FOR MORE INFORMATION

HUIE, FERNAMBUCQ & STEWART, LLP
Birmingham, Alabama
www.huielaw.com

Bart Cannon
bcannon@huielaw.com

Paul Malek
pmalek@huielaw.com

Will Thompson
wthompson@huielaw.com

MCDOWELL, KNIGHT, ROEDDER & SLEDGE, LLC
Mobile, Alabama
www.mcdowellknight.com

Hart Benton
tbenton@mcdowellknight.com

Jon Lieb
jlieb@mcdowellknight.com

Alex Steadman
asteadman@mcdowellknight.com

Alabama

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The Alabama Supreme Court has held that the fact that surveillance exists is not protected by the work product doctrine and is discoverable. *Ex parte Doster Constr. Co.*, 772 So. 2d 447, 451 (Ala. 2000). However, the Court has indicated that video surveillance *would* constitute protected work product if it was prepared or conducted in anticipation of litigation. *Id.* at 451-52. That is not to say that the Plaintiff may not, under any circumstance, obtain surveillance discovery; however, requiring a defendant to produce surveillance must be predicated on a showing that the plaintiff has a "substantial need to see [the surveillance] and . . . that he could not obtain the substantial equivalent of such information without undue hardship." *Id.* at 452.

FOR MORE INFORMATION

WRIGHT, LINDSEY & JENNINGS LLP
Little Rock, AR
www.wlj.com

Michael D. Barnes
mbarnes@wlj.com

Greg Jones
gjones@wlj.com

Antwan Phillips
aphillips@wlj.com

Jerry Sallings
jsallings@wlj.com

Glenn Ritter
gritter@wlj.com

Zachary Trail
ztrail@wlj.com

Arkansas

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Arkansas Rule of Civil Procedure 26(b)(1) provides for "discovery of any matter, not privileged, which is relevant to the issues in the pending actions[.]" Other than the duty to "seasonably amend" discovery and any scheduling orders from the court setting forth specific discovery deadlines, there is no Arkansas law governing the point in time when surveillance must be disclosed.[i] Video surveillance that a party intends to use at trial should be disclosed in sufficient time to allow the plaintiff to prepare for trial, which is a subjective standard. Production of the surveillance can be delayed until after the subject of the surveillance has been deposed, absent a court order requiring disclosure beforehand.

Arkansas courts have not addressed whether a party can protect the contents of surveillance from discovery by claiming it as privileged work product, but if video surveillance is obtained that will be used at trial, it should be produced in accordance with the Arkansas Rules of Civil Procedure. If a party fails to disclose the surveillance and intends to use it at trial, causing the plaintiff to suffer prejudice, the court may impose sanctions including prohibiting the introduction of the surveillance into evidence or rendering a judgment of default against the offending party.[ii]

FOR MORE INFORMATION

MATHENY SEARS LINKERT & JAIME, LLP
Sacramento, California
www.mathenysears.com

Jeffrey E. Levine
jlevine@mathenysears.com

HAIGHT BROWN & BONESTEEL, LLP
Los Angeles, CA
www.hbblaw.com

Peter A. Dubrawski
pdubrawski@hbblaw.com

Austin Smith
asmith@hbblaw.com

HIGGS FLETCHER & MACK, LLP
San Diego, California
www.higgslaw.com

Peter S. Doody
doody@higgslaw.com

Nicholas D. Brauns
braunsn@higgslaw.com

Molly H. Teas
mhteas@higgslaw.com

California

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

In California, surveillance is discoverable at any time during the discovery process. California has long held that photographs and films of surveillance are subject to discovery and, further, that such evidence is not generally protected by the attorney-client or work-product privilege. (*Suezaki v. Superior Court* 58 Cal.2d 166 (1962).) The California Judicial Council recognized the discoverability of surveillance evidence in Form Interrogatories published by the Judicial Council. Form Interrogatory 13.1 specifically requires the responding party to identify the name, address and telephone number of the individual conducting surveillance; the time, date, and place of surveillance; and the name, address and telephone number of each person who has the original or copy of any surveillance photograph, film or videotape. Moreover, Form Interrogatory 13.2 requires the responding party to identify information for any written surveillance reports including the title, date, name of author, and identification of the person who has the original or copy.

Thus, if surveillance evidence exists at the time the discovery is propounded, it must be disclosed. However, if the surveillance evidence reflects the attorney's strategies and tactics in preparation for trial and no injustice would follow if the evidence were not produced it is given qualified work product protection. (Cal. Code Civ. Proc. §2018.030.) Generally, however, if surveillance is to be used at trial, it must be disclosed during discovery, if requested.

FOR MORE INFORMATION

HALL & EVANS LLC
Denver, Co
www.hallevans.com

Lance G. Eberhart
eberhartl@hallevans.com

Paul T. Yarbrough
yarbroughp@hallevans.com

Brooke A. Churchman
churchmanb@hallevans.com

Colorado

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Though there is no direct appellate authority applying the current version of the Colorado Rules of Civil Procedure, pursuant to Colorado's expansive disclosure requirements, surveillance should be disclosed at the outset of litigation pursuant to C.R.C.P. 26(a)(1). Colorado's version of Rule 26 is more expansive than the federal rule because Colorado requires initial disclosure of all materials "that are relevant to the claims and defenses of a party." Because surveillance is relevant, it should be disclosed at the beginning of litigation regardless of whether it will be used for impeachment. Though some defendants have argued that surveillance does not become relevant until the defendant understands the plaintiff's injury claims, a defendant who withholds surveillance risks having the evidence precluded pursuant to C.R.C.P. 37(c) unless the non-disclosure is substantially justified or harmless.

FOR MORE INFORMATION

HALLORAN SAGE, LLP
New Haven, CT
www.halloransage.com

Frederick J. Trotta, Sr
trotta@halloransage.com

Connecticut

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

According to Connecticut Practice Act §13-c, the plaintiff is entitled to know if surveillance films or videos were taken. A defendant is not required to produce the videos until 30 days after the plaintiff deposition or 60 days prior to trial. Failure to produce the footage may result in preclusion of the evidence.

