

“A PICTURE IS WORTH A THOUSAND WORDS”— THE PERMISSIBLE SCOPE OF DISCOVERY OF VIDEOTAPE IN CIVIL CASES: A BIFURCATION APPROACH

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INTRODUCTION—THE DISCOVERY DILEMMA

“[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”¹ This quote from Justice Jackson’s concurring opinion in *Hickman v. Taylor* eloquently articulates the struggle in the discovery process between the right to access all relevant information prior to trial in order to advance the goals of discovery² and the need to preserve effective trial preparation.³

This tension has been further heightened by the advent of modern camera and video technology, whose effectiveness as a tool in civil litigation has been due largely in part to its modest expense. Litigants use videotape evidence at trial to impeach witnesses, to refute the extent of the plaintiff’s injuries, and to demonstrate the daily obstacles facing a personal injury victim as a result of the disputed event.⁴ In addition, defendants use the tapes to prepare for depositions⁵ and to evaluate the extent of the plaintiff’s injuries for settlement purposes.⁶

This Note will discuss an opposing party’s ability to gain discovery of surveillance videotape. Specifically, it will address the implications of the work product doctrine and explore the limitations that courts have imposed on the discovery of surveillance videotape in civil cases. Emphasis will be placed on differentiating between the rationale for and the uses of surveillance videotape that is to be introduced at trial and non-evidentiary videotape. A bifurcation approach

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1. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

2. The goals of discovery include a method of narrowing and clarifying the issues between or among the parties and a way to ascertain the facts or information as to the existence or whereabouts of such facts. *Id.* at 501. See also *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973) (Goals of discovery include speedy and effective dispute resolution); *Kane v. Her-Pet Refrigeration, Inc.*, 587 N.Y.S.2d 339, 341 (N.Y. App. Div. 1992) (The goals include ascertainment of truth); *Camelback Contractors, Inc. v. Industrial Comm’n*, 608 P.2d 782, 785 (Ariz. Ct. App. 1980); *Crist v. Goody*, 507 P.2d 478, 499 (Colo. Ct. App. 1972) (The goals include the elimination of surprise and encouragement of settlements).

3. *Jenkins v. Rainer*, 350 A.2d 473, 476 (N.J. 1976); *Martin*, 63 F.R.D. at 54.

4. Tricia E. Habert, “*Day in the Life*” and *Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits*, 97 DICK. L. REV. 305 (1993).

5. Denis P. Juge, *Proper Use of Surveillance Film*, FOR THE DEF., June 1990, at 8-9.

6. *Martin*, 63 F.R.D. at 54.

will be advanced to limit the pre-trial discovery of surveillance videotape to include only material to be presented at trial, as outlined in *Fisher v. National Railroad Passenger Corp.*⁷ Further, potentially related areas under the new federal discovery rules will be explored in relation to surveillance videotapes.

I. OVERVIEW

The issue of when surveillance videotape should be discoverable by the opposing party has its roots in cases addressing the admissibility of videotape at trial.⁸ Courts addressing the discoverability issue have evaluated the admissibility of videotape evidence as they would photographic evidence.⁹ However, difficulties with editorial manipulation, subtle jury bias, and the technical limitations of videotape evidence have led to inconsistent results.¹⁰

Similarly, courts addressing the issue of whether to allow discovery of surveillance videotape to the opposing party prior to trial have yielded grossly differing results.¹¹ Courts allowing discovery of the videotapes prior to trial consistently cite the liberal discovery doctrine of the Federal Rules of Civil Procedure.¹² Courts refusing discovery of surveillance videotapes base their rulings on the availability of other sources to the plaintiff,¹³ local rules prohibiting

7. 152 F.R.D. 145 (S.D. Ind. 1993).

8. See generally 3 WIGMORE ON EVIDENCE § 798 (Chadbourn rev. 1970); Wanda E. Wakefield, Annotation, *Discovery of Surveillance Photographs*, 19 A.L.R. 4th 1236 (1983 & Supp. 1994).

9. See *Baird v. Campbell*, 590 N.Y.S.2d 399, 400 (N.Y. Sup. Ct. 1992); *Boyarsky v. G.A. Zimmerman Corp.*, 270 N.Y.S. 134, 137 (N.Y. App. Div. 1934). See also FED. R. EVID. 1001(2) (stating that photographs include "still photographs, X-ray films, video tapes, and motion pictures").

10. For a complete discussion of the problems associated with videotape evidence in general, see Sharon Panian, *Truth, Lies, and Videotape: Are Current Federal Rules of Evidence Adequate?*, 21 SW. U. L. REV. 1199 (1992).

11. For a general discussion of different courts' views on the discovery of videotape surveillance evidence, see 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2015 (1994).

12. See *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973) (noting that liberal discovery leads to the just and speedy determination of cases); *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974) (noting that the doctrine permits effective settlement discussions and effective trial preparation); *Kane v. Her-Pet Refrigeration, Inc.*, 587 N.Y.S.2d 339, 341 (N.Y. App. Div. 1992) (stating that liberal discovery helps to ascertain truth and accelerate the disposition of suits); *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782, 785 (Ariz. Ct. App. 1980) (holding that the rules of discovery eliminate surprise and encourage settlement); *Crist v. Goody*, 507 P.2d 478, 499 (Colo. Ct. App. 1972) (discussing the fact that liberal discovery simplifies issues, eliminates surprises, and leads to the just settlement of disputes without having to go to trial); *Marigliano v. Krumholtz*, 603 N.Y.S.2d 1020, 1023 (N.Y. Sup. Ct. 1993) (stating that liberal open discovery is favored in New York).

13. See *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 152 (S.D. Ind. 1993)

discovery of impeachment materials,¹⁴ or work product protection.¹⁵ Although the majority of current decisions have held that videotapes to be used at trial must be provided to the opposing party in advance,¹⁶ few courts have addressed the issue of whether non-evidentiary videotape¹⁷ should be discoverable by the opposing party in a civil case.¹⁸ The majority of the courts that have addressed this issue have allowed the discovery of *all* videotape, evidentiary and non-evidentiary, without careful analysis of the differences in the two types.¹⁹ Few courts have considered the issue of the discoverability of non-evidentiary videotape in the context of the work product doctrine.²⁰

The unpredictability of discovery and subsequent use of surveillance videotapes can have a dramatic impact on the outcome of a case. For example, in

(refusing to allow discovery of non-evidentiary videotape, citing the fact that plaintiff had a readily available source of information, i.e., his own knowledge); *United States v. O.K. Tire & Rubber Co.*, 71 F.R.D. 465, 467 (D. Idaho 1976) (discovery refused when the materials were available from other sources which the adverse party had not explored); *Hikel v. Abousy*, 41 F.R.D. 152, 155 (D. Md. 1966) (stating that the names of persons with knowledge of the facts were available to the plaintiff through interrogatories, enabling her own investigation); *Ranft v. Lyons*, 471 N.W.2d 254, 262 (Wis. Ct. App. 1991) (requiring a strong showing to warrant disclosure of work product, and noting that plaintiff was aware of her physical limitations and kept a diary of her activities after the accident).

14. See *MacIvor v. South Pac. Transp. Co.*, No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988); *Bogatay v. Montour R.R.*, 177 F. Supp. 269, 270 (W.D. Pa. 1959); *Coyne v. Monongahela Connecting R.R.*, 24 F.R.D. 357, 358 (W.D. Pa. 1959).

15. *Ranft*, 471 N.W.2d at 260 (holding that surveillance videos are work product and not discoverable); *Gay v. P.K. Lindsay Co.*, 666 F.2d 710, 713 (1st Cir. 1981) (reasoning that statements of witnesses in attorney's work product are not discoverable when the effect would be cumulative and deposition testimony was available); *Fisher*, 152 F.R.D. at 150 (holding that surveillance videos are work product; those videos not to be used at trial are not discoverable).

16. *Fisher*, 152 F.R.D. at 150; *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 40 (E.D.N.C. 1995).

17. As used in *Fisher*, non-evidentiary videotapes are defined as those surveillance videotapes, taken of the plaintiff by the defendant, which the defendant does not currently intend to use at trial. *Fisher*, 152 F.R.D. at 150.

18. *Id.*

19. See *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435 (S.D. W. Va. 1992); *DiGiacobbe v. National R.R. Passenger Corp.*, No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160 (S.D.N.Y. 1986); *Delvaux v. Ford Motor Co.*, 518 F. Supp. 1249 (E.D. Wis. 1981); *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Zimmerman v. Superior Ct.*, 402 P.2d 212 (Ariz. 1965) (en banc); *Suezaki v. Superior Ct.*, 373 P.2d 432 (Cal. 1962) (en banc) (cited in *Fisher*, 152 F.R.D. at 150); *Olszewski v. Howell*, 253 A.2d 77 (Del. Super. Ct. 1969); *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980); *Jenkins v. Ranner*, 350 A.2d 473 (N.J. 1976); *Boulware v. Triborough Bridge & Tunnel Auth.*, 613 N.Y.S.2d 580 (N.Y. Sup. Ct. 1994); *Marigliano v. Krumholtz*, 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

20. *Fisher*, 152 F.R.D. at 150.

