THE DISCOVERABILITY OF SURVEILLANCE VIDEOTAPES UNDER THE FEDERAL RULES

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I. INTRODUCTION

The use of surveillance videotape in the courtroom to refute a plaintiff's claim of injury can be an extremely powerful tool.[1] Surveillance videotape depicting a plaintiff engaging in activities that are contrary to her claimed injuries may very well "establish the most important facts in the entire case."[2] However, the videotape may not tell the whole story because a videotape can be easily manipulated to create the misleading impression that the plaintiff is faking or exaggerating her injuries.[3] Consequently, the discoverability of such a videotape becomes a major concern of both the defendant and the plaintiff in a civil litigation suit. This results in a conflict between the liberal discovery philosophy of the Federal Rules of Civil Procedure (Federal Rules) and the limitations placed on that philosophy by the work product doctrine.

Since the adoption of the Federal Rules, the courts have interpreted the rules as mandating broad discovery.[4] However, there are some limitations to this broad discovery philosophy. In *Hickman v. Taylor*, the United States Supreme Court held that work prepared by a party's attorney in anticipation of litigation which was used to prepare legal theories and to plan trial strategies is protected from discovery.[5] This exception to discovery is the work product doctrine.[6]

While the work product doctrine limits the discovery of materials prepared by an attorney in anticipation of litigation, there are two exceptions to the doctrine. First, an adverse party may overcome the work product limitation with a showing of substantial need of the materials to prepare his case as well as an undue hardship in obtaining the substantial equivalent of the material by other means.[7] The second exception, discoverability of the party's own statement, is found in the last paragraph

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[1]Though case law on the discoverability of surveillance videotapes is extensive, the secondary literature is sparse. For articles discussing the issue, see George A. LaMarca, *Overintrusive Surveillance of Plaintiffs in Personal Injury Cases*, 9 AM. J. TRIAL ADVOC. 1 (1985); Dennis Minichello, *Use and Abuse of Surveillance Videos*, 85 ILL. B.J. 22 (Jan. 1997); Tricia E. Habert, Comment, *"Day in the Life" and Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits*, 97 DICK. L. REV. 305 (1993); Patricia L. Ogden, Note, *"A Picture is Worth a Thousand Words"—The Permissible Scope of Discovery of Videotape in Civil Cases: A Bifurcation Approach*, 29 IND. L. REV. 441 (1995).

[2]Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973).

[3]*See* Habert, *supra* note 1, at 305–06.

[4]*See* Hickman v. Taylor, 329 U.S. 495, 506 (1947).

[5]*Id.* at 514 (noting that these items would be subject to discovery in some cases.).

[6]*See* FED. R. CIV. P. 26(b)(3).

[7]*See id.*

of rule 26(b)(3). It provides that a party may discover her own statement without having to show substantial need or undue hardship.[8]

To date, courts universally have assumed that surveillance videotapes constitute work product and that a plaintiff, to discover them, must show substantial need and undue hardship.[9] Courts are inconsistent on the issue of whether, and under what circumstances, a plaintiff who has been the subject of videotape surveillance can make this showing. The courts have never had occasion to consider whether surveillance videotapes fall within the meaning of a party's own statement.

This article argues that a surveillance videotape of a plaintiff constitutes the plaintiff's own statement and therefore is discoverable as a matter of course under rule 26(b)(3). Part II describes the liberal discovery philosophy underlying the Federal Rules and then discusses the following two exceptions to that philosophy: the work product doctrine and the party's own statement exception. Part III then describes how and why the parties use surveillance videotapes and how courts have handled issues pertaining to discoverability.

Part IV of this article proposes that courts automatically classify surveillance videotapes as a party's own statement, making the videotapes discoverable as a matter of course. Furthermore, this Part weighs the advantages and disadvantages of this approach and concludes that such an approach is not only consistent with the plain language and philosophy of the Federal Rules, but is the best policy choice as well. However, to preserve the defendant's legitimate interest in using the videotapes for impeachment purposes and in deterring fraudulent or exaggerated claims of injury, this Part also proposes that courts defer the discovery of videotapes until after the plaintiff's deposition. Part V then concludes this article.

II. DISCOVERY AND ITS LIMITATIONS

The Federal Rules of Civil Procedure created a liberal discovery philosophy in which there are few limitations. One such limitation is the work product doctrine found in rule 26(b)(3).

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[8]*See id.*

[9]*See* Gutshall v. New Prime, Inc., 196 F.R.D. 43, 46 (W.D. Va. 2000); Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 104 (E.D.N.C. 1993).