FOR MORE INFORMATION

MORRIS JAMES LLP
Wilmington, DE
www.morrisjames.com

David J. Soldo
dsoldo@morrisjames.com

Delaware

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Under Rule 26(b)(3), discovery of photographs and similar materials has been permitted on the theory that the difficulty of duplicating photographs, diagrams and the like, made at or about the time of the occurrence giving rise to the suit is a sufficient showing to overcome the qualified immunity of the work product doctrine. Surveillance photographs, motion pictures, or video tapes are subject to discovery by the party whose activities the photographs or films purport to represent. *Hoey v. Hawkins*, 332 A.2d 403 (Del. 1975); *Olszewski v. Howell*, 253 A.2d 77 (Del. Super. 1969).

However, the party requesting production still carries the burden of showing that the substantial need and undue hardship requirement is met. The unique nature of photographs, movies and videotapes may weigh heavily towards a sufficient showing of substantial need and undue hardship to overcome the qualified immunity of the work product doctrine. *Olszewski*, 253 at 77.

First, even assuming the plaintiffs can recall the events of the two days in question, the precise evidence which the defendant has, the film, is now unique and cannot now be reproduced. Second, moving picture evidence is subject to misuse by splicing, angle of shooting, misleading condensation, selective lighting, either natural or artificial, and many other variables. It may take an expert to discover and analyze the product and techniques. Third, there is now, at least in civil cases, *a well-established policy of pretrial disclosure* which is based on a rationale that a trial decision should result from a disinterested search for truth from all the available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production. Fourth, disclosure should expedite the disposition of the case by encouraging settlement, by bringing to head any objections to the evidence, and by giving the plaintiffs an advance opportunity to develop counter-evidence. *Cf. MacManus v. Food Fair Stores, Inc.*, 5 Storey 554, 188 R.2d 678 (Super.Ct.1962). These policy reasons support disclosure. *Id.* at 78 (emphasis added).

The timing for production of surveillance recordings is uncharted territory in Delaware. The closest decision pertaining to the issue was *Hoey v. Hawkins*. In *Hoey*, a defendant in a personal injury action failed to disclose the existence of surveillance footage of plaintiff taken by a detective until the end of the first day of trial. *Id.* at 405. The trial court admitted the evidence. *Id.* On appeal, the Delaware Supreme Court held that the defendant breached his duty to update answers to interrogatories by intentionally failing to disclose the existence of

FOR MORE INFORMATION

HAWKINS PARNELL & YOUNG, LLP
Atlanta, Georgia
hpylaw.com

David H. Wilson
dwilson@hpylaw.com

Garret J. Drogosch
gdrogosch@hpylaw.com

HUNTER, MACLEAN, EXLEY & DUNN, P.C.
Savannah, Georgia
huntermaclean.com

Taylor L. Dove
tdove@huntermaclean.com

Georgia

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

While the Georgia Supreme Court and appellate courts have not address discovery of surveillance evidence, numerous Georgia state and superior courts have held that surveillance conducted on a plaintiff constitutes work product and is protected from discovery, unless the plaintiff can show a substantial need for such surveillance evidence. *See Berber-Cabrera v. Tmx Intermodal Logistics*, 2022 Ga. State LEXIS 243 (2022), State Court of Georgia, Dekalb County, Civil Action File No. 19A77551-1; *Walker v. CSX Transp. Inc.*, 2023 Ga. Super. LEXIS 2886 (2023), Superior Court of Fulton County, Civil Action No. 2022CV373595. Moreover, the Georgia Supreme Court has held that the Georgia Civil Practice does not require a litigant to disclose impeaching documents in their pretrial disclosures. *See Ballard v. Meyers*, 275 Ga. 819, 820-821 (2002) (*citing* O.C.G.A. § 9-11-16) (finding no "rationale for requiring the disclosure of documents which may be used to attack the credibility of the other side's witnesses.").

Georgia's federal courts have considered the issue, and those courts have found that "[s]urveillance materials are clearly within the definition of work product since they are tangible and were prepared in anticipation of litigation by or for a party to the litigation. The surveillance materials are, however, entitled to only a qualified immunity since no mental impressions, conclusions, or legal theories of the attorney are implicated. The qualified immunity can be overcome by a showing of substantial need. The only time there will be a substantial need to know about surveillance pictures will be in those instances where there would be a major discrepancy between the testimony the plaintiff will give and that which the films would seem to portray." *Orr v. Macy's Retail Holdings, Inc.*, 2016 U.S. Dist. LEXIS 147573, *15-16, 2016 WL 6246798 (S.D. Ga. Oct. 24, 2016); *see also Turner v. Atl. Southeast Airlines, Inc.*, 2008 U.S. Dist. LEXIS 127034, *3-4 (N.D. Ga. Jan. 25, 2008) ("the courts agree that surveillance evidence is attorney work product, but that it is discoverable if the requesting party can show a substantial need for it. It is also well settled that the possible use of surveillance evidence at trial creates the requisite substantial need to make surveillance evidence discoverable."). "On the other hand, courts have agreed that, if a party who has surveillance information is not going to use it at trial, then there is no need for the other party to be given access to that attorney work product…That is, when, as here, surveillance material is barred from use at trial, or is 'nonevidentiary surveillance material,' it is protected by the attorney work product doctrine and is not discoverable. *Turner,* 2008 U.S. Dist. LEXIS 127034, at *4.

Georgia courts have not indicated whether there are consequences for failure to

disclose surveillance materials. However, a Georgia superior court recently provided a "cautionary note for Defendant: if there is surveillance evidence and Defendant decides mid-trial that it wishes to use it, such late disclosure, while not prohibited under the law, may prompt a day's continuance, which never makes jurors happy." *Walker v. CSX Transp. Inc.*, 2023 Ga. Super. LEXIS 2886, *4, Superior Court of Fulton County, Georgia, Civil Action No. 2022DV373595 (J. McBurney) (Sept. 5, 2023).

FOR MORE INFORMATION

LEWIS WAGNER, LLP
Indianapolis, IN
www.lewiswagner.com

Robert R. Foos
rfoos@lewiswagner.com

Lesley Pfleging
lpfleging@lewiswagner.com

Katherine Strawbridge
kstrawbridge@lewiswagner.com

Indiana

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The existence and substance of surveillance activities are not discoverable unless Defendant elects to use the same at trial, and then only after the Defendant is given an opportunity to depose the Plaintiff fully regarding their alleged injuries and damages. *Pioneer Lumber, Inc. v. Bartels*, 673 N.E.2d 12 (Ind. Ct. App. 1996). If surveillance is not disclosed after Plaintiff has been deposed on the extent of injuries, disabilities, and restrictions, the surveillance will be inadmissible at trial and loses it potential impeachment value.

