

To Disclose or Not to Disclose

[The discoverability of surveillance evidence in state and federal courts](#)

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The obvious purpose of surveillance is to expose a plaintiff at worst as a fraud and at least as an exaggerator.

Usually, surveillance films prove to be neutral or useless to the defense. However, surveillance films can turn out to destroy a plaintiff's case and serve as the juiciest part of trial for a very bored jury. In any event, once surveillance is completed, questions abound as to whether and when such evidence must be produced under Pennsylvania law.

For litigators in the civil arena, attempting to pin down rules as to the discoverability of surveillance information in either the federal or state court system can make one's head hurt. While a review of the cases in the federal court system results in concrete rules of thumb, an analysis of the Pennsylvania state court decisions in this regard leaves more open questions than answers.

The Federal Approach

In the Pennsylvania federal courts, surveillance evidence is treated as protected attorney work product. The case of *Snead v. American Export-Isbrandtsen Lines Inc.*, 59 F.R.D. 148 (E.D.Pa. 1973) is viewed as the seminal decision in Pennsylvania on the discoverability of surveillance films in civil litigation matters.

The court in *Snead* noted that the protections afforded by the attorney work product doctrine, as set forth under Federal Rule of Civil Procedure 26 (b)(3), not only covered materials prepared by attorneys but also extended to materials prepared by the consultants and agents of attorneys, including surveillance investigators.

Under Rule 26(b)(3), a plaintiff may not obtain surveillance tapes through discovery simply by asserting that such evidence is relevant.

Rather, under this rule, materials that are prepared in anticipation of litigation or for trial by the defendant's attorney, or agents retained by the attorney, are protected and need not be disclosed unless the plaintiff shows that he or she "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."

The 1973 *Snead* case involved the then novel issue of whether a plaintiff could discover whether or not a defendant had in fact conducted surveillance. The court in *Snead* found that surveillance films were indeed "highly relevant," perhaps establishing "the most important facts of the case."

Yet, the court chose to protect the all-important potential impeachment value of surveillance films by ordering that the defendant need not answer any interrogatories concerning surveillance activities and need not produce any surveillance films until after the plaintiff's deposition was completed. The court stated that once the plaintiff's deposition was completed, "the interrogatories are to be answered and the films, if they exist and will be used at trial, are to be exhibited to the plaintiff."

More specifically, the court stated that the disclosure of the films could take place as close to the time of trial as possible, but certainly no later than the final pretrial conference so as to prevent unfair surprise and foster a possible settlement of the case.

The 36-year-old opinion in *Snead* has been followed by the federal trial courts up to the present. As recent as 2008, the Eastern District of Pennsylvania followed *Snead* in its slip opinion in *Ward v. AT Systems Inc.* 2008 WL 4148599 (E.D.Pa. 2008), as did the Western District of Pennsylvania in its slip opinion in *Machi v. Metropolitan Life Insurance Co.*, 2008 WL 2412947 (W.D.Pa. 2008). Both decisions quoted extensively from the *Snead* decision and held that the defendant's surveillance information did not need to be produced until after the plaintiff's deposition was completed, so as to preserve the impeachment value of the evidence.

One rationale behind the rule requiring these post-deposition supplemental responses is that the federal discovery rules "were designed to ... make trials 'less a game of blind man's bluff and more a fair contest.'" See *DiGiacobbe v. National Railroad Passenger Corp.*, 1987 WL 11227 (E.D. Pa. 1987). The *DiGiacobbe* court also noted that knowledge by a party that surveillance exists, whether or not the tapes are ultimately used at trial, "will often cause the most blatant liar to consider carefully the testimony he plans to give under oath." The court also noted that another rationale is that requiring the disclosure of the existence of surveillance tapes to the plaintiffs "clearly serves the important collateral value of encouraging settlements."