Chiasson v. Zapata Gulf Marine Corp.,²¹ the Fifth Circuit found reversible error when the trial court permitted the defendant to show the jury a videotape without prior disclosure to the plaintiff. The jury subsequently found the plaintiff ninety percent liable for the injury based on contributory negligence. The surveillance tape showed the plaintiff engaged in activities such as sweeping the carpet, working under a car, and purchasing food. The appellate court, in reversing the lower court's decision, held that the plaintiff had a right to the substantive evidence prior to trial, and noted that such a preliminary viewing could have produced an early settlement.²²

By contrast, in *DiMichel v. South Buffalo Railway*,²³ the New York Court of Appeals reversed the trial court (in *Poole v. Consolidated Rail Corp.*²⁴) using an abuse of discretion standard. The plaintiff, who had accessed *all* the defendant's surveillance videotapes (which were not subsequently used by the defendant) during discovery, repeatedly referred to the tapes during trial and in closing statements, inferring that the defendants did not produce the tapes because they would have helped the plaintiff's case. The appellate court refused to allow the plaintiff to utilize the discovery process in such an underhanded way. Thus, consistency and predictability concerning the discovery of surveillance videotape remains crucial to a fair resolution of the dispute.

A. *Purposes and Uses of Surveillance Films*

In certain civil cases, especially personal injury or workers' compensation cases, the use of surveillance videotape by the defendant, taken without the knowledge of the plaintiff, can be an "extremely useful tool."²⁵ Surveillance videotape serves two distinct purposes: it provides impeachment evidence²⁶ against the plaintiff,²⁷ and it provides substantive

21. 988 F.2d 513 (5th Cir. 1993).

22. *Id.* at 516.

23. 604 N.E.2d 63, 69-70 (N.Y. 1992).

24. 579 N.Y.S.2d 772 (N.Y. App. Div. 1991).

25. Denis P. Juge, *Proper Use of Surveillance Film*, FOR THE DEF., June 1990, at 8.

26. Impeachment evidence does not relate to the claim or defense, but to the credibility of the witness. Paul C. Ney, *Videotape Surveillance in Civil Cases*, LITIG., Summer 1991, at 11. See also *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 517 (5th Cir. 1993) (stating that "impeachment evidence . . . is that which is offered to 'discredit a witness . . . to reduce the effectiveness of [her] testimony by bringing forth evidence which explains why the jury should not put faith in [her] or [her] testimony'" (quoting John P. Frank, *Pretrial Conferences and Discovery—Disclosure or Surprise?*, 1965 INS. L. J. 661, 664)).

27. Juge, *supra* note 25, at 8. See generally 8 WRIGHT & MILLER, *supra* note 11, § 2015, at 113-121; R. L. Martyn, Annotation, *Discovery, in Civil Case, of Material Which is or may be Designed for Use in Impeachment*, 18 A.L.R.3d 922 (1968 & Supp. 1994); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973) (stating that "[o]ne who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud").

evidence²⁸ which, by refuting the extent of the plaintiff's disability, may reduce damages. Defendants typically resist the disclosure of impeachment evidence, claiming nondisclosure will prevent plaintiffs from exaggerating their claims, thereby keeping the testimony honest.²⁹ Moreover, the value of impeachment testimony lies in preventing the plaintiff from viewing the tape prior to trial; otherwise, plaintiffs will be able to shape or mold their testimony to conform to the evidence on the tape.³⁰ Plaintiffs counter this argument with the need to authenticate the tape prior to trial³¹ and to prepare effective cross examination,³² as well as the assertion that revealing all evidence prior to trial will promote effective dispute resolution.³³ When the tape will be used for substantive evidence to dispute the degree of the plaintiffs' injury, most courts will allow pre-trial

28. Juge, *supra* note 25, at 8. "Substantive evidence is that which is offered to establish the truth of a matter to be determined by the trier of fact." *Chiasson*, 988 F.2d at 517 (citing John P. Frank, *Pretrial Conferences and Discovery—Discovery or Surprise?*, 1965 INS. L.J. 661, 664).

29. See Kenneth E. Siemens, *The Discoverability of Personal Injury Surveillance and Missouri's Work Product Doctrine*, 57 MO. L. REV. 871 (1992). See also *Smith v. CSX Transp., Inc.*, No. 93-373-CIV-5-F, 1994 WL 762208, at *2 (E.D.N.C. 1994) (asserting that denial of discovery would "discourage successful perjury"); *Snead*, 59 F.R.D. at 150 (stating the "possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath"); *Hikel v. Abousy*, 41 F.R.D. 152, 155 (D. Md. 1966) (noting that in those cases where the plaintiff would be influenced by the possibility of the defendant's possession of the videotape, it would probably tend to make the testimony more honest); *Jenkins v. Rainer*, 350 A.2d 473, 476 (N.J. 1976) (discussing defendant's claim that nondisclosure would keep plaintiff from exaggerating claim, and striking the argument in favor of more liberal discovery).

30.

If every witness consistently told the truth, and none cut his cloth to the wind, little possible harm and much good might come from maximum pretrial disclosure. Experience indicates, however, that there are facile witnesses whose interest in 'knowing the truth before trial' is prompted primarily by a desire to find the most plausible way to defeat the truth.

Margeson v. Boston & Me. R.R., 16 F.R.D. 200, 201 (D. Mass. 1954); see also *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. Ct. 1969). But see *DiMichel v. South Buffalo Ry.*, 604 N.E.2d 63, 68 (N.Y. 1992) (striking down defendant's motion on this basis); *Jenkins*, 350 A.2d at 473 (same).

31. *Snead*, 59 F.R.D. at 150; accord *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Boldt v. Sanders*, 111 N.W.2d 225 (Minn. 1961); *Marte v. Hickok Mfg. Co.*, 552 N.Y.S.2d 297 (N.Y. App. Div. 1990).

32. *Snead*, 59 F.R.D. at 150; *Jenkins*, 350 A.2d at 477 ("[T]he surprise which results from distortion of misidentification is plainly unfair. If it is unleashed at the time of trial, the opportunity for an adversary to protect against its damaging inference by attacking the integrity of the film and developing counter-evidence is gone or at least greatly diminished."); *Dodson v. Persell*, 390 So. 2d 704, 706 (Fla. 1980) (asserting that if pre-trial disclosure is not required, "plaintiffs will be without means to effectively challenge or prepare rebuttal evidence").

33. *Wegner v. Cliff Viessman, Inc.*, 153 F.R.D. 154, 159 (N.D. Iowa 1994); *Smith*, 1994 WL 762208, at *2; *Martin*, 63 F.R.D. at 54.

disclosure to the plaintiffs.³⁴

B. Background: Courts' Approaches to Discoverability of Videotapes

1. *Impeachment Evidence.*—Historically, some courts have refused the plaintiff discovery of videotape or other *impeachment* evidence prior to trial, weighing the defendant's need to prevent disclosure more heavily than the plaintiff's need to authenticate the evidence and prepare effective cross examination.³⁵ Other courts have adopted the opposite position, allowing the discovery of impeachment videotape.³⁶ In so doing, several courts have emphasized the importance of validating the authenticity of the video prior to trial to prevent fraud.³⁷ The case most cited relating to the need to authenticate the videotape before trial is *Snead v. American Export-Isbrandtsen Lines, Inc.*, which notes:

The main purpose for secret motion pictures of a plaintiff is to

34. See, e.g., *Wegner*, 153 F.R.D. at 159 (en banc); *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782 (Ariz. Ct. App. 1980); *Crist v. Goody*, 507 P.2d 478 (Colo. Ct. App. 1972); *Simons v. State Compensation Mut. Ins. Fund*, 865 P.2d 1118 (Mo. 1993).

35. See *Gay v. P.K. Lindsay Co.*, 666 F.2d 710, 713 (1st Cir. 1981) (refusing to allow plaintiff to discover statements of defendant's witnesses prior to trial, citing plaintiff's knowledge of the area and little additional value of statements); *MacIvor v. Southern Pac. Transp. Co.*, No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988) (holding that impeachment is not discoverable, citing local rules of court). See also FED. R. CIV. P. 26(b), advisory committee's note (stating that impeachment materials are generally protected from discovery).

36. See *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435, 437 (S.D. W. Va. 1992); *Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505, 508 (D. Haw. 1989) (allowing impeachment video to be discovered provided impeaching character is preserved via deposition); *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y. 1986); *Boldt v. Sanders*, 111 N.W.2d 225, 228 (Minn. 1961) (holding that the impeachment evidence does not prevent discovery of information solely on that basis). See also 8 WRIGHT & MILLER, *supra* note 11, § 2015, at 115 (criticizing the approach that allows a party to select the purpose for which surveillance evidence will be used and thus obtain immunity from discovery by selecting impeachment purposes).

37. In *Boldt v. Sanders*, the court noted:

Defendant's entire argument proceeds on the premise that defendant's evidence which plaintiffs seek to elicit constitutes the unblemished truth which, if prematurely disclosed, will prevent defendant from revealing to the jury the sham and perjury inherent in plaintiffs' claims. While defendant disclaims such an assumption, it is implicit in his position that witnesses whose testimony is designed to impeach invariably have a monopoly on virtue and that evidence to which the attempted impeachment is directed is, without exception, fraudulent.

111 N.W.2d at 227; cf. 4 JAMES W. MOORE ET AL., FEDERAL PRACTICE ¶ 26.21 (2d ed. 1994); accord *Martin*, 63 F.R.D. at 53 (reasoning if the videotape is to be used at trial, it is discoverable to authenticate tape); *Marte v. Hickok Mfg. Co.*, 552 N.Y.S.2d 297, 300 (N.Y. App. Div. 1990) (holding that all videotape to be used at trial is discoverable). See generally Wanda E. Wakefield, Annotation, *Discovery of Surveillance Photographs*, 19 A.L.R.4th 1236 (1983 & Supp. 1994).

impeach his credibility. Films taken without the knowledge of the subject often have a dramatic impact in court. One who has described in elaborate detail his disabilities, their extent and duration, and the limitations they impose may be shown by the camera to be a fraud. The possibility that such pictures exist will often cause the most blatant liar to consider carefully the testimony he plans to give under oath.

On the other hand, the camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be slowed down or speeded up. The editing and splicing of films may change the chronology of events . . . Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false.³⁸

2. *Local Rules on Impeachment Evidence.*—In denying the discovery of impeachment videotape, other courts cite their local rules of evidence prohibiting discovery of impeachment evidence as an exception to the overall discovery rules.³⁹ These courts often note that the Federal Rules of Civil Procedure⁴⁰ allow each district court, upon a majority vote, to amend the rules governing practice, as long as the local rules do not conflict with the federal rules.⁴¹ However, the only circuit court to speak on the issue rejected decisions that were based on local rules prohibiting discovery of impeachment evidence as unlawfully narrowing the scope of discovery under the federal rules.⁴²

3. *Impeachment v. Substantive Evidence.*—Recently, many courts have ordered the discovery of impeachment videotape on the grounds that the tapes also contain substantive evidence and should therefore be accessible to the plaintiff before trial.⁴³ Indeed, it can generally be said that in the midst of all the confusion

38. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973) (citation omitted).

39. *See Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 150 (S.D. Ind. 1993) (noting that S.D. Ind. L.R. 16.1(f)(5) excludes impeachment evidence from pre-trial discovery and provides that “[a] list of exhibits to be offered at trial [are to be disclosed at final pre-trial conference] except those to be used solely for *impeachment* or rebuttal” (emphasis added)); *MacIvor v. South Pac. Transp. Co.*, No. 87-6424-E, 1988 WL 156743, at *3 (D. Or. June 9, 1988); *Bogatay v. Montour R.R.*, 177 F. Supp. 269, 270 (W.D. Pa. 1959).

40.

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83.

41. *Id.* *See also Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 515 (5th Cir. 1993).

42. *Chiasson*, 988 F.2d at 516-17.

43. *See DiMichel v. South Buffalo R.R.*, 604 N.E.2d 63, 66 (N.Y. 1992); *Zimmerman v.*

over what type of evidence surveillance materials represent, the weight of modern authority allows the discovery of surveillance videotapes *if* they are to be used at trial.⁴⁴ Still other courts have ruled that surveillance videotapes are *primarily* substantive evidence, and therefore discoverable on those grounds.⁴⁵

4. *Evidentiary v. Non-Evidentiary Surveillance Videotape*.—Few courts have analyzed the differences between evidentiary and non-evidentiary videotape.⁴⁶ In fact, because most of the courts that have addressed the issue have allowed the discovery of *all* videotape, they did not undertake further analysis.⁴⁷ Finally, few

Superior Ct., 402 P.2d 212, 217 (Ariz. 1965) (holding that surveillance evidence, although helpful for impeachment, also contains substantive evidence *relevant* to the matter litigated, and is therefore discoverable); *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782, 785 (Ariz. Ct. App. 1980):

44. See *DiGiacobbe v. National R.R. Passenger Corp.*, No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987) (holding that plaintiff had a right to know of the *existence* of video regardless of whether it would be used at trial; plaintiff had a right to discover the actual video only if defendant intended to use it at trial); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973) (holding that surveillance video must be produced in advance if it is to be used at trial); *Dodson v. Persell*, 390 So. 2d 704, 706 (Fla. 1980); *Kane v. Her-Pet Refrigeration, Inc.*, 587 N.Y.S.2d 339, 344 (N.Y. App. Div. 1992) (holding that plaintiff is entitled to the pre-trial examination of all evidence that defendant intends to offer at trial); *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. Dist. Ct. App. 1975), where the court reasoned:

Much confusion exists as a result of the attempt to differentiate between substantive evidence and impeachment evidence. For example, here the movies are described by petitioner as impeachment evidence and therefore not subject to discovery. However, if they are at all effective will they not also be substantive evidence going directly to the petitioners' injuries and damages? Thus, it seems to me it is time to articulate a rule everyone can understand and use as a guide, namely: if a party possesses material he expects to use as evidence at trial, that material is subject to discovery.

45. See *Chiasson*, 988 F.2d at 513 (finding the surveillance tape discoverable on substantive grounds); *Crist v. Goody*, 507 P.2d 478, 480 (Colo. Ct. App. 1972) (holding that surveillance movies were "primarily substantive evidence and not totally or even basically impeachment evidence").

46. For cases that differentiate between the two types, see *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 150 (S.D. Ind. 1993) (allowing discovery of evidentiary videotape but refusing to allow discovery of non-evidentiary video); *Dodson*, 390 So. 2d at 707 (allowing discovery of evidentiary video and discovery of non-evidentiary video depending on whether the evidence was unique and otherwise unavailable); *Spencer*, 307 So. 2d at 462 (allowing discovery of evidentiary video and discovery of non-evidentiary video depending on work product privilege).

47. See *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435 (S.D. W. Va. 1992); *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160 (S.D.N.Y. 1986); *Delvaux v. Ford Motor Co.*, 518 F. Supp. 1249 (E.D. Wis. 1981); *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Suezaki v. Superior Ct.*, 373 P.2d 432 (Cal. 1962) (en banc); *Olszewski v. Howell*, 253 A.2d 77 (Del. Super. Ct. 1969); *Dodson*, 390 So. 2d at 704; *Collins v. Crosby Group, Inc.*, 551 So. 2d 42 (La. Ct. App. 1989); *Boldt v. Sanders*, 111 N.W.2d 225 (Minn. 1961); *Jenkins v. Rainer*, 350 A.2d 473 (N.J. 1976).

decisions have addressed this bifurcation in the context of the work product doctrine.⁴⁸

II. THE WORK PRODUCT DOCTRINE

The work product doctrine, first described in *Hickman v. Taylor*,⁴⁹ remains a viable restriction on the overall liberal discovery policy of the federal rules.⁵⁰ Although not within the absolute privilege afforded the attorney-client privilege,⁵¹ work product receives a two-tiered protection. First, the mental impressions and opinions of the attorney during trial preparation receive an absolute protection.⁵² Second, basic work product, such as information or materials gathered in anticipation of litigation, acquires a qualified immunity and is only discoverable upon a showing of necessity for the materials in prosecuting the case.⁵³

A. *The Beginning—Hickman v. Taylor*

In the landmark case of *Hickman v. Taylor*,⁵⁴ the Supreme Court adopted a middle position between the federal district court and the court of appeals, by holding that an attorney's "work product" should receive qualified immunity from the normal discovery process.⁵⁵ The court stated that "until some rule or statute definitely prescribes otherwise, we are not justified in permitting discovery in a

48. See *Fisher*, 152 F.R.D. at 150.

49. 329 U.S. 495 (1947).

50. The court in *Hickman v. Taylor* agreed with the general proposition that discovery rules should be accorded a broad and liberal treatment. "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id.* at 507. However, the court still concluded that the attempts of the plaintiff, without justification or necessity, to secure written statements, private memoranda, and personal recollections of the defense attorney prepared in anticipation of litigation fell "outside the arena of discovery and contravene[d] the public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. For general information and background on the work product doctrine, see also 8 WRIGHT & MILLER, *supra* note 11, §§ 2022-28, at 183-240 and Edward H. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969).

51. *Hickman*, 329 U.S. at 508.

52. *Id.* at 510 (stating "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney"). See also FED. R. CIV. P. 26 (b)(3) (stating that the "court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation").

53. "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." *Hickman*, 329 U.S. at 511. See also FED. R. CIV. P. 26 (b)(3) (stating "a party may obtain discovery of documents and tangible things . . . only upon a showing . . . that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means").

54. 329 U.S. 495 (1947).

55. *Id.* at 510; 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318.

situation of this nature as a matter of unqualified right.”⁵⁶

In *Hickman*, a tugboat named the *J.M. Taylor* sank, without explanation, killing five of the nine crew members. Representatives of the deceased crew members brought suit against the tug owners. The four surviving crew members were examined at a public hearing within one month of the accident, and the testimony was made available to all interested parties. Additionally, the tugboat owner’s counsel, after receiving notice of suit by two of the five parties, interviewed the survivors and others connected with the accident and obtained written statements. A year later the plaintiffs filed interrogatories for production of any written statements and for exact provisions of any oral statements to be set forth in detail. The defendant challenged the interrogatories as an attempt to gain access to the attorney’s files and thoughts of counsel.⁵⁷ Although the district court held the material was not privileged, the Third Circuit reversed.⁵⁸

The Supreme Court laid out the qualified immunity of the doctrine.⁵⁹ Work product would be discoverable only upon a substantial showing of necessity or justification.⁶⁰ The Court drew a further distinction for any work product that may reflect the mental impressions or opinions of counsel, stating that for all practical purposes, these were immune from discovery.⁶¹

What constitutes work product is, however, limited. Even the *Hickman* Court distinguished between documents prepared in anticipation of litigation and facts learned by counsel during the investigation process.⁶² Since *Hickman*, an overwhelming majority of courts have held that facts discovered during trial preparation are not immune from discovery, and are not protected as work

56. *Hickman*, 329 U.S. at 514.

57. *Id.* at 499.

58. *Id.* at 499-500.

59. 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318.

60. *Hickman*, 329 U.S. at 510.

61.

But as to oral statements made by witnesses . . . whether presently in the form of [the attorney’s] mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production.

Id. at 512-13.

62. “A party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.” *Id.* at 504. For additional discussion of this topic, see 8 WRIGHT MILLER, *supra* note 11, § 2023, at 326 (“The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party’s lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.”); Cooper, *supra* note 50, at 1282.

product.⁶³

B. Current Theory—Federal Rules of Civil Procedure—Rule 26

After the *Hickman* decision, courts struggled to solve the interpretive problems left open by the *Hickman* holding.⁶⁴ The 1970 amendments to the Federal Rules of Civil Procedure codified the *Hickman* holding in Rule 26(b)(3).⁶⁵ However, even after the codification of the rule, debate still continues as to the interpretation of the language and whether there should be work product protection at all.⁶⁶

63. See *Milwaukee Concrete Studios v. Greely Ornamental Concrete Prod.*, 140 F.R.D. 373 (E.D. Wis. 1991); *Protective Nat'l Ins. Co. v. Commonwealth, Ins. Co.*, 137 F.R.D. 267 (D. Neb. 1989); *Dunn v. State Farm Ins.*, 122 F.R.D. 507 (N.D. Miss. 1988); *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987); *DiGiacobbe v. National R.R. Corp.*, No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); *Eoppolo v. National R.R. Passenger Corp.*, 108 F.R.D. 292 (E.D. Pa. 1985); *Ford v. Phillips Elecs. Instruments Co.*, 82 F.R.D. 359 (E.D. Pa. 1979); *United States v. Glaxo Group, Ltd.*, 302 F. Supp. 1 (D.D.C. 1969); *Cedolia v. C.S. Hill Saw Mills, Inc.*, 41 F.R.D. 524 (M.D.N.C. 1967); *McCall v. Overseas Tankship Corp.*, 16 F.R.D. 467 (S.D.N.Y. 1954); *Baltimore Transit Co. v. Mezzanotti*, 174 A.2d 768 (Md. 1961); *Jenkins v. Rainner*, 350 A.2d 473 (N.J. 1976). See generally 8 WRIGHT & MILLER, *supra* note 11, § 2023, at 326-35.

64. See generally, 8 WRIGHT & MILLER, *supra* note 11, § 2022, at 318-26.

65. The current version of Rule 26(b)(3) reads as follows:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order.

FED. R. CIV. P. 26(b)(3). Although the 1993 amendments made significant changes to other parts of Rule 26, especially part (a), which broadens the scope of material that must be automatically disclosed to the other party at the commencement of the suit, the section on work product did not receive substantial revisions. See *infra* Part V.C. for an analysis of the significant changes to the other parts of Rule 26.

66. For discussion in support of the work product doctrine, see generally Cooper, *supra* note

According to Rule 26(b)(3), materials must meet three tests to fall within the Rule's work product protection. The material must be a "document or tangible thing,"⁶⁷ prepared in anticipation of litigation or trial,⁶⁸ and by or for another party or by or for that party's representative.⁶⁹

C. Required Showing to Overcome Work Product Immunity

Documents that fall within work product protection are still discoverable upon a showing of sufficient necessity.⁷⁰ The issue of whether the petitioner has demonstrated such a showing has been hotly litigated.⁷¹ To meet this burden, there

50. For a discussion opposing the work product protection, see Elizabeth G. Thornburg, *Rethinking Work Product*, 77 VA. L. REV., 1515 (1991). For additional discussion of the work product doctrine, see Jeffrey F. Ghent, Annotation, *Development Since Hickman v. Taylor of Attorney's "Work Product" Doctrine*, 35 A.L.R.3d 412 (1971 & Supp. 1994).

67. "Documents or tangible things" set out the requirement under 26(b)(1) of those things that fall within the scope of discovery. FED. R. CIV. P. 26(b)(1); 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 196.

68. Work product protection only applies to documents prepared due to the prospect of litigation, not to documents prepared in the normal course of business that may eventually be used in the litigation. 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 199. Cases that held the documents were *not* prepared in anticipation of litigation, but during the regular course of business, and therefore discoverable, include: *Binks v. National Presto Indus., Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Natta v. Hogan*, 392 F.2d 686 (10th Cir. 1968); *Colten v. United States*, 306 F.2d 633 (2d Cir. 1962); *Henderson v. Zurn Indus.*, 131 F.R.D. 560 (S.D. Ind. 1990); *Scott Paper Co. v. Ceilcote Co.*, 103 F.R.D. 591 (D. Me. 1984); *Technograph, Inc. v. Texas Instruments, Inc.*, 43 F.R.D. 416 (S.D.N.Y. 1967); *Hogan v. Zletz*, 43 F.R.D. 308 (N.D. Okla. 1967). Cases that held the documents were prepared in anticipation of litigation, and therefore immune from discovery, include: *Lett v. State Farm Fire & Casualty Co.*, 115 F.R.D. 501 (N.D. Ga. 1987); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982). See generally, 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 336-69.

69. Work product protection thus extends to things prepared by the attorney or his agent. After the 1970 and 1993 amendments, the protection clearly includes the party's indemnitors, insurance company's attorneys, and other consultants as long as the documents are being prepared because of the prospect of litigation. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 11, § 2024, at 204-07; *id.* § 2023, at 196-97.

70. FED. R. CIV. P. 26(b)(3); 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211.

71. For cases discussing the plaintiff's burden in establishing a sufficient showing of necessity, see *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 558 (2d Cir. 1967) (showing by plaintiff that disclosure would be helpful held insufficient); *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 152 (S.D. Ind. 1993) (sufficient showing not made); *Henderson v. Zurn Indus.*, 131 F.R.D. 560, 572 (S.D. Ind. 1990) (insufficient showing by plaintiff); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 211 F. Supp. 736, 743 (N.D. Ill. 1962) (no showing by plaintiff of sufficient necessity); *Newton v. Yates*, 353 N.E.2d 485, 496-97 (Ind. Ct. App. 1976); *DiMichel v. South Buffalo Ry.*, 604 N.E.2d 63, 68 (N.Y. 1992) (substantial need shown). For additional cases and discussion, see also 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211-28; Ghent, *supra* note 66.

must be a substantial need for the materials in the preparation of the case, *and* the petitioner must show an inability, without undue hardship, to obtain the substantial equivalent of the materials by other means.⁷² Finally, even if this initial burden is met, any portion of the document that reflects the mental impressions, opinions, legal theories, or conclusions of the opposing counsel will still be protected.⁷³

III. SURVEILLANCE VIDEOTAPE AS WORK PRODUCT V. NON-WORK PRODUCT

When defendants have asserted the work product doctrine to prevent discovery of surveillance videotapes prior to trial, the results have been mixed.⁷⁴ Some courts have flatly rejected the work product defense in this context, citing the broad goals of the discovery process.⁷⁵ Others have allowed the videotape as work product, but have held that plaintiffs met their burden *per se* as the film is unique and not easily duplicated.⁷⁶ Still other courts that have recognized videotape as

72. FED. R. CIV. P. 26(b)(3). What constitutes substantial need in case preparation and substantial hardship in acquiring the materials from other sources has been frequently litigated. For example, when a witness is no longer available, or has a faulty memory, courts have ruled the deposition discoverable. 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 216-17. By contrast, the assertion by a plaintiff that he wishes to ensure that he has not overlooked anything, or that he surmises that the document may be helpful for impeachment purposes is not strong enough to meet this burden. *Id.* Additionally, courts have held that when the information is available from an alternative source, the plaintiff has not demonstrated "substantial need." *Fisher*, 152 F.R.D. at 152. For a complete discussion and cases on this issue, see 8 WRIGHT & MILLER, *supra* note 11, § 2025, at 211-28.

73. FED. R. CIV. P. 26(b)(3). For a general discussion of the protection afforded the attorney's mental impressions, see 8 WRIGHT & MILLER, *supra* note 11, § 2026, at 229-32. The authors noted that the decision in *Hickman v. Taylor* was based primarily on protecting the thought processes of attorneys. *Id.* at 230. In *Hickman*, the court noted that in performing their duties, it was essential that attorneys "work with a certain degree of privacy, free from unnecessary intrusions by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

74. See *supra* notes 15, 63 and accompanying text.

75. See *Blount v. Wake Elec. Membership Corp.*, 162 F.R.D. 102, 104 (E.D.N.C. 1993); *Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435, 437 (S.D. W. Va. 1992); *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782, 784 (Ariz. Ct. App. 1980); *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. Ct. App. 1975) (noting that "[t]he weight of authority is that photographs and movies are not considered work product and are discoverable"); *Marte v. W. O. Hickok Mfg. Co.*, 552 N.Y.S.2d 297 (N.Y. App. Div. 1990); *Marigliano v. Krumholtz*, 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

76. *Wegner v. Cliff Vessman, Inc.*, 153 F.R.D. 154, 159 (N.D. Iowa 1994); *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974); *Olszewski v. Howell*, 253 A.2d 77, 78 (Del. Super. Ct. 1969); *Jenkins v. Rainer*, 350 A.2d 473, 477 (N.J. 1976); *DiMichel v. South Buffalo Ry.*, 604 N.E.2d 63, 69 (N.Y. 1992) (holding visual evidence of this kind unique as it memorializes a set of conditions and can never be replicated); *Ancona v. Net Realty Holding Trust Co.*, 583 N.Y.S.2d 784, 788-89 (N.Y. Sup. Ct. 1992); *Prewitt v. Beverly-50th Street Corp.*, 546 N.Y.S.2d 815, 816 (N.Y. Sup. Ct. 1989); *Cabral v. Arruda*, 556 A.2d 47, 50 (R.I. 1989).

work product have employed more of a balancing approach, weighing the plaintiff's need to authenticate the tape and prepare for trial against the defendant's need to protect trial strategy and to preserve the impeachment value of the tapes.⁷⁷

A. *Current Debate on Discoverability of Videotape Generally*

Since the dramatic increase in the use of videotape surveillance during the last two decades, due to the availability of equipment, ease of use, and decreasing costs,⁷⁸ court decisions regarding the discoverability of the videotape prior to trial have divided roughly into four categories: 1) those allowing discovery of all videotape regardless of the intended use,⁷⁹ 2) those allowing discovery only of videotape to be used at trial,⁸⁰ 3) those allowing discovery of videotape only after the deposition of the plaintiff,⁸¹ and 4) those refusing the discovery of videotape.⁸²

77. *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 40 (E.D.N.C. 1995); *Smith v. CSX Transportation, Inc.*, No. 93-373-5-F, 1994 WL 762208, at * 3 (E.D.N.C. May 18, 1994); *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 151 (S.D. Ind. 1993) (explaining that the party demonstrating a "substantial need" to justify discovery of the document "involves a balancing of the value of broad discovery as an accurate method of arriving at a full resolution of each dispute with the corresponding need to prevent undue intrusion into the attorney's preparation of her case"); *Milwaukee Concrete Studios Ltd. v. Greely Ornamental Concrete Prod.*, 140 F.R.D. 373, 376 (E.D. Wis. 1991); *DiGiacobbe v. National R.R. Passenger Corp.*, No. Civ. A. 86-534, 1987 WL 11227, at * 2 (E.D. Pa. 1987); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973); *DiMichel*, 604 N.E.2d at 190 (stating that the court must fashion a rule that "respects a defendant's qualified right to keep videotapes prepared in anticipation of litigation private, but that at the same time advances the policy of liberal disclosure"); *Kane v. Her-Pet Refrigeration, Inc.*, 587 N.Y.S.2d 339, 344 (N.Y. App. Div. 1992); *Carrecia v. Enstrom*, 578 N.Y.S.2d 678, 680 (N.Y. App. Div. 1992) (holding the elements necessary for plaintiff to establish her burden are not inherent in the nature of visual evidence; plaintiff bears burden to prove need); *Ranft v. Lyons*, 471 N.W.2d 254, 261 (Wis. Ct. App. 1991).

78. See James P. Connors, *Surveillance Video Discoverability—Are We Protecting the Fraudulent Claimant?*, FOR THE DEF., July 1994, at 22.

79. See *Boyle*, 142 F.R.D. at 435; *Daniels v. National R.R. Passenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y. 1986); *Delvaux v. Ford Motor Co.*, 518 F. Supp. 1249, 1252 (E.D. Wis. 1981); *Martin*, 63 F.R.D. at 54; *Zimmerman v. Superior Ct.*, 402 P.2d 212, 213 (Ariz. 1965); *Suezaki v. Superior Ct.*, 373 P.2d 432, 438-39 (Cal. 1962); *Olszewski*, 253 A.2d at 78; *Dodson v. Persell*, 390 So. 2d 704, 705 (Fla. 1980); *Jenkins*, 350 A.2d at 477.

80. See *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993); *Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505 (D. Haw. 1989); *Carlton v. National R.R. Passenger Corp.*, No. Civ. A. 86-5215, 1987 WL 7607, at *2 (E.D. Pa. March 6, 1987); *Snead*, 59 F.R.D. at 148; *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782 (Ariz. Ct. App. 1980); *Crist v. Goody*, 507 P.2d 478 (Colo. Ct. App. 1972); *Collins v. Crosby Group, Inc.*, 551 So. 2d 42 (La. Ct. App. 1989); *Shenk v. Berger*, 587 A.2d 551 (Md. Ct. Spec. App. 1991); *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332 (Miss. 1987); *Kane*, 587 N.Y.S.2d at 344.

81. See *Forbes*, 125 F.R.D. at 505; *Martin*, 63 F.R.D. at 53; *Blyther v. Northern Lines, Inc.*,

Courts that have differentiated their decision based on whether the videotape's intended use was evidentiary or non-evidentiary have allowed the discovery of non-evidentiary videotape only in exceptional circumstances,⁸³ or when the non-evidentiary videotape did not fall within work product protection.⁸⁴

The majority of recent decisions regarding the discoverability of videotape surveillance materials have dealt with videotapes that were either anticipated as trial evidence or actually presented at trial.⁸⁵ However, even these opinions were careful in their holdings to limit the applicability of discovery to videotape materials the defendant intended to use at trial, thus implicitly identifying that a difference existed between the two types of uses.⁸⁶

The courts that permit plaintiffs to discover all the videotape in the defendant's possession, regardless of the intended purpose of the tapes, have adopted a blanket approach by relying upon the liberal discovery policy of the federal rules, without performing a careful analysis of the distinguishing, underlying rationale for non-evidentiary videotape use.⁸⁷ For example, in *Boyle*

61 F.R.D. 610 (E.D. Pa. 1973); *Snead*, 59 F.R.D. at 151; *Williams*, 514 So. 2d at 332; *Jenkins*, 350 A.2d at 473; *Kane*, 587 N.Y.S.2d at 346.

82. *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 145 (S.D. Ind. 1993); *MacIvor v. Southern Pac. Transp. Co.*, No. 87-6424-E, 1988 WL 156743, at *2 (D. Or. June 9, 1988); *Lett v. State Farm Fire & Casualty Co.*, 115 F.R.D. 501 (N.D. Ga. 1987); *Flynn v. Church of Scientology Int'l*, 116 F.R.D. 1 (D. Mass. 1986); *United States v. O.K. Tire & Rubber Co.*, 71 F.R.D. 465 (D. Idaho 1976); *Bird v. Penn Cent. Co.*, 61 F.R.D. 43 (E.D. Pa. 1973); *Hikel v. Abousy*, 41 F.R.D. 152 (D. Md. 1966); *Kriskey v. Chestnut Hill Bus Co.*, No. CV 87 0090900 S, 1990 WL 284343, at *2 (Conn. Super. Ct. May 9, 1990); *Ranft v. Lyons*, 471 N.W.2d 254 (Wis. Ct. App. 1991).

83. *Dodson*, 390 So. 2d at 707.

84. *Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. Ct. App. 1975).

85. *See Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513 (5th Cir. 1993); *Forbes*, 125 F.R.D. at 506; *DiGiacobbe v. National R.R. Passenger Corp.*, No. Civ. A. 86-534, 1987 WL 11227, at *3 (E.D. Pa. May 21, 1987); *Carlton v. National R.R. Passenger Corp.*, Civ. A. No. 86-5215, 1987 WL 7607, at* 2 (E.D. Pa. Mar. 6, 1987); *Snead*, 59 F.R.D. at 148; *Camelback Contractors, Inc. v. Industrial Comm'n*, 608 P.2d 782 (Ariz. Ct. App. 1980); *Crist v. Goody*, 507 P.2d 478 (Colo. Ct. App. 1973); *Dodson*, 390 So. 2d at 704; *Collins v. Crosby Group, Inc.*, 551 So. 2d 42 (La. Ct. App. 1989); *Shenk v. Berger*, 587 A.2d 551, 555 (Md. Ct. Spec. App. 1991) (admitting if for substantive evidence); *Williams*, 514 So. 2d at 332; *Kane*, 587 N.Y.S.2d at 346; *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989).

86. *See, e.g., Snead*, 59 F.R.D. at 151 (concluding that the defendant must disclose tapes to plaintiff if he desires to use them at trial).