A. *The Liberal Discovery Philosophy of Rule 26*

Rule 26(b)(1) of the Federal Rules states, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[10] This liberal discovery philosophy is intended to "avoid trial by ambush,"[11] and to make a trial "a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[12] As the New Jersey Supreme Court noted, "Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts."[13] As a result, broad discovery serves to "narrow issues that [remain] in dispute, equalize knowledge among the parties about the evidence, eliminate trickery or surprise at trial, and, as a result, increase the likelihood that justice [will] be efficiently achieved."[14]

However, the liberal discovery concept does have some limits. One such limitation to discovery is the work product doctrine contained in rule 26(b)(3) of the Federal Rules. This limitation, first introduced in *Hickman v. Taylor*, prevents an opposing party from obtaining material that a lawyer or his agent has prepared in anticipation of litigation.[15]

B. *The Work Product Doctrine*[16]

The work product doctrine provides a limitation to the liberal discovery philosophy. This limitation to an attorney's work product is "necessary to

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[10]FED. R. CIV. P. 26(b)(1).

[11]Martino v. Baker, 179 F.R.D. 588, 589 (D. Colo. 1998).

[12]Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986) (citing United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)).

[13]Jenkins v. Rainner, 350 A.2d 473, 476 (N.J. 1976).

[14]Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a): "Much Ado About Nothing?"* 46 HASTINGS L.J. 679, 690–91 (1995).

[15]329 U.S. 495, 511–12 (1947).

[16]*See generally* Ronald J. Allen, *Work Product Revisited: A Comment on Rethinking Work Product*, 78 VA. L. REV. 949 (1992); Jeff A. Anderson et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760 (1983); Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33 (1997); Kevin M. Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755 (1983); Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917 (1983); Marguerita B. Dolatly, *Creating Evidence: Ethical Concerns, Evidentiary Problems, and the Application of Work Product Protection to Audio Recordings of Nonparty Witnesses Secretly Made by Attorneys or Their Agents*, 22 RUTGERS COMPUTER & TECH. L.J. 521 (1996); Elizabeth G. Thornburg, *Work Product Rejected: A Reply to Professor Allen*,

ensure that a client receives the highest quality representation from his attorney."[17]

1. History of the Work Product Doctrine

The United States Supreme Court first introduced the work product doctrine in the case of *Hickman v. Taylor*.[18] This case involved the sinking of a tugboat involved in a towing operation in which five of the nine crewmembers drowned.[19] In anticipation of litigation, the owners of the tugboat employed an attorney to defend them against potential liability suits filed by the deceased crewmembers' representatives.[20] The attorney privately interviewed survivors and others who might have had information regarding the sinking of the tugboat.[21]

One year later, the opposing parties' counsel requested the production of all statements and reports pertaining to the sinking of the tugboat, the towing operation, or the deaths of the crewmembers.[22] The tugboat owners' attorney confirmed that he had taken statements from the survivors and others, but refused to produce the statements.[23] The District Court for the Eastern District of Pennsylvania held that the statements were not privileged and ordered the attorney to produce them.[24] The Third Circuit Court of Appeals reversed and held that the statements were part of the work product of the attorney and therefore privileged under the Federal Rules.[25] The United States Supreme Court held that the materials would reveal the attorney's mental impressions contained in the materials and therefore were the work product of the attorney and exempt from disclosure.[26] However, the Court also noted that there was no showing of

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78 VA. L. REV. 957 (1992); Elizabeth G. Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515 (1991) [hereinafter Thornburg, *Rethinking Work Product*]; Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385 (1994); Andrea L. Borgford, Comment, *The Protected Status of Opinion Work Product: A Misconduct Exception*, 68 WASH. L. REV. 881 (1993); Christina L. Klopfenstein, Note, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481 (1999); Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697 (1995).

[17]Smith v. Diamond Offshore Drilling Inc., 168 F.R.D. 582, 583 (S.D. Tex. 1996).

[18]329 U.S. 495, 500 (1947).

[19]*See id.* at 498.

[20]*See id.*

[21]*See id.*

[22]*See id.* at 498–99.

[23]*See id.* at 499.

[24]*See* Hickman v. Taylor, 4 F.R.D. 479, 483 (E.D. Pa. 1945).

[25]*See* Hickman v. Taylor, 153 F.2d 212, 222–23 (3d Cir. 1945).