Not Using, No Disclosure

A separate but equally important surveillance discovery rule was created by the Eastern District in *Gibson v. Amtrak*, 170 F.R.D. 408, 409 (E.D.Pa. 1997). The court in *Gibson* held that if a defendant does not intend to use the surveillance at trial, perhaps because it is neutral or not favorable to the defense, the defendant must still answer interrogatories confirming the existence of the tapes regardless. However, a defendant who has chosen not to use the films in federal court need not ever turn the tapes over to the plaintiff.

The rationale for this rule is that, where the films are neutral or even favorable to the plaintiff's case, discovery of the video evidence is barred by the work product doctrine because the plaintiff is deemed to have no "substantial need" of the evidence under Rule 26(b)(3).

The *Gibson* court noted that the court in *Snead* had held that 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." Where the defendant does not intend to use the evidence at trial, there is no discrepancy to speak of.

This rule issued by the *Gibson* court was likewise followed in 2008 by the above-referenced Pennsylvania federal district court slip opinions in *Machi* and *Ward*.

The federal court in *Ward* offered additional reasoning in favor of the rule allowing the non-disclosure of tapes not being used at trial. That court noted that the plaintiff may employ other alternative means to prove that the plaintiff's injuries "without appropriating the Defendant's work-product" such as by offering the testimony of the plaintiff and that of his or her damages witnesses on the injuries and limitations alleged.

The *Ward* court also reasoned that a requirement that a defendant produce all video surveillance tapes, regardless of whether such evidence would be introduced at trial, "may cast an undesirable chilling effect on a defendant's decision to employ this important discovery tool."

Thus, a federal court defendant may object to surveillance interrogatories and refuse to answer them up until the plaintiff's deposition is completed. Thereafter, the defendant is required in the federal court to supplement its responses to the surveillance interrogatories by disclosing the existence of such tapes. However, the federal court rule is that the tapes themselves need not be produced unless the defendant intends to use the tapes at trial.

The State Approach

A review of the state court decisions circling around the question of the discoverability of surveillance evidence reveals that this issue is largely unsettled at the state level.

Generally, the Pennsylvania state courts have repeatedly held that the overriding "purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits." See, e.g., *Dominick v. Hanson*, 753 A.2d 824, 826 (Pa. Super. 2000).

The noted discovery expert, Judge R. Stanton Wettick, Jr., summarized the then existing state court surveillance decisions in *Morganti v. Ace Tire and Parts Inc.*, 70 Pa.D.&C. 4th 1 (C.P. Allegheny 2004). Wettick suggested that, while those state courts had viewed the federal decisions on the discoverability of surveillance information with favor, the state appellate courts had not been squarely faced with this issue in the discovery context. Rather, the prior Pennsylvania appellate court decisions really only addressed the separate issue of the admissibility of surveillance tapes at trial. Wettick noted that the side commentary in those appellate court decisions on the discoverability of surveillance tapes could not be deemed to be binding precedent on the questions presented.

In contrast, Wettick did find himself squarely faced with the issue of discoverability in *Morganti*. The judge began his analysis by noting that the Pennsylvania Rules of Civil Procedure differ from the more stringent Federal Rules with respect to the parameters of the attorney work product doctrine.

More specifically, except for certain limited circumstances that do not apply to surveillance evidence, the Pennsylvania Rules of Civil Procedure actually do not protect trial preparation material. Under Pa.R.C.P. 4003.1 "a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial" by any party, that party's attorney, or any agent retained by the party or the party's attorney. Rule 4003.1 only serves to protect the mental impressions, conclusions, opinions, legal research or theories of the attorney and his agents.

Therefore, as explained by Wettick in his Morganti opinion, unlike in the federal courts where the discoverability of surveillance information revolves around the F.R.C.P. 26(b)(3) issue of whether the plaintiff has a "substantial need" for such information, the question in the Pennsylvania state courts is simply whether the surveillance is discoverable under the scope stated in Pa.R.C.P. 4003.1.

Under Rule 4003.1, a party is permitted to obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."