FOR MORE INFORMATION

JOHNSON & BELL, LTD.
Chicago, Illinois
www.johnsonandbell.com

Michael J. Linneman
linnemanm@jbltd.com

Brendan T. Fallon
fallonb@jbltd.com

Illinois

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Post-incident surveillance tapes must be disclosed prior to use at trial. *Wiker v. Pieprzyca-Berkes*, 314 Ill. App. 3d 421, 430 (2000). The Court in *Wiker* held that video surveillance of the Plaintiff was not equally available and in the public domain because, while she may know of her actions, she may not know the impression that would be created by a particular videotape with its particular editing choices, lighting choices, lighting conditions, camera angles, etc. *Id*. However, the *Wicker* court gives no indication of when such disclosure must occur.

"Day-in-the-life" videos created by a Plaintiff's attorney are subject to different rules. In *Velarde v. Ill. Cent. R. R.*, a plaitniff attorney filmed the plaintiff for a week creating a demonstrative "day-in-the-life" video. 354 Ill. App. 3d 523, 532 (1st Dist. 2004). Filming commenced about three weeks before trial. *Id*. The raw footage was reviewed and edited during the weeks preceding trial and was finalized the Friday preceding the start of trial. *Id*. The attorney disclosed and tendered the video on the following Monday and supplemented his discovery responses. *Id*. The trial court modified the discovery deadline and depositions were taken up to a week prior to trial by both sides. *Id*. Given that the video's purpose was to illustrate the Plaintiff's life at the time of trial, it would make little sense to record Plaintiff months in advance. *Id*. The video was not disclosed and tendered too late, and a retrial was not warranted, especially where the video was used as a demonstrative. *Id*.

A discovery violation can occur in an instance in which defendant kept surveillance video of the plaitniff for two months before turning it over. *Warrender v. Millsop*, 304 Ill. App. 3d 260, 270 (2d Dist. 1999).

Ill. Sup. Ct. R 213 committee comments specify that a party should never be allowed "to fail to comply with the spirit of this rule by either negligent or willful noncompliance." Opposing counsel can argue that not turning over surveillance after specific requests or interrogatories is willful noncompliance and may seek to bar any surveillance from admission and/or other sanctions within the court's discretion. Factors in determining proper sanctions for discovery violations include: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 110-11 (2004). Discovery violations can warrant barring witnesses from testifying, barring admission of non-disclosed evidence, remanding for retrial on damages,

and awarding costs and fees to the prejudiced party. If failing to disclose surveillance in a timely fashion prejudices the opposition, the court will minimally bar the evidence.

FOR MORE INFORMATION

WHITFIELD & EDDY, PLC
Des Moines, Iowa
Website

Zach J. Hermsen
Email: hermsen@whitfieldlaw.com

Matthew D. Jacobson
Email: jacobson@whitfieldlaw.com

Nick J. Gral
Email: gral@whitfieldlaw.com

Bryn E. Hazelwonder
Email: hazelwonder@whitfieldlaw.com

Anna E. Mallen
Email: mallen@whitfieldlaw.com

Iowa

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Under Iowa law, at what point surveillance is discoverable, whether it has to be disclosed, and the consequences of not disclosing it depend on whether the surveillance is deemed work product. Something is work product if it is "(1) a document or tangible thing, (2) prepared in anticipation of litigation, and (3) prepared by or for another party or by or for that party's representative." *Iowa Ins. Inst. v. Core Grp. of the Iowa Ass'n for Justice*, 867 N.W.2d 58, 70 (Iowa 2015). In determining whether something was prepared in anticipation of litigation, Iowa courts consider "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 48 (Iowa 2004).

There are two tiers of work product recognized in Iowa. *See Iowa Ins. Inst.*, 867 N.W.2d 70. The lower tier of work product consists of relevant facts which may be discoverable if there is a showing of substantial need and undue hardship. *Id.* The upper tier of work product consists of "any work product revealing attorneys' mental impressions and conclusions" and is undiscoverable. *Id.* In *Iowa Ins. Inst. v. Core Grp. of the Iowa Ass'n for Justice*, the Iowa Supreme Court determined that "[i]t is clear that surveillance materials are documents or tangible things, prepared in anticipation of litigation, by or for another party or that party's representative, so surveillance materials are protected, lower-tier materials, at least initially." 867 N.W.2d 71. However, if a determination is made that the surveillance will be used at trial, it will no longer be considered work product. *Id.*

If surveillance is not deemed work product, then it is subject to Iowa's standard disclosure rules. Iowa Rule of Civil Procedure Rule 1.500(1) provides that "a party must, without awaiting a discovery request, provide to the other parties . . . All documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Iowa R. Civ. P. 1.500(1) (2024). With some modifications, Rule 1.500 adopts the required disclosures used by the federal courts. The information disclosed under Rule 1.500(1) is subject to a continuing duty to supplement. Additionally, Rule 1.500(3) governs pretrial disclosures and provides that "a party must provide to the other parties . . . information about the evidence the party may present at trial other than evidence to be used solely for impeachment." Iowa R. Civ. P. 1.500(3)(a) (2024). Pretrial disclosures must be made at least 14 days before trial. Iowa R. Civ. P. 1.500(3)(b) (2024).

If the surveillance is discoverable and a party fails to disclose such surveillance, the court may institute sanctions as outlined in Iowa Rule of Civil Procedure 1.517. *See* Iowa R. Civ. P. 1.517 (2024).

FOR MORE INFORMATION

HINKLE LAW FIRM LLC
Wichita, KS 67206
www.hinklaw.com

J. Philip Davidson
pdavidson@hinklaw.com

Paul J. Skolaut
jskolaut@hinklaw.com

BAKER, STERCHI, COWDEN & RICE, LLC
Kansas City, MO 64108
bakersterchi.com

Jonathan E. Benevides
benevides@bakersterchi.com

James R. Jarrow
jarrow@bakersterchi.com

Shawn M. Rogers
rogers@bakersterchi.com

Kansas

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance is discoverable, but it does not have to be disclosed until after plaintiff's deposition. *Glendora Russell Claimant v. Bank of Am, et al.*, 2004 WL 1810318 (Kan. Work. Comp. App. Bd. 2004) and *Koser v. Atchison, Topeka, and Santa Fe Railway Company*, 261 Kan. 46, 928 P. 2d 85 (1996). If the surveillance video and other information is not timely produced after the deposition, it can be excluded from trial. *Koser*, 261 Kan. at 60-65.