[26]*See Hickman*, 329 U.S. at 512–13.

the plaintiff's need to obtain the materials sought and that the plaintiff had other means of obtaining them.[27] The work product doctrine has since been partially codified in rule 26(b)(3).[28]

2. Purpose of the Work Product Doctrine

The United States Supreme Court formulated the work product doctrine to protect a certain degree of the attorney's privacy in performing his duties as an officer of the court working for the advancement of justice while protecting the rightful interests of his client.[29] Rule 26(b)(3) differentiates between opinion work product and ordinary work product. Opinion work product, which includes the mental impressions, conclusions, opinions, or legal theories of an attorney or his representative, must be protected from disclosure even when the required showing of substantial need and inability "to obtain the substantial equivalent of the materials by other means" has been made.[30] Ordinary work product is discoverable under certain circumstances.[31]

a. Opinion Work Product

Opinion work product relates to the attorney's preparation, strategy, and appraisal of the strengths and weaknesses of a client's case.[32] Its protection is needed because if an attorney's work product were available to opposing counsel through discovery, much of what was written by the attorney would remain unwritten and "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."[33] Therefore, absolute protection of opinion work product and limited protection of ordinary work product is necessary for the adversarial process and "seeks to enhance the quality of professionalism within the legal field by preventing attorneys from benefiting from the fruit of an adversary's labor."[34] As a result, the work product doctrine generally is a means of "insuring the fullest possible

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[27]*See id.* at 513.

[28]*See* Anderson et al., *supra* note 16, at 862.

[29]*See Hickman*, 329 U.S. at 510.

[30]FED. R. CIV. P. 26(b)(3).

[31]*See id.*

[32]*See* Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 16 (Ind. Ct. App. 1996) (citing Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc., 592 N.E.2d 1274, 1277 (Ind. Ct. App. 1992)).

[33]*Hickman*, 329 U.S. at 511.

[34]Maertin v. Armstrong World Indus., Inc., 172 F.R.D. 143, 147 (D.N.J. 1997).

knowledge of the issues and facts involved in a case without sacrificing the 'wits' of attorneys" preparing for litigation.[35]

b. Ordinary Work Product

Ordinary work product includes "documents and tangible things prepared in anticipation of litigation" for or by an attorney or his representative that do not reflect the attorney's mental processes.[36] Ordinary work product may be discoverable if the party requesting discovery shows substantial need of the material to prepare the party's case and that the party is unable to obtain the equivalent material without undue hardship.[37] However, as noted above, opinion work product enjoys "an almost absolute immunity"[38] from discovery and requires a "far greater showing of necessity than ordinary work product" to overcome that immunity.[39] Therefore, even when the party requesting discovery has overcome the ordinary work product doctrine with a showing of substantial need and inability to obtain the equivalent material, the courts will protect "the mental impressions, conclusions, opinions, and legal theories" of the attorney or his representative involved in the litigation.[40]

Surveillance videotapes made by a defendant to refute a plaintiff's claim of injury usually do not contain the attorney's mental impressions, legal theories, or any conclusions of the attorney.[41] Consequently, the videotapes should be classified as ordinary work product, and the plaintiff should be permitted to overcome the work product doctrine with the requisite showing of both substantial need and inability to obtain the equivalent without undue hardship.[42] Therefore, to overcome the claim of ordinary work product, the plaintiff need only prove that, even though the videotape was prepared in anticipation of litigation for or by the defendant's attorney or representative, he has a substantial need of the videotape to prepare his case for litigation and an inability to obtain the equivalent material without undue hardship.[43]

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[35]*Pioneer Lumber, Inc.*, 673 N.E.2d at 16.

[36]Wegner v. Cliff Viessman, Inc., 153 F.R.D. 154, 159 (N.D. Iowa 1994).

[37]*See* FED. R. CIV. P. 26(b)(3).

[38]Onwuka v. Federal Express Corp., 178 F.R.D. 508, 512 (D. Minn. 1997).

[39]*Maertin*, 172 F.R.D. at 151 n.4 (citing Upjohn Co. v. United States, 449 U.S. 383, 401 (1981)).

[40]Mattison v. Imbesi, No. CIV.A.97-2736, 1998 WL 720061, at *2 (E.D. Pa. Oct. 6, 1998) (citing Hartman v. Banks, 164 F.R.D. 167, 169 (E.D. Pa. 1995)).

[41]*See* Martino v. Baker, 179 F.R.D. 588, 590 (D. Colo. 1998).

[42]*See* Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 16 (Ind. Ct. App. 1996).

[43]*See* FED. R. CIV. P. 26(b)(3).