Wettick held in Morganti that "[d]iscovery regarding surveillance activity comes within the scope of this provision because it relates to the claims of the plaintiff."

In Morganti, the defendant had advised the plaintiff of the existence of surveillance tapes in the defendant's answers to the plaintiff's interrogatories but had refused to produce the tapes prior to the completion of the plaintiff's deposition. The plaintiff filed a motion to compel and apparently refused to be deposed until the issue was decided. Accordingly, unlike the Pennsylvania appellate court decisions he reviewed for guidance, Wettick was squarely faced with the issue of whether a defendant must produce a surveillance videotape before the plaintiff's deposition had been completed.

Wettick referred to three Pennsylvania appellate court decisions that had generally revolved around the separate issue of the admissibility of surveillance information at trial in support of his own ruling that the defendant did not have to produce the tapes until after the plaintiff's deposition was completed.

Persuasive Decisions

The first of these three appellate cases was Dominick, in which the court was faced with the separate issue of whether the trial court properly allowed the introduction of surveillance evidence at trial that had not been produced in response to the plaintiff's pre-trial discovery requests specifically seeking surveillance information. While addressing this separate issue, the Dominick court noted that there was then no appellate Pennsylvania case on point, and stated its belief that such evidence was indeed discoverable.

The court in Dominick noted that surveillance videotapes were clearly "relevant" under Rule 4003.1 to a case involving alleged injuries and limitations to a plaintiff. The Superior Court also held that, although surveillance evidence was work product in that it was prepared in anticipation of litigation or trial, it was not protected from disclosure since Pa.R.C.P. 4003.3 mandated that work product materials remain discoverable with the exception of mental impressions and opinions of the party's attorney and other agents.

Although the Dominick court commented that surveillance films should be produced in response to discovery requests under Pa.R.C.P. 4003, it declined to address the issue of the proper timing of the required production of the surveillance evidence during the course of discovery and under what circumstances the disclosures must occur, except to note that the defendants "were required, when questioned, to disclose whether they conducted videotaped surveillance of [the plaintiff] prior to trial." In *Bindschusz v. Phillips*, 771 A.2d 803 (Pa. Super. 2001), the Superior Court again addressed the separate issue of the admissibility or preclusion of surveillance evidence at trial. In that case, the defendants sought a new trial because the trial court had precluded the use of videotaped surveillance that the defendants had obtained six days prior to the start of the trial but which was not disclosed until after the plaintiff had testified at trial.

The *Bindschusz* court relied extensively upon the persuasive federal decision in *Snead* and upheld the trial court's preclusion of the surveillance evidence. In doing so, the court emphasized that, during pre-trial discovery, the plaintiff's interrogatories had requested disclosure of any surveillance information secured by the defendant. The court noted that, after the surveillance activities were completed, the defendant failed to timely supplement his original negative responses to these inquiries and also failed to list the tapes as a trial exhibit. Thus, the Superior Court said that the defendant's failures in these respects resulted in unfair and prejudicial surprise to the plaintiff, requiring the preclusion of the tapes at trial.

The court in *Bindschusz* quoted with favor the part of the *Snead* decision pertaining to a federal court defendant's duty to disclose surveillance information under certain circumstances. As noted above, the *Snead* court had held that once the plaintiff's deposition was completed, a federal court defendant possessing surveillance evidence was required to disclose such information in answers to the plaintiff's interrogatories and was required to produce the tapes, if they were to be used at trial.

Significantly, the Bindschusz court stated its belief that the Snead opinion properly resolved this issue of when surveillance information should be disclosed.

Thus, although not squarely faced with the issue, the Bindschusz court's decision can be read as suggesting that a defendant can object and refuse to answer any surveillance discovery requests, whether in the form of interrogatories or a request for production, until after the plaintiff's deposition has been completed.

The Superior Court revisited the separate surveillance issue of admissibility at trial in the 2002 case of *Duncan v. Mercy Catholic Medical Center of Southeastern Pennsylvania*, 813 A.2d 6 (Pa.Super. 2002). In *Duncan*, the defense sought to utilize surveillance tapes that were first produced to the plaintiff in the middle of trial and after the close of the plaintiff's case. The trial court did not allow the tapes into evidence because the defense had never properly supplemented its negative pre-trial responses to the plaintiff's interrogatories requesting surveillance information. The trial court did, however, permit the defense to go on to cross-examine the plaintiff with respect to the specific activities the plaintiff was seen performing on the videotape.

On appeal, the Superior Court in *Duncan* ruled that the trial court had erred in permitting this specific cross-examination as such questions were just as prejudicial as if the videotapes themselves had been allowed into evidence. In so ruling, the *Duncan* court relied heavily upon its own prior decision in *Bindschusz and Snead*.

As to the timing of when surveillance evidence should have been disclosed so that it could be admissible at trial, the *Duncan* court commented that the Superior Court in *Bindschusz* had previously "agreed that the purpose of Pennsylvania's own discovery rules -- prevention of surprise and unfairness, and the fostering of a fair trial on the merits -- was best served by the procedure espoused in the federal cases," i.e. that the defendant need not disclose the existence of surveillance tapes at all until after the defendant has had an opportunity to depose the plaintiff regarding the extent and effect of the plaintiff's alleged injuries.

The Superior Court would again follow the *Duncan* and *Bindschusz* decisions on the surveillance issue in precluding a defendant's use of an untimely produced surveillance videotape of the plaintiff in the more recent case of *Mietelski v. Banks*, 854 A.2d 579 (Pa. Super. 2004). Unfortunately, the *Mietelski* decision did not add anything further to the analysis of the separate discoverability issue.

Wettick's Way

Rather, as noted above, it was not until *Wettick's* 2004 opinion in *Morganti* that a concrete holding on the issue was handed down in the Pennsylvania state court system. *Wettick's* decision stands as a persuasive holding that a defendant need not produce any surveillance tapes in a state court proceeding until after the plaintiff's deposition has been completed.

However, since the defendant in *Wettick's* case had already answered the plaintiff's interrogatories and disclosed the existence of the tapes, *Wettick* did not have an opportunity to address the separate and still open issue of whether a state court defendant may properly refuse to answer surveillance interrogatories until the plaintiff's deposition has been completed. In the case of *Kurtz v. Hydrocarbon Research Inc.*, 32 Pa.D.&C.4th 205 (C.P. Bucks 1996), a trial court held that a defendant need not disclose the existence of surveillance information in response to a plaintiff's interrogatories.

A review of the above more recent appellate court commentary on the issue also appears to indicate that if the Pennsylvania appellate courts were directly faced with the issue they would likewise allow a defendant to object and refrain from disclosing the existence of surveillance evidence in answers to interrogatories, at least until after the plaintiff's deposition is completed.

Open Issues

Another open issue that remains in the state court system is whether the defendant is required to disclose or produce to the plaintiff surveillance tapes at all, if the defendant does not intend to utilize them at trial. To date, it does not appear that any state appellate court decision has been issued in this regard.

As noted by the Superior Court in *Bindschusz*, another open issue in the scenario of a defendant who has disclosed the existence of surveillance films but who has decided not to utilize the same at trial is whether a plaintiff is entitled bring the defendant's surveillance efforts to the attention of the jury or secure an adverse inference jury instruction.

'Aye, There's the Rub'

While concrete rules have been set down in the federal court system on the discoverability of surveillance information, the issue remains unsettled in the state courts. At the state level, it remains to be seen whether the appellate courts will continue to follow the trend noted and someday affirmatively adopt the federal court approach on this important issue under the less stringent parameters of the Pennsylvania Rules of Civil Procedure. Until then, litigators in Pennsylvania state court civil matters will be forced to ponder and continue struggling with a Shakespearean dilemma -- to disclose or not to disclose. •

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