FOR MORE INFORMATION

HARLIN PARKER ATTORNEYS
Bowling Green, KY
harlinparker.com

Marc A. Lovell
lovell@harlinparker.com

Justin L. Duncan
duncan@harlinparker.com

STOLL KEENON OGDEN
Lexington, KY
skofirm.com

Palmer G. Vance, II
gene.vance@skofirm.com

Matthew R. Parsons
matt.parsons@skofirm.com

Kentucky

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

As a general matter, Kentucky law protects all documents and tangible things prepared in anticipation of litigation from discovery. See CR 26.02(3). The privilege is not limited to attorneys and "applies with equal force to the work product of the party's other representatives, including private investigators." *Transit Authority of River City (TARC) v. Vinson*, 703 S.W.2d 482, 485 (Ky. App. 1985). With that said, not all surveillance materials are protected by the work product doctrine. *Id*. Work product that does not reflect the mental impressions of the investigator and is primarily factual, "receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship." *Id.*

In Kentucky, to obtain the disclosure of materials deemed work product, the requesting party must show that "it has a substantial need for, and is unable to obtain the substantial equivalent of" the material. *Id*. at 486. In *TARC*, the Kentucky Court of Appeals held that the surveillance photographs and reports were factual in nature and did not contain the mental impressions or legal opinions of the investigation. *Id.* Therefore, the materials received a qualified protection that could be overcome by the requesting party's showing of substantial need and inability to obtain the material elsewhere without undue hardship. Id. Because it was impossible to obtain a substantial equivalent to the surveillance materials, the court ordered its disclosure. *Id.*

Under Kentucky law, matters relating to the timing and/or sequence of discovery are generally left to the broad discretion of the court. See *C.C. v. Cabinet for Health & Family Servs.*, 330 S.W.3d 83, 87 (Ky. 2011) ("generally speaking, the trial court has the power to control the timing and sequence of discovery."). However, in Kentucky state court, written discovery requests for surveillance materials can be served along with a plaintiff's Complaint at the commencement of a lawsuit. In federal Court, written discovery requests for surveillance materials can be served immediately after the Fed. R. Civ. P. 26(f) conference of parties.

If a party fails to disclose and/or produce discoverable surveillance footage, the Court may enter an order compelling the disclosure and/or production of the surveillance footage. A party may also be subject to sanctions under CR 37 if it does not disclose and/or produce discoverable surveillance. The sanctions could include paying the opposing party reasonable expenses incurred in obtaining an order compelling the production, including attorney fees, unless

the court finds the opposition was substantially justified or that other circumstances make an award of expenses unjust. *See* CR 37.01(d)(i).

FOR MORE INFORMATION

LEAKE & ANDERSSON, LLP
New Orleans, LA
leakeandersson.com

MISHA M. LOGAN-JOHNSON
Email:
mlogan@leakeandersson.com

MICHAEL B. GUERRY
Email:
mguerry@leakeandersson.com

CRAIG M. COUSINS
Email:
ccousins@leakeandersson.com

LOUIS P. BONNAFFONS
Email:
lbonnaffons@leakeandersson.com

ROBERT L. BONNAFFONS
Email:
rbonnaffons@leakeandersson.com

Louisiana

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

La. C.C.P. art. 1422 provides that any relevant matter, that is not privileged, is discoverable. Even information which will be inadmissible at trial but is "reasonably calculated to lead to the discovery of admissible evidence" is discoverable. Under this broad rule, surveillance is discoverable material.

If the surveillance was performed prior to the issuing of written discovery, the existence of the surveillance must be disclosed in response to written discovery. More specifically, a defendant must respond, either in the affirmative or the negative, to an interrogatory inquiring about the existence of surveillance videotape. *See Wolford v. Joellen Smith Psychiatric Hosp.,* 693 So.2d 1164, (La. 05/20/97), However, the surveillance does not have to be produced at the time of responding to written discovery. Defendants are not required to produce the surveillance footage, photos, and/or reports prior to the plaintiff's deposition testimony in the case. *See Wolford v. Joellen Smith Psychiatric Hosp.,* 693 So.2d 1164, (La. 05/20/97), *Clark v. Matthews*, 04-848 (La. App. 5 Cir. 1/11/05), 891 So. 2d 799, 804, *writ denied*, 2005-0473 (La. 4/22/05), 899 So. 2d 577, and *O'Dwyer v. Our Lady of the Lake Nurse Anesthesia Program*, 117 So.3d 1252, 2013-0703 (La. 5/17/13), *writ denied*, 118 So.3d 405, 2013-0703 (La. 6/21/13). More specifically, a plaintiff is not entitled to surveillance videos, reports, or photos until a reasonable time prior to trial. *Id.*

If the plaintiff has not inquired through deposition or written discovery about surveillance and defendants are using it solely for impeachment purposes, defendants do not have a duty to disclose. Failing any such request by plaintiff, any pretrial surveillance videos would be admissible as impeachment evidence without notice to plaintiff. *See* La. C.C.P. art. 1428.*; Detillier v. Smith,* 638 So. 2d 445, 449 (La. Ct. App.), *writ denied,* 94-1762 (La. 10/7/94), 644 So. 2d 645.

As it relates to potential consequences for a failure to disclose, "Louisiana jurisprudence holds that when a litigant destroys, conceals, or fails to produce evidence within his or her control, it gives rise to an adverse presumption that had the evidence been produced, it would have been detrimental to the litigant's case." *Allstate Ins. Co. v. Ford Motor Co.,* 00–710, p. 4 (La. App. 3 Cir. 11/2/00), 772 So.2d 339, 342. If you are asked in discovery about surveillance and fail to produce it at a reasonable time prior to trial, there can be an adverse inference and/or the court has the discretion to exclude the surveillance from being used at trial. *Simpson v. U V Ins. Risk Retention Grp.*, Inc., 2019-625 (La. App. 3 Cir. 9/30/20), 304 So. 3d 1002, 1011

FOR MORE INFORMATION

SEMMES BOWEN & SEMMES
Baltimore, MD
www.semmes.com

Thomas V. McCarron
tmccarron@semmes.com

Simone T. Fair
sfair@semmes.com

Anthony Blanchfield-Felice
ablanchfield-felice@semmes.com

Maryland

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Evidence relating to surveillance, including photographs, videos, and motion pictures, is discoverable during the pre-trial discovery of documents if the party intends to use it as substantive evidence in their case.[xiii] It is well settled in Maryland that if a party has possession or control over items that another party demanded, and the request is not objectionable, this item must be disclosed.[xiv]