C. Elements of Ordinary Work Product Doctrine

Rule 26(b)(3), which codifies the work product doctrine, pertains to the discovery of documents and tangible items.[44] The work product doctrine has two elements. First, the materials sought to be discovered must be prepared in anticipation of litigation.[45] Second, the material must have been prepared by or for a party or by or for that party's representative.[46]

Courts and commentators have varied in their characterization of what exactly must be shown to meet the "anticipation of litigation" requirement. Some say, for example, that there must be a substantial probability that imminent litigation will occur, that the threat of litigation is "real and imminent," or that the prospect of litigation is identifiable or reasonably anticipated.[47] Others say that anticipation of litigation must have been the primary motivating factor leading to the creation of the materials sought.[48] However worded, the basic requirement is that the party opposing discovery demonstrate some nexus between the materials sought to be discovered and the creation of those materials in anticipation of litigation.[49]

The second element of the ordinary work product doctrine requires the material to have been prepared by or for the party or by or for the party's representative, consultant, surety, indemnitor, insurer, or agent.[50] Prior to 1970, the work product doctrine extended only to materials prepared by or for the party or the party's representative. This led to much litigation over exactly whose work was covered.[51] In 1970, the scope of the doctrine was expanded by the adoption of rule 26(b)(3). As one court noted, attorneys often must rely on the assistance of agents to compile materials in preparation for trial, so it makes sense for the work product doctrine to protect materials prepared by those persons as well.[52] The 1970 amendments effectively resolved the issue of whose work is covered by the work product doctrine.[53]

The work product doctrine therefore protects from discovery any material that is prepared in anticipation of litigation by or for a party or the

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[44] *Id.*

[45] *See id.*

[46] *See id.*

[47] *See, e.g.*, *In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979).

[48] *See, e.g.*, Front Royal Ins. Co. v. Gold Players, Inc., 187 F.R.D. 252, 257 (W.D. Va. 1999).

[49] *See* 23 AM. JUR. 2D *Depositions and Discovery* § 53 (1983).

[50] *See* FED. R. CIV. P. 26(b)(3).

[51] *See* 39 AM. JUR. PROOF OF FACTS 3D § 1 (1996).

[52] *See* Martin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1261–62 (3d Cir. 1993).

[53] *See* 39 AM. JUR. PROOF OF FACTS 3D § 1.

party's representative or agent.[54] While the work product doctrine is a limitation on the otherwise liberal discovery philosophy of the Federal Rules, the doctrine is not without exception. Two exceptions are discussed in the next section.

D. Exceptions to Ordinary Work Product Doctrine

The Federal Rules require that to overcome the work product doctrine, the party seeking discovery must show a "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."[55] In addition, a party may obtain her own statement without the required showing of substantial need or undue hardship.[56]

1. Overcoming the Work Product Doctrine

A party that opposes discovery of materials as work product bears the burden of showing that the materials requested fall within the work product doctrine.[57] Since the work product doctrine is a qualified privilege, rather than a right,[58] the plaintiff can overcome this exception by showing both a substantial need for the material to prepare for litigation and an inability to obtain the equivalent material without undue hardship.[59] However, the trial judge has broad discretion to decide precisely when the disclosure should be made.[60]

a. Substantial Need

The party requesting disclosure of material protected by work product must first show a substantial need for the material in preparation for trial.[61] Satisfying the substantial need requirement depends on the facts and circumstances of each case.[62] The requirement is not satisfied by an

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[54]*See id.*

[55]FED. R. CIV. P. 26(b)(3).

[56]*See id.*

[57]*See* Front Royal Ins. Co. v. Gold Players, Inc., 187 F.R.D. 252, 254 (W.D. Va. 1999).

[58]*See* Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 584 (S.D. Tex. 1996) (citing Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 514 n.2 (5th Cir. 1993)); Cohn, *supra* note 16, at 929.

[59]*See* FED. R. CIV. P. 26(b)(3).

[60]*See* Wolford v. JoEllen Smith Psychiatric Hosp., 693 So. 2d 1164, 1167 (La. 1997) (citing Moak v. Illinois Cent. R.R. Co., 631 So. 2d 401, 406 (La. 1994)).

[61]*See* Peterson v. Wallace Computer Serv., Inc., 984 F. Supp. 821, 826 (D. Vt. 1997); Thomas v. General Motors Corp., 174 F.R.D. 386, 388 (E.D. Tex. 1997).

[62]*See* 39 AM. JUR. PROOF OF FACTS 3D § 1 (1996); *see also* Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000) (citing 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL

assertion that the party merely wants to make certain it has not overlooked anything.[63] While the substantial need requirement is satisfied if the material sought to be produced would be useful to impeach a witness,[64] the requirement is not satisfied based on mere suspicion that the material would be useful for impeachment purposes.[65]

In videotape surveillance cases, courts often hold that the plaintiff can make the substantial need showing. This is so for several reasons. First, the surveillance videotape may have damaging effects on the plaintiff's claims of injury.[66] Second, the plaintