance should be objective, and original footage should remain unedited.

It is vital that, once acquired, surveillance evidence is submitted in a format that is admissible to the courts (this is covered in various pieces of legislation and is dependant on whether the case is to be dealt with in criminal

or civil law, but this is outside the scope of this article). There have been several cases where incorrectly formatted evidence has been ruled inadmissible. After a surveillance operation has been completed, copies of the original unedited footage can be edited to save the viewers’ and the court’s time. That said, the edited footage should have no images of the claimant removed unless explained and clearly stated. Unedited footage and logs should be retained for ten years, or until three months after the settlement. Reports should be confined to fact and contain no opinion.

For more than ten years, there has been active lobbying for licensing and competency testing to raise the standard of investigations and surveillance in the private sector. Regulation is due to follow, but there are currently still numerous unqualified and unethical individuals and companies offering sub-standard services. Today, any person can set up shop and carry out investigations and surveillance without any training, qualifications or regulation. There are believed to be in excess of 10,000 individuals working as private investigators gathering evidence for presentation in criminal courts, some of whom act unprofessionally. As a result, Parliament felt that there was a need for the public to be protected. The concept of licensing regulation by the SIA was first introduced via the Private Security Act in 2001. So, what areas of investigation and surveillance will the new regulations cover?

### Key applications

The Act will apply to any surveillance, inquiries or investigations that are carried out under contract for the purposes of obtaining information about a particular person, or about the activities or whereabouts of a particular person, and obtaining information about the circumstances in which property has been lost or damaged. A licence will not be required if the activities are being carried out with the knowledge of the subject of those enquiries, or if the enquiries are being carried out as incidental to a non-licensable activity. In-house investigators will not need to be licensed. The legislation will include, but is not limited to: the Data Protection Act, the Human Rights Act, the Regulation of Investigatory Powers Act, the Computer Misuse Act, the Protection from Harassment Act, the Fraud Act, the Police and Criminal Evidence Act and the Civil Procedures Act.

Proof of competency will be the most crucial factor when obtaining a licence. This will take the format of a knowledge-based test of a person’s understanding of the legislation surrounding and controlling the licensable activities of investigation and surveillance. While it is possible for certain applicants, such

as recently retired police officers, to sit the test without any training provided that they are able to accredit prior learning, the Home Office/SIA has determined that 60 hours of training will be required for the majority of applicants.

### Protecting the public

The objective of introducing licensing is not to teach a person how to investigate or undertake surveillance, but to ensure that they understand what the rules are; thereby providing the public with some degree of protection. The Competency Test will cover five core competencies:

- Conducting investigations.
- Conducting interviews.
- Searching for information and preserving evidence.
- Conducting surveillance.
- Understanding and working to relevant laws and standards.

Various offences will be created by the Act, the most serious of which will be that for a private investigation company for using or supplying an unlicensed operative; which on indictment will carry a maximum penalty of five years’ imprisonment and/or an unlimited fine. While it will not be an offence for a company to instruct an unlicensed investigator under the new regulations, the reputational risk attached to such use could be very significant, particularly in regulated industries such as the financial sector. An analogy of reputational damage might be akin to using child labour or illegal immigrants for the production of a company’s products.

### Looking ahead

Private investigator involvement in the confirmation gathering of evidence in support of civil and criminal cases looks set to grow in tandem with the alarming rise in fraud and other recession-related crime. Law firms will increasingly find themselves working with third party surveillance and investigations firms to manage away fraud and it is imperative that any external evidence provided by them is ethically gathered and presented for use in court. The introduction of new regulations will go a long way to tackling and enhancing the reputation of the surveillance and investigation industry. Law firms should not wait for the new Act to become law, however, before reviewing their investigation and surveillance strategies and insisting that they work only with ethical partners.

David Halstead is business manager at specialist surveillance, claim validation, fraud investigation and risk control company Robertson & Co. For further information visit <http://www.robertsonandco.com>