If a party does disclose this surveillance that they intend to use during the presentation of evidence at trial, and another party had requested it during discovery, the party faces sanctions.[xv] The trial judge then has a large amount of discretion to decide the sanction that will follow from the party's failure to adhere to the discovery rules.[xvi] However, the court should enter the sanction that "impose[s] the least severe sanction that is consistent with the purpose of the discovery rules."[xvii]

Under Maryland Rule 2-433, a trial judge may enter any sanction they feel is just, including prohibiting a party from introducing certain evidence, claims, or defenses; staying proceedings until the requested discovery is produced; dismissing an action or parts of the action; or entering a default against the party that failed to provide the requested discovery. A sanction to dismiss the action, enter default, or preclude a party from entering certain types of evidence to support a claim is considered to be severe and should only be implemented on "persistent and deliberate violations".[xviii]

FOR MORE INFORMATION

Morrison Mahoney LLP
Boston, Massachusetts
www.morrisonmahoney.com

Sean F. McDonough
smcdonough@morrisonmahoney.com

Gareth Notis
gnotis@morrisonmahoney.com

Massachusetts

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

A party may serve interrogatories concerning the existence of surveillance at any time in a lawsuit, but defense counsel can certainly object. There is no rule concerning when surveillance must be disclosed to the plaintiff, but to avoid arguments from plaintiff's attorney should be disclosed before trial.

FOR MORE INFORMATION

PLUNKETT COONEY, PC
Bloomfield Hills, MI
PlunkettCooney.com

Maura B. Battersby
mbattersby@plunkettcooney.com

Michael K. Sheehy
msheehy@plunkettcooney.com

Michigan

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

There is no definitive answer in Michigan. There is not a specific statute regarding discovery and disclosure of surveillance. This issue has not come before the Michigan Supreme Court. The cases that have been taken up by the Michigan Court of Appeals have dealt with the limitation of use of surveillance at trial, due to the party's failure to produce the same evidence in discovery.

Parties have successfully objected to disclosure of surveillance as "work product." The Court of Appeals did not directly address this, as by the time the matter came before the Court of Appeals, the party had produced surveillance, waiving the privilege.

FOR MORE INFORMATION

NILAN JOHNSON LEWIS PA
Minneapolis, MN
www.nilanjohnson.com

Stanley E. Siegel
ssiegel@nilanjohnson.com

Sheila T. Kerwin
skerwin@nilanjohnson.com

Kelly P. Magnus
kmagnus@nilanjohnson.com

Minnesota

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Minnesota appellate courts have not ruled directly on the question of whether surveillance done in anticipation of litigation is protected by the work-product doctrine.

Minnesota Rule of Civil Procedure 26.02 describes the scope and limits of discovery. Generally, "parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party." *Id*. Thus, surveillance may generally be discoverable. From a practical purpose, while the fact that surveillance occurred may be discoverable, if requested, the information obtained through surveillance will likely only be used for impeachment. The Minnesota Court of Appeals has stated, "[t]here appears to be no obligation under the rules for an attorney to disclose information which can solely be used for impeachment purposes." *May v. Strecker*, 453 N.W.2d 549, 556 (Minn. Ct. App. 1990). Under this logic, surveillance need not be disclosed.

FOR MORE INFORMATION

DANIEL COKER HORTON & BELL
Oxford, Mississippi
www.danielcoker.com

Robert F. Stacy, Jr.
rstacy@danielcoker.com

Mississippi

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Mississippi state courts follow the rule that a party is justified in refraining from informing the adverse party of its recordings while surveillance was in progress, but it must still comply with discovery in some meaningful way. If surveillance video is requested in discovery, there is a duty to seasonably produce them to opposing counsel. *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332 (Miss. 1987). If surveillance videos are requested in discovery and are not disclosed, they will not be allowed at trial. If no request is made in discovery, there is a better argument for use of surveillance video at trial if it was not disclosed.

It should be noted that Mississippi federal courts may be more stringent in the requirement to produce surveillance videos because of the disclosure requirements under FRCP 26.

FOR MORE INFORMATION

BAKER STERCHI COWDEN & RICE
Kansas City, Missouri
www.bakersterchi.com

Kyle Roehler
kroehler@bakersterchi.com

Missouri

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Missouri treats video surveillance as a "statement" of a party. *State ex rel. Missouri Pac. R.R.Co. v. Koehr,* 853 S.W.2d 925 (Mo. 1993). Therefore, upon receipt of a proper discovery request, surveillance video must be produced.

FOR MORE INFORMATION

HALL & EVANS
Billings & Missoula, MT
www.hallevans.com

Jill Gerdrum
gerdrumj@hallevans.com

Brian Taylor
taylorb@hallevans.com

Montana

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance data is discoverable in Montana. Cook v. Montana Rail Link, 1995 Mont. Dist. LEXIS 823. Whether reports written on surveillance are discoverable is not entirely clear in Montana. However, as a result it should be assumed that they will be discoverable.

While the Court's generally have discretion on the specific sanction, if surveillance exists and is not disclosed the sanctions can be harsh. This can include entry of default as to liability.

FOR MORE INFORMATION

BAYLOR EVNEN WOLFE & TANNEHILL, L.L.P.
Lincoln, Nebraska
www.baylorevnen.com

Jarrod P. Crouse
jcrouse@baylorevnen.com

Kate Q. Martz
kmartz@baylorevnen.com

J. Michael Hannon
jmhannon@baylorevnen.com

Nebraska

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The Nebraska Supreme Court has not addressed whether pre-trial disclosure of surveillance/social media investigations is required; however, at least one lower court has held that the Nebraska Rules of Discovery in Civil Cases require the disclosure of surveillance investigations in response to appropriate discovery pleadings. See *William Schernikau v. Lincoln Pub. Sch*., Nebraska Workers' Compensation Court, Docket 199, No. 0658 (Nov. 8, 1999) [at p. 2] (Nebraska Discovery Rules apply to Nebraska workers' compensation cases).

Upon demand for production of surveillance materials, the defendant is generally entitled to first obtain the plaintiff's deposition, after which it must provide plaintiff's counsel with a complete and unedited copy of the surveillance materials, unless it claims such materials are privileged. *Id*. If the defendant claims such materials are privileged, then it must conform to the procedural requirements of *Greenwalt v. Wal-Mart Stores, Inc*., 253 Neb. 32, 567 N.W.2d 560 (1997); *but see S & R Am. Farms, LLC. Russell Farm & Ranch Corp*., No. A-15-998, 2016 WL 7094135, at *3 (Neb. Ct. App. Dec. 6, 2016) (noting that *Greenwalt* concerned production of defendant's internal documents and is therefore distinguishable from cases that concern production of documents from an expert witness). Until the Nebraska Supreme Court takes up this issue, we anticipate that the above-referenced procedure would be used by courts in the determination of surveillance disclosures.

FOR MORE INFORMATION

WADLEIGH, STARR & PETERS, PLLC
Manchester, New Hampshire
www.wadleighlaw.com

New Hampshire

Tierney M. Chadwick
tchadwick@wadleighlaw.com

Michael G. Eaton
meaton@wadleighlaw.com

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

A party may discover surveillance footage from an opposing party or nonparty at any time after filing an action. If the party seeking surveillance footage does not file a claim, then such party may only seek discovery from nonparties for the limited purpose of identifying adverse parties. *See Gutbier v. Hannaford Bros. Co.*, 150 N.H. 540, 544 (2004) (party could not seek pre-suit discovery from known potential adversary); *Robbins v. Kalwall Corp.*, 120 N.H. 451, 452 (1980) (party could seek pre-suit discovery from third party to obtain information necessary to file a claim).

Generally, a party must provide other parties "all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses[.]" *See* N.H. Cir. Ct. Dist. Div. R. 3.22(a); N.H. Super. Ct. R. 22(a). Such disclosures must occur "without awaiting a discovery request[.]" *See id.* Otherwise, parties may obtain any relevant, non-privileged documents via discovery request. *See* Dist. Div. R. 3.21(a); Super. Ct. R. 21(a).

Sanctions for failure to comply with a discovery request include monetary sanctions (including attorney's fees), issue sanctions (e.g.., an order that deems facts true against the noncompliant party), evidence sanctions (e.g., prohibition against the noncompliant party from introducing certain evidence), and a terminating sanction (e.g.,, an order that strikes all or parts of the noncompliant party's claims or defenses). *See* Dist. Div. R. 3.21(d); Super. Ct. R. 21(d).

FOR MORE INFORMATION

GERMAN, GALLAGHER & MURTAGH, P.C.
Philadelphia, PA
www.ggmfirm.com

Matthew J. McColgan
mccolganm@ggmfirm.com

New Jersey

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance can be discoverable prior to a Plaintiff's deposition. NJ laws are silent as to whether a party must disclose surveillance and the consequences if a party does not disclose it. The New Jersey court held that "any demand [by plaintiff] for surveillance motion pictures should be accompanied by a consent to be deposed after the movies have been taken and before the films must be presented for the adversary's examination." *Jenkins v. Rainner*, 69 N.J. 50, 60. The Court noted that, "both simple fairness and full discovery for both sides require the opportunity be afforded to fill in that gap by interrogation directed to the specific activities filmed. *Id*.

In *Mernick v. McCutchen*, 442 N.J. Super. 196, 204 (App. Div. 2015), the New Jersey Appellate Division affirmed the holding of Jenkins, and extended it to the situation where the surveillance was disclosed in initial interrogatories, before plaintiff was ever deposed. The Court explained that the consent to a later deposition after the film had already been viewed by the plaintiff would "not allow the benefit recognized in Jenkins, that is, the impeachment value of the film." *Id*.

It should be noted that the United States District Court for the District of New Jersey has rejected Jenkins and held that "because the surveillance evidence directly relates to Plaintiffs' physical conditions, it constitutes evidence relevant to the subject matter of this action, and discoverable pursuant to the standards set forth in Federal Rule of Civil Procedure 26." *Gardner v. Norfolk Southern Corp.*, 299 F.R.D. 434, 437 (D.N.J. Apr. 17, 2014). The Gardner Court further noted that, "permitting parties to delay production of this relevant evidence requested in the context of the parties' discovery requests would nullify the discovery process." *Id*. at 438.

FOR MORE INFORMATION

BUTT THORNTON & BAEHR PC
Albuquerque, NM
www.btblaw.com

Charles B. Kraft
cbkraft@btblaw.com

Monica R. Garcia
mrgarcia@btblaw.com

Ryan T. Sanders
rtsanders@btblaw.com

New Mexico

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance of a Plaintiff is not discoverable because it is considered attorney work product and is used as impeachment material in a deposition or at trial. As such, it need not be disclosed.

FOR MORE INFORMATION

YOUNG MOORE AND HENDERSON, P.A.
RALEIGH, NC
www.youngmoorelaw.com

North Carolina

David M. Duke
david.duke@youngmoorelaw.com

Andrew D. Webster
andy.webster@youngmoorelaw.com

Anderson H. Phillips
anderson.phillips@youngmoorelaw.com

Brittany D. Levine
brittany.levine@youngmoorelaw.com

Rachel O. Laughery
rachel.laughery@youngmoorelaw.com

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance conducted at the direction of an attorney is typically considered attorney work product and generally entitled to protection until after the deposition of the surveilled party. Under the work product doctrine, surveillance materials are afforded a qualified immunity from protection that may be invaded if the party seeking the surveillance materials "has a substantial need for the materials and cannot without undue hardship obtain the substantial equivalent by other means." *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528 (2006). North Carolina federal courts have determined that the ends of justice and spirit of the discovery rules are best served by allowing discovery of surveillance materials after the party under surveillance has been deposed. *Ward v. CSX Transp., Inc.,* 161 F.R.D. 38, 39 (E.D.N.C. 1995). See also *Bl*ount v. Wake Elec. Membership Corp., 162 F.R.D. 102 (E.D.N.C. 1993) (delaying the timing of disclosure to preserve the impeachment value of the evidence and finding disclosure appropriate after the party's deposition); *Lively v Reed*, 2021 WL 11691709 (W.D.N.C. 2021)(following *Ward* and *Blount*, but reversing ruling on surveillance reports pending an in camera review).

In addition, a party may be required to disclose surveillance if an expert witness has reviewed it and relied on it to formulate their opinions when requested through written discovery or a subpoena issued to the expert witness. Furthermore, if a party intends to use surveillance as an exhibit during trial, it must be disclosed as part of the party's pre-trial disclosures. We are not aware of any North Carolina cases directly addressing the discoverability of surveillance materials that will not be used at trial. The prevailing federal rule is that the work product doctrine bars discovery in such circumstances because the requesting party does not have a substantial need where the surveillance will not be used. *See Gibson v. National R.R. Passenger Corp.,* 170 F.R.D. 408 (E.D. Pa. 1997); *Tripp v. Severe*, 2000 WL 708807, fn. 1 (D. Md. 2000).

If a party fails to produce surveillance requested during discovery when the surveillance does not qualify for valid work product protections, the trial court may order its production, impose sanctions, or prohibit its introduction as evidence during the trial. There is no independent duty to disclose surveillance absent an applicable discovery request.

FOR MORE INFORMATION

VOGEL LAW FIRM
Fargo, North Dakota
www.vogellaw.com

M. Daniel Vogel
dvogel@vogellaw.com

Jack M. Buck
jbuck@vogellaw.com

North Dakota

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

North Dakota courts have not established a specific point in time when surveillance becomes discoverable. District Courts are granted broad discretion regarding the discoverability of information, including surveillance videos or photographs. *See Simpson v. Chicago Pneumatic Tool Co.*, 2003 ND 31, ¶ 10, 657 N.W.2d 261 (A trial court's discovery decision is reviewed under the abuse of discretion standard). Similarly, North Dakota courts have not established whether disclosure of surveillance information is mandatory. Surveillance information may be discoverable under N.D. R. Civ. P. 26, if it is "relevant to any party's claim or defense."

FOR MORE INFORMATION

FRANDEN FARRIS QUILLIN
GOODNIGHT ROBERTS & WARD
Tulsa, Oklahoma
Tulsalawyer.com

Jason Goodnight
Jgoodnight@tulsalawyer.com

Oklahoma

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The Oklahoma appeals courts have not directly addressed at what point in time surveillance becomes discoverable.

To the extent that this issue has been addressed by the state district courts, it has come up in the context of motions to compel after the defendant disclosed the existence of surveillance footage in response to a discovery request but objected to producing the footage on the grounds that it was privileged. The district courts have generally denied or granted the motions without opining as to timing of the disclosure or production.

At least one judge in the Oklahoma County District Court has issued an order compelling a defendant to produce surveillance, but the judge also ordered that the surveillance did not need to be produced until after plaintiff's deposition. *See Ducharme v. Taco Mayo* Franchise Sys., 2012 Okla. Dist. LEXIS 5569.

The Oklahoma Courts have not imposed special consequences for the failure to disclose surveillance footage beyond those already imposed for the failure to disclose other documents or items responsive to a discovery request.

FOR MORE INFORMATION

FRANTZ WARD LLP
Cleveland, Ohio
https://www.frantzward.com

Christopher G. Keim
ckeim@frantzward.com

Matthew J. Selby
mselby@frantzward.com

Meghan C. Lewallen
mlewallen@frantzward.com

NAME OF FIRM
City, State
Website

Name of Attorney
Email

Name of Attorney
Email

Ohio

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The Supreme Court of Ohio has not decided the issue, but case law indicates that surveillance is considered work product and may only be disclosed if the plaintiff can show good cause. *Sutton v. Stevens Painton Corp.,* 193 Ohio App.3d 68, (8th Dist.). Civ. R. 26(B)(3) expressly provides that a party may obtain discovery of work product upon a showing of good cause. The party seeking discovery carries the burden of demonstrating good cause for the sought-after materials. *Jackson v. Greger*, 110 Ohio St.3d 488 (2006). In *Jackson,* the Supreme Court of Ohio considered the meaning of "good cause," stating that a showing of good cause under Civ.R. 26(B)(3) requires a demonstration of need for the materials—i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable. *Id.* at 491.

There is sparse case law on when a party must disclose the existence of surveillance footage, but one Ohio trial court delayed the release of the video until after the defendant in that case had the opportunity to depose the plaintiff. *Koeks v. Kroger Partnership I*, C.P. No. CV 2016-08-1721, 2017 Ohio Misc. LEXIS 18753 (Feb. 14, 2017). In deciding this issue Ohio courts have recognized the importance of weighing competing considerations of elimination of surprise at trial and the unfairness of advance disclosure of cross-examination which anticipates untruthfulness. *See* Smith v. Chen, Case No. 10 CV 18058, 2012 Ohio Misc. LEXIS 16082, *6-7 (Dec. 5, 2012).

FOR MORE INFORMATION

COSGRAVE VERGEER KESTER LLP
Portland, OR
cosgravelaw.com

Nicole M. Nowlin
nnowlin@cosgravelaw.com

Amber A. Beyer
abeyer@cosgravelaw.com

Oregon

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Oregon does not require pre-trial disclosure of surveillance in civil cases. Although there is no controlling case law, such materials are typically considered non-discoverable attorney work product so long as the requirements of the doctrine are met. Or. R. Civ. P. 36 B (defining trial preparation materials). *See also*¸ Multnomah County Judges Civil Motion Consensus Statement, II.J. ("Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument."). It should be noted that the work product doctrine provides a qualified protection that can be overcome by a showing of "substantial need of the materials in the preparation of such party's case" and that the party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Or. R. Civ. P. 36 B(2)(a). An example of a scenario where such a case could be made is where the plaintiff has died post-incident.

FOR MORE INFORMATION

GERMAN, GALLAGHER & MURTAGH, P.C.
Philadelphia, PA
www.ggmfirm.com

Matthew J. McColgan, Esq.
mccolganm@ggmfirm.com

Kevin Ellis, Esq.
ellisk@ggmfirm.com

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
Pittsburgh, PA
mdbbe.com

Nicholas J. Indovina, Esq.
nindovina@mdbbe.com

Rachel L. Myers, Esq.
rmyers@mdbbe.com

Pennsylvania

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance evidence is discoverable in Pennsylvania. Pennsylvania courts permit the defense to wait until after they have been given an opportunity to depose the plaintiff fully as to his/her injuries, their effects, and present disabilities prior to disclosing the surveillance evidence. *See Bindschusz v. Phillips*, 771 A.2d 803, 811 (Pa. Super. 2001) (adopting the reasoning from *Snead v. American Expert-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150–51 (E.D. Pa. 1973)). However, the disclosure of the surveillance evidence must be done in such a time to prevent unfair and prejudicial surprise to the opposing party. *See Bindschusz*, 771 A.2d at 811. At a minimum, the surveillance evidence must be listed as an exhibit in the party's pretrial filing. *See id.* at 811. Additionally, disclosure after the plaintiff's case has already started is untimely. *See Mietelski v. Banks*, 854 A.2d 579, 582 (Pa. Super. 2004). Failure to disclose the surveillance evidence could result in preclusion of introducing or referencing the surveillance evidence at trial. *Id.* at 581–82.