87. *See Boyle v. CSX Transp., Inc.*, 142 F.R.D. 435 (S.D. W. Va. 1992); *Daniels v. National R.R.*, 110 F.R.D. 160 (S.D.N.Y. 1986); *Delvaux v. Ford Motor Co.*, 518 F. Supp. 1249 (E.D. Wis. 1981); *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Zimmerman v. Superior Ct.*, 402 P.2d 212 (Ariz. 1965) (en banc); *Suezaki v. Superior Ct.*, 373 P.2d 432 (Cal. 1962) (en banc); *Olszewski v. Howell*, 253 A.2d 77 (Del. Super. Ct. 1969); *Dodson*, 390 So. 2d at 704; *Johnson v. Archdiocese of New Orleans*, 649 So. 2d 12 (La. Ct. App. 1995); *Collins*, 551 So. 2d at 42; *Jenkins v. Rainner*, 350 A.2d 473 (N.J. 1976).

v. CSX Transportation, Inc.,⁸⁸ the court, after discussing the advantages of complete disclosure and early discovery, held that the defendant, "after the passage of sufficient time for deposing those surveilled, [shall] make available for inspection and copying all films and tapes taken in connection with the surveillance."⁸⁹ Further, the court did not discuss any fact pattern that would warrant such broad disclosure; instead, it limited its comments to a general policy discussion and decided the case on that basis.⁹⁰

Similarly, in *Daniels v. National Railroad*,⁹¹ the district court ordered the production, for the plaintiff's inspection, of "not only those portions of film or tape which it intends to introduce at trial, but all films or tapes of the defendant in its possession."⁹² The court's rationale was again the broad and liberal discovery policy of the rules.⁹³ Finally, in *Olszewski v. Howell*,⁹⁴ the court resorted to a very similar approach, discussing the plaintiff's need to authenticate the technique of filming and editing the moving pictures taken of the plaintiff as good cause for disclosure of all the tape.⁹⁵

To summarize, none of the courts that adopted the blanket discovery approach considered the different policy considerations that accompany an attempt to discover non-evidentiary videotape.⁹⁶ As discussed in *Fisher v. National R.R. Passenger Corp.*,⁹⁷ most of the factors that weigh heavily in favor of the plaintiff when the film is used in evidence drop out when the defendant does not intend to use the tape at trial.⁹⁸

B. Work Product Doctrine and the Non-evidentiary Videotape

1. *The Fisher Case.*—The most recent case to explore the differences between evidentiary and non-evidentiary videotape in relation to discovery needs under the work product doctrine was *Fisher v. National Railroad Passenger Corp.*⁹⁹ The district court in *Fisher* held that the plaintiffs failed to meet their burden of establishing substantial need necessary to overcome the protection afforded the

88. 142 F.R.D. 435 (S.D. W. Va. 1992).

89. *Id.* at 437.

90. *Id.*

91. 110 F.R.D. 160 (S.D.N.Y. 1986).

92. *Id.* at 161.

93. *Id.*

94. 253 A.2d 77 (Del. Super. Ct. 1969).

95. The court noted that "moving picture evidence is subject to misuse by splicing, angle of shooting, misleading condensation, selective lighting, either natural or artificial, and many other variables." *Id.* at 78.

96. For a discussion of these policy issues, see *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145 (S.D. Ind. 1993).

97. *Id.*

98. These reasons include the need to authenticate the tape for accuracy, prepare an effective cross examination, and prevent unfair surprise and lengthy delays. *Id.* at 152-54.

99. 152 F.R.D. 145 (S.D. Ind. 1993).

non-evidentiary videotape by the work product doctrine. In *Fisher*, employees sued their employer under the Federal Employer's Liability Act (FELA) for injuries suffered during employment. The employer secretly videotaped the employees to obtain impeachment evidence at trial. When the plaintiffs submitted interrogatories regarding the existence of videotape or pictures and requests for production of all tapes in the employer's possession, the defendant agreed to and did produce, after deposing the plaintiffs, the single videotape it intended to use as impeachment evidence at trial. When the plaintiffs made subsequent demands for all videotape taken, the defendant objected, based on the work product doctrine as well as the local rule protecting impeachment evidence from discovery.¹⁰⁰

In a well reasoned opinion, the district court balanced the plaintiff's need to discover the non-evidentiary videotape with the employer's need to protect its trial preparation materials.¹⁰¹ After noting and accepting the reasoning in *Snead v. American Export-Isbrandtsen Lines, Inc.*,¹⁰² allowing discovery of videotape to be used at trial, the court examined whether the plaintiff had met the burden of "substantial need" required to overcome the employer's work product protection for the non-evidentiary videotapes.¹⁰³

2. *Plaintiff's Rationale.*—The plaintiff offered three distinct reasons why he had a "substantial need" for the non-evidentiary tapes.¹⁰⁴ First, the tapes may have contained substantive evidence that could be necessary in trial preparation.¹⁰⁵ The court rejected this argument, stating that the plaintiff had another readily available source of information regarding his injuries, i.e., his own knowledge and testimony, and it noted that the "[e]xistence of a viable alternative to invading work product, will, in most situations--and in this case--negate any substantial need."¹⁰⁶

The plaintiff's second argument focused on the need to ensure proper use of the video by the defendant, such as preventing the showing of the tapes to potential witnesses to "taint" their testimony.¹⁰⁷ The court similarly rejected this reason, stating that "[c]ompelling production of the tapes will not alleviate this risk because Defendant could still show the videos to witnesses."¹⁰⁸

Finally, the plaintiff asserted a "substantial need" to view the non-evidentiary videotape in order to assist in investigation and potentially impeach the producer of the film.¹⁰⁹ The court, in rejecting this argument, differentiated between the plaintiff's need to examine any evidentiary tape to be used at trial for

100. *Id.* at 148.

101. *Id.* at 151.

102. 59 F.R.D. 148 (E.D. Pa. 1973).

103. *Fisher*, 152 F.R.D. at 151-52.

104. *Id.* at 152.

105. *Id.*

106. *Id.*

107. *Id.* at 153-54.

108. *Id.* at 154.

109. *Id.*

discrepancies,¹¹⁰ thus decreasing the possibility of surprise at trial, and the lack of a similar basis for non-evidentiary tapes. The district court further noted that "mere surmise, on Plaintiff's part, that the non-evidentiary tapes may prove some assistance in impeaching the evidentiary tape is insufficient to breach attorney work product."¹¹¹ Thus, in assessing the plaintiff's stated needs for the non-evidentiary tapes, the court held that denying access to the tapes would not unduly prejudice the preparation of plaintiff's case or cause him any hardship or injustice,¹¹² as required to overcome work product immunity.¹¹³

C. Other Courts Distinguishing Evidentiary and Non-evidentiary Videotape

Although no other opinion has explored in detail the bifurcation approach outlined in *Fisher*, several courts have identified the issue of balancing the different needs present in evidentiary versus non-evidentiary videotape discovery.¹¹⁴ In *DiMichel v. South Buffalo Railway*,¹¹⁵ the New York Court of Appeals upheld the appellate court's decision, which had reversed the trial court's order for discovery of *all* the tapes, and allowed the plaintiff to discover *only* the tape to be used at trial.¹¹⁶ In addition, the same court reversed the lower court's ruling of harmless error in *Poole v. Consolidated Rail Corp.*,¹¹⁷ in which the defendant had been required to disclose *all* videotapes taken of the plaintiff prior to trial, even though the defendant did not subsequently use all the tapes at trial. The New York Court of Appeals noted the particularly egregious conduct of the plaintiff's attorney who referred to the existence of the tapes several times during the trial itself, further prejudicing the defendant to the jury.¹¹⁸ The Court of Appeals carefully pointed out, however, that it did not address the specific issue of whether non-evidentiary videotape *should* be discoverable by the plaintiff prior to trial or at all.¹¹⁹

110. *Id.* The court in *Fisher* noted that authentication of evidentiary videotape was the predominant reason that courts allow discovery needs to override the work product protection of the tapes. *Id.* at 154 (citing *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150-51 (E.D. Pa. 1973) and *Forbes v. Hawaiian Tug & Barge Corp.*, 125 F.R.D. 505, 508 (D. Haw. 1989)).

111. *Id.* at 155.

112. *Id.* This was the language used by the court in *Hickman* to explain the burden the plaintiff must overcome to negate work product protection. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

113. *Fisher*, 152 F.R.D. at 155-56.

114. See *Spencer v. Beverly*, 307 So. 2d 461 (Fla. Dist. Ct. App. 1975); *DiMichel v. South Buffalo Ry.*, 604 N.E.2d 63 (N.Y. 1992).

115. 604 N.E.2d 63 (N.Y. 1992).

116. *Id.* at 69.

117. 579 N.Y.S.2d 772, 773 (N.Y. App. Div. 1991), *rev'd*, *DiMichel v. South Buffalo Ry.*, 604 N.E.2d 63 (N.Y. 1992) (consolidated action including *Poole v. Consolidated Rail Corp.*).

118. *DiMichel*, 604 N.E.2d at 69.

119. *Id.* at 65-66.

Similarly, in *Spencer v. Beverly*,¹²⁰ the Florida appellate court distinguished between evidentiary videotape to be used at trial, and non-evidentiary tape,¹²¹ summarizing its position as follows:

Thus, it seems to me it is time to articulate a rule everyone can understand and use as a guide, namely: if a party possesses material he expects to use as evidence at trial, that material is subject to discovery Of course, the converse of that is not necessarily true. If a party possesses matter that is relevant or material to the case but does not intend to use it at trial, it may or may not be the subject of discovery, depending upon whether it is privileged as work product.¹²²

At least two state courts, discussing surveillance videotape materials in the context of the work product doctrine, have recognized an inherent difference in the discoverability of evidentiary and non-evidentiary videotape.¹²³ In *Cabral v. Arruda*,¹²⁴ the court distinguished evidentiary surveillance materials in which the plaintiff's burden of proving "substantial burden" and "undue hardship" was inherently established by the need to authenticate the tape to be used from the situation where the defendant's intended use of the video was only to aid in trial preparation or to examine the extent of the plaintiff's injuries.¹²⁵ In the latter situation, the court ruled the plaintiff's burden of proof had not been established per se and would require a higher showing to overcome the work product protection afforded the non-evidentiary videotape.¹²⁶

Similarly, in *Dodson v. Persell*,¹²⁷ the court held that any material to be used as evidence at trial ceases to have work product protection and is discoverable.¹²⁸ However, the court further held that the content of surveillance materials not intended to be submitted as evidence was subject to discovery only if they were "unique and otherwise unavailable, and materially relevant to the cause's issues."¹²⁹

120. 307 So. 2d 461 (Fla. Dist. Ct. App. 1975).

121. *Id.* at 462.

122. *Id.* (citation omitted).

123. See *Dodson v. Persell*, 390 So. 2d 704 (Fla. 1980); *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989).

124. *Cabral*, 556 A.2d at 47.

125. *Id.* at 50.

126. *Id.* The court stated:

However, in circumstances where a lawyer creates or causes to have created surveillance materials solely for his or her own use, such material is work product and thus qualifiedly immune from discovery. The mere existence of such materials alone does not constitute a showing of undue hardship to overcome qualified immunity under Rule 26(b)(2).

Id. at 50-51.

127. 390 So. 2d 704 (Fla. 1980).

128. *Id.* at 707.

129. The court gave the example of a photograph of a scene that had changed or could not

These decisions touched upon the basic policy differences required between the two types of videotape evidence, but did not discuss non-evidentiary tapes in detail. Where the videotape is to be used by the defendant only for trial preparation, the rationale for early discovery by the plaintiff simply does not apply (i.e., the need for authentication, and the need to prepare effective cross examination), and the defendant's need for privacy regarding trial preparation materials outweighs the plaintiff's need.

D. "Substantial Need" Rationale for Evidentiary and Non-evidentiary Videotape

As the court in *Fisher* correctly concluded, basic differences exist between evidentiary and non-evidentiary videos regarding the requirements the plaintiff must demonstrate in order to establish a substantial need strong enough to overcome the work product immunity afforded by Rule 26(b)(3).¹³⁰ When dealing with a videotape to be used against the plaintiff at trial, the plaintiff's need to authenticate the tape and to prepare effective cross examination and the broad discovery policy of preventing unfair surprise, preventing costly delays, and effecting a speedy resolution to the dispute weigh in the plaintiff's favor.¹³¹ These reasons fail, however, when the defendant does not intend to use the video at trial. The need for authentication and the need to prepare cross examination based on the content of the tapes becomes minimal if the jury will not view the tapes.¹³² The plaintiff's desire to find helpful impeachment or substantive evidence from the tapes is precisely the type of discovery the *Hickman* decision opposed as an invasion of the attorney's work product.¹³³ Additionally, the defendant has a stronger need with non-evidentiary video to prevent the plaintiff from unjustly benefiting from the defendant's investigatory efforts, and revealing his trial strategy.

IV. STANDARDS FOR ANALYSIS—POLICY CONSIDERATIONS

The spectrum of analysis for the discoverability of evidentiary and non-evidentiary videotape ranges from refusing to acknowledge the tapes as work

be reproduced as a unique circumstance where work product protection would be overcome. *Id.* To support this position, the court used a broad interpretation of a passage from *Hickman v. Taylor*, 329 U.S. 495 (1947), equating *facts* remaining hidden in an attorney's file in *Hickman* with the surveillance evidence in the instant case. *Dodson*, 390 So. 2d at 708 (citing *Hickman*, 329 U.S. at 511).

130. *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145, 155 (S.D. Ind. 1993).

131. *See supra* note 2.

132. *See Fisher*, 152 F.R.D. at 155.

133. "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). "Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure he has overlooked nothing. That is insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [the attorney's] professional activities." *Id.* at 513.

product,¹³⁴ to recognizing the tapes as work product but using a per se approach in analyzing the plaintiff's burden for showing a substantial need for the tapes,¹³⁵ to a balancing of the plaintiff's and defendant's needs in determining if work product protection has been overcome.¹³⁶ Because court approaches have encompassed a broad spectrum, ranging from a blanket policy to be applied in all cases¹³⁷ to a careful analysis based on the facts of each case,¹³⁸ it is little wonder that, in the quagmire of approaches employed, few courts have differentiated the varying factors present between evidentiary and non-evidentiary videotapes.

The overall policy underlying the discovery issue is the intent of the federal rules to facilitate a liberal discovery process in which adversaries share essential facts to eliminate surprise and foster speedy dispute resolution.¹³⁹ This goal must always be tempered with the right of the parties to a certain amount of privacy in trial preparation, as delineated by the work product doctrine.¹⁴⁰ This balancing of interests implies a need for careful, fact sensitive analysis by the courts in evaluating whether plaintiffs, in a given fact situation, have met their burden of demonstrating substantial need for the tapes in preparation of the case. As noted in *Fisher*,¹⁴¹ the plaintiff who attempts to access non-evidentiary videotape bears a higher burden to overcome the defendant's right to work product protection.¹⁴² This directly correlates to the decreased need for the tapes when they will not be used at trial, absent exceptional circumstances.¹⁴³ Therefore, the most effective approach in these cases results from the balancing approach employed by many recent court decisions, looking at the facts of the case and weighing the relative needs of the plaintiff against those of the defendant.

Decisions such as *Fisher v. National Railroad Passenger Corp.*,¹⁴⁴ *DiMichel v. South Buffalo Railway*,¹⁴⁵ *Spencer v. Beverly*,¹⁴⁶ and *Dodson v. Persell*,¹⁴⁷ weighed the intended use of the videotape evidence against the opposing counsel's need to access the film and arrived at well-reasoned bases to allow or disallow discovery. Their careful approach avoided the pitfalls encountered by the trial courts in *Chiasson v. Zapata Gulf Marine Corp.*¹⁴⁸ and *Poole v. Consolidated Rail*

134. See *supra* note 75.

135. See *supra* note 76.

136. See *supra* note 77.

137. See *supra* note 79.

138. *Fisher v. National R.R. Passenger Corp.*, 152 F.R.D. 145 (S.D. Ind. 1993).

139. See *supra* note 2.

140. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

141. *Fisher*, 152 F.R.D. at 145.

142. *Id.* at 151-52.

143. See *supra* note 83 and accompanying text.

144. 152 F.R.D. 145 (S.D. Ind. 1993).

145. 604 N.E.2d 63 (N.Y. 1992).

146. 307 So. 2d 461 (Fla. Dist. Ct. App. 1975).

147. 390 So. 2d 704 (Fla. 1980).

148. 988 F.2d 513 (5th Cir. 1993).

Corp.,¹⁴⁹ where a blanket approach resulted in reversible error and significant additional expense and delays in dispute resolution. Skillful analysis of the relevant factors in the case results in the proper application of the work product doctrine as intended when first identified by the Supreme Court in *Hickman*.

V. OTHER DISCOVERY ISSUES RELATING TO SURVEILLANCE VIDEOTAPES

A. *State Statutes and Surveillance Videotapes—A Different Wrinkle*

In addition to the issue of discovery of surveillance videotapes under the work product doctrine, at least one state has enacted a civil statute requiring the full disclosure of "any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof . . . including out-takes, rather than only those portions a party intends to use."¹⁵⁰ In *Marigliano v. Krumholtz*,¹⁵¹ the first case to deal with the discovery of tapes and memoranda after the statute was passed, the court held that the tapes and memoranda were discoverable by the plaintiff, after the memos had been redacted so as not to reflect the thoughts of the defendant's attorney.¹⁵² The court, in arriving at this decision, cited the "open far-reaching disclosure policy" of New York and the liberal interpretation of the statute.¹⁵³ In two subsequent cases interpreting the statute, state courts have upheld the discovery of all videotapes, regardless of their planned use,¹⁵⁴ while at the same time refusing to expand the discovery rule to include materials used in preparation of the surveillance.¹⁵⁵ The Defense Bar has predicted a chilling effect on the defendant's use of surveillance film where uncertainty exists as to the extent to which the materials will be discoverable.¹⁵⁶

Further, the issue of whether the discovered materials can subsequently be used by the plaintiff in its *prima facie* case remains unanswered.¹⁵⁷ The only case to address the issue was decided prior to the enactment of the statute.¹⁵⁸ In *Baird v. Campbell*,¹⁵⁹ the court refused to allow the plaintiff to use the defendant's videotape in the *prima facie* case, holding that the tapes were not "material and

149. 579 N.Y.S.2d 772 (N.Y. App. Div. 1991).

150. N.Y. CIV. PRAC. L. & R. § 3101(a)(i) (McKinney 1991 & amended 1993); *see* Conners, *supra* note 78, at 22.

151. 603 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1993).

152. *Id.* at 1022.

153. *Id.* at 1023.

154. *Boulware v. Triborough Bridge & Tunnel Auth.*, 613 N.Y.S.2d 580 (N.Y. Sup. Ct. 1994).