FOR MORE INFORMATION

HIGGINS, CAVANAGH
& COONEY, LLP
Providence, RI
www.hcc-law.com

Paul Callaghan
Email:
PCallaghan@hcc-law.com

Rhode Island

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

The Rhode Island Supreme Court first addressed the issue of discoverability of surveillance materials in *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989). Generally, any videos or photographs that will be introduced at trial must be disclosed. *Id.* at 50. Parties are entitled to discover whether surveillance videos or photographs exist. *Id.* However, surveillance materials can receive work product protection when they fit the test for determining work product production, that is; "whether, in light of the nature of the document or tangible material and the facts of the case, the document can be said to have been prepared or obtained because of the prospect of litigation, by or for an adverse party or its agent." *Id.* at 49. Nevertheless, even materials protected by the work product doctrine may be discoverable "with a showing of injustice or undue hardship." *Id.* That burden lies with the party contesting the work product privilege. *See Henderson v. Newport Cnty. Regional YMCA*, 966 A.2d 1242, 1249 (R.I. 2009).

As to timing of disclosure, the *Cabral* court recognized that an "untruthful plaintiff" may alter or fabricate testimony if allowed to view surveillance footage before he is deposed. *See Cabral*, 556 A.2d at 50. As such, the "surveilling party has the right to depose the party or witness surveilled before being required to produce the surveillance materials." *Id.* If a plaintiff is deposed prior to such surveillance materials have been created, "[t]he deposition testimony may be used to impeach post-surveillance-material testimony seeking to tailor an injury to surveillance material." *Id.*

FOR MORE INFORMATION

LEITNER, WILLIAMS, DOOLEY & NAPOLITAN, PLLC
Chattanooga, TN
www.leitnerfirm.com

Alan B. Easterly
alan.easterly@leitnerfirm.com

Nashville, TN
Thomas J. Dement, II
thomas.dement@leitnerfirm.com

LEWIS THOMASON, PC
Knoxville, TN
www.lewisthomason.com

Benjamin W. Jones
bjones@lewisthomason.com

David A. Chapman
dchapman@lewisthomason.com

Nashville, TN
Mary Beth White
mbwhite@lewisthomason.com

Tennessee

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance is discoverable upon request from plaintiff's counsel, either in written discovery or depositions. Failure to disclose may result in exclusion of the evidence at trial or other sanctions, pursuant to Tenn. R. Civ. P. 37.

FOR MORE INFORMATION

RYAN SMITH & CARBINE, LTD.
Rutland, VT
www.rsclaw.com

Mark F. Werle
mfw@rsclaw.com

Vermont

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Unless an independent basis for objecting to the discovery of surveillance exists, a party must produce surveillance material in response to a proper request for surveillance. Generally, the consequence for failing to disclose surveillance is preclusion from using it at trial.

There is no specific rule for surveillance discovery in Vermont, and therefore surveillance is regulated under Vermont Rule of Civil Procedure 26, which specifies that

> "[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FOR MORE INFORMATION

MERRICK, HOFSTEDT & LINDSEY, P.S.
Seattle, Washington
www.mhlseattle.com

Thomas J. Collins
tcollins@mhlseattle.com

Rossi F. Maddalena
rmaddalena@mhlseattl.com

Washington

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

No appellate case in Washington has addressed this specific question. If a party receives an interrogatory regarding surveillance, it must be answered. If a party receives an interrogatory re disclose all witnesses with knowledge, some lawyers will take the view that this seeks information protected by work product doctrine and do not disclose.

FOR MORE INFORMATION

ROBINSON & McELWEE PLLC
Clarksburg, West Virginia
www.ramlaw.com

Keith J. George
kg@ramlaw.com

Stephen F. Gandee
sfg@ramlaw.com

West Virginia

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance evidence in West Virginia becomes discoverable when it is intended to be used at trial. Parties must disclose such evidence according to discovery rules and timelines. Under Rule 26 of the West Virginia Rules of Civil Procedure, parties are required to supplement their discovery responses if they obtain new information that makes their previous responses incomplete or incorrect, including surveillance materials. W. Va. R. Civ. P. 26(e).

Failure to disclose such materials can lead to sanctions, including the exclusion of the evidence at trial, as seen in the case of *Hanson v. Keeling*, where the court allowed the respondent to call the investigator as a fact witness due to the petitioner's voluntary production of the surveillance evidence, despite the petitioner's objections. *Hanson v. Keeling*, No. 16-0799, 2017 W. Va. LEXIS 726, at *5 (W. Va., Sept. 25, 2017)

The court emphasized that the defendant's failure to supplement discovery in a timely manner, despite having the surveillance materials, led to the plaintiff incurring additional costs to obtain service of process on the investigator. The court concluded that the discovery request for surveillance materials was reasonably calculated to lead to the discovery of admissible evidence, and the defendant's failure to disclose these materials in a timely manner was a violation of Rule 26(e)(2). *Keeling v. Hanson*, No. 16-0799, 2016 W.V. Cir. LEXIS 58, at *8 (W. Va. Cir. Ct., July 29, 2016).

FOR MORE INFORMATION

SUNDAHL, POWERS, KAPP & MARTIN, L.L.C.

Cheyenne, WY
www.spkm.org

Patrick M. Brady
pbrady@spkm.org

Andrew F. Sears
asears@spkm.org

Wyoming

At what point in time is surveillance discoverable in your state? Do you have to disclose it? If you have it and don't disclose it, what are the consequences?

Surveillance materials are considered work product protected by Wyo. R. Civ. P. 26(b)(3). *Puskarich v. BNSF Co.*, 2022 U.S. Dist. LEXIS 43113, *10 (D. Wyo. 2022). Surveillance materials are considered ordinary work product and therefore may be discovered if the opposing party can satisfy the requirements of Wyo. R. Civ. P. 26(b)(3)(A). *Id*.