155. *Grossman v. Emergency Cesspool & Sewer Cleaners, Inc.*, 617 N.Y.S.2d 422 (N.Y. Sup. Ct. 1994); *Weinhold v. Witte Heavy Lift, Inc.*, No. 90 Civ. 2096 (PKL), 1994 WL 132392, at * 3 (S.D.N.Y. April 11, 1994).

156. *See* Conners, *supra* note 78, at 24.

157. *Id.*

158. *Baird v. Campbell*, 590 N.Y.S.2d 399 (N.Y. Sup. Ct. 1992).

159. *Id.*

necessary” to the plaintiff’s case, but refusing to carve out another exception to the liberal discovery doctrine.¹⁶⁰

While the future impact of the New York statute is unknown, the statute clearly restricts work product protection for materials such as memoranda or transcripts that would have certainly been included under Rule 26(b)(3). Thus, the *Hickman* doctrine has been substantially diluted in New York.

B. FRCP, Discovery and The Expert Witness Rule—Does the Investigator Qualify?

Another possibility exists that would impact the discoverability of surveillance videotape evidence. Under Rule 26(a)(2),¹⁶¹ if the investigator who conducted the surveillance is utilized as an expert, the rule would compel full disclosure of what the expert knows prior to trial.¹⁶² An expert is a witness who is qualified by knowledge, experience, skill, training, or education, and therefore is qualified to give an opinion.¹⁶³ Although there are no cases dealing with this issue directly, a recent Pennsylvania case addressed what information, given to an expert to form

160. *Id.* at 402.

161. FED. R. CIV. P. 26(a)(2).

162. The rule directs:

Except as otherwise stipulated or directed by the court, the disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; *the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions . . .*

Id. (emphasis added). For general background on the expert witness rule, see Thomas R. Trenkner, Annotation, *Pretrial Discovery of Facts Known and Opinions Held by Opponent’s Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure*, 33 A.L.R. FED. 403 (1977 & Supp. 1994).

163. According to FED. R. EVID. 702, the expert testimony rule reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by *knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise.

FED. R. EVID. 702. (emphasis added). Additionally, the advisory committee’s notes stated: The fields of knowledge which may be drawn upon are not limited merely to the “scientific” and “technical” but extend to all “specialized” knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by “knowledge, skill, experience, training or education.” Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called “skilled” witnesses, such as bankers or landowners testifying to land values.

FED. R. EVID. 702 (advisory committee’s note on 1972 proposed rules).

an opinion, would be discoverable by the plaintiff. In *Corrigan v. Methodist Hospital*,¹⁶⁴ the court ruled that the defendant doctor had to disclose to the plaintiff patient *all materials* that had been provided to the expert for consideration, not merely the reports relied upon.¹⁶⁵

By contrast, in an earlier case, *Gay v. Lindsay, Inc.*,¹⁶⁶ the First Circuit reached a different result on the same issue. The court held that certain correspondence documents provided to the expert witness by the defendant before trial were work product and not discoverable.¹⁶⁷ The rationale cited by the court referred to the minimal additional impeachment value the statements would have made, and that work product should remain protected when the person was available to be deposed.¹⁶⁸

While the issue of what an expert private investigator would be required to disclose on the basis of the expert witness rule remains unanswered, the possibility exists that a court could order discovery of all surveillance materials within the investigator's knowledge, based on Rule 26(a)(2). The new rule goes even further to require automatic disclosure of all relevant material experts have utilized in forming the basis of their opinions. In the midst of this uncertainty, the most prudent course for defendants would be to avoid utilizing their investigators as expert witnesses.

C. Impact of the New Federal Discovery Rule

The most recent revision to the discovery rules under Rule 26 significantly changed the method of discovery, requiring early and automatic disclosure of the types of information felt to be basic to the case,¹⁶⁹ and thus preventing undue

164. 158 F.R.D. 54 (E.D. Pa. 1994).

165. *Id.* at 58.

166. 666 F.2d 710 (1st Cir. 1981).

167. *Id.* at 713.

168. *Id.*

169. Rule 26(a)(1) requires:

Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without waiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which is based, including materials bearing on the nature and extent of injuries suffered.

FED. R. CIV. P. 26(a)(1).

delays in the discovery process.¹⁷⁰ The new rule provides for three types of self-executing disclosure: initial disclosure,¹⁷¹ expert disclosure,¹⁷² and pre-trial disclosure.¹⁷³ Although court interpretations of this new section remain uncertain, it would appear that the rule requires a party to disclose without request any documents or tangible things relating to the facts of the case in the party's possession within ten days after the initial meeting of the parties.¹⁷⁴ If taken literally by the courts, this provision could limit the scope of work product protection as it is known today. The uncertainty of the extent of mandatory disclosure under the new rule will challenge defendants and the courts in outlining the limits of the materials to be included under this provision.¹⁷⁵

CONCLUSION

Inconsistencies in federal and state decisions relating to the discoverability of videotapes by the plaintiff prior to trial have resulted from the multitude of

170. The advisory committee for the 1993 amendments cited this rationale as the basis for the automatic disclosure provision, noting that many local rules already required such disclosure. FED. R. CIV. P. 26(a)(1) (advisory committee's note for 1993 amendments). The new mandatory disclosure rules have also generated significant criticism. *See, e.g.,* Carol Cure, *Discovery Reform and the Impending Death of the Adversary System*, FOR THE DEF., September 1995, at 21-26; Fred S. Souk, *No Disclosure!-No Discovery!-No Nonsense! Faster, Cheaper, Better Civil Justice*, FOR THE DEF., September 1995, at 28-31 (recommending complete change to the civil justice system and abolition of the discovery process).

171. Initial disclosure includes information in the following categories: the names, addresses, and telephone numbers of all persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings; a copy or description by category and location of all documents, data compilations, and tangible things in the party's possession relevant to the disputed facts; computation of damages claimed, with supporting documentation to be available for copying and inspection; and insurance policies which could satisfy the judgment. FED. R. CIV. P. 26(a)(1).

172. Experts who may testify at trial must be disclosed, along with a written report prepared and signed by the expert, including: a statement of the opinions to be expressed by the expert with the bases for the opinions; the data or information considered by the expert in forming the opinions; exhibits to be used to support or summarize the opinions; qualifications of the expert; compensation to be paid; and a list of cases in which the expert has testified at trial or by deposition in the last four years. FED. R. CIV. P. 26(a)(2).

173. The party must provide the following information about evidence it may present at trial (except impeachment evidence): name, address, and phone number of each witness, separating those the party will call from those they may call; a list of the witnesses whose testimony will be presented by deposition, and a transcript of the applicable portions; and a list of exhibits, including a summary of evidence, separating those that will be offered from those it will offer if necessary. FED. R. CIV. P. 26(a)(3).

174. FED. R. CIV. P. 26(a)(1).

175. Interestingly, to date at least 42 of the federal districts have opted out of or altered the mandatory initial disclosure requirements of FED. R. CIV. P. 26(a)(1).

analytical approaches employed by the various district courts and their varying interpretations of the federal rules. As the use of videotape surveillance continues to increase, the need for a consistent approach in dealing with this issue will become paramount. Given the nature of the material and the potential impact on the jury, the issue of whether the tapes are discoverable before trial will sometimes have a dramatic impact on the outcome of the trial.

Although the federal rules were enacted to provide a more uniform implementation of court procedure in the federal courts, this goal has been frustrated by the inconsistent application of the discovery rule to surveillance cases. The *Hickman* doctrine correctly identified that there are necessary limits to the materials a plaintiff should rightfully be able to discover, based on demonstrating a substantial need for the defendant attorney's work product. Many recent court decisions have reflected the belief that each case must be decided through the utilization of a balancing approach between the plaintiff's need to effectively prepare his case, and the defendant's need to protect his work product, and thus, trial strategy.

The balancing approach produces the most consistently fair results by addressing the parties' needs relative to the facts of the case. The bifurcation approach outlined in *Fisher v. National R.R. Passenger Corp.* reflects the most well-reasoned way to analyze the need for videotape discovery. When the tape has an intended evidentiary use, the plaintiff has a heightened need to authenticate the film before trial and to prepare an effective cross examination strategy. This also facilitates the discovery goals of speedy resolution of disputes. The defendant's need to preserve the impeachment value of the tape is safeguarded, as outlined in the *Snead v. American Export-Isbrandtsen Lines, Inc.* decision, by requiring the plaintiff to submit to a full deposition before being informed of the existence of the tape or being given the tape.

However, when the videotape is intended for non-evidentiary use, such as case preparation and evaluation of the extent of the plaintiff's injuries, the plaintiff's need to discover such material is greatly diminished, because the jury will not be exposed to the tape. This type of investigation falls within the work product protection as envisioned by the court in *Hickman v. Taylor*. To allow the plaintiff to invade the defendant's work product, absent unusual circumstances, would be to ignore the requirement of establishing substantial need. As discussed in *Fisher*, the plaintiff has an alternate source of information, i.e., his own knowledge and testimony, that would preclude discovery of this type of work product.

Although good policy reasons exist for allowing the plaintiff to discover evidentiary video prior to trial, these reasons are not present when dealing with non-evidentiary videotape. The plaintiff should be required to meet a higher burden to access this type of work product. Any rule which adopts a blanket policy approach without looking to the relative needs in the case runs the risk of inequitable decisions. That is not, and has never been, the intent of the federal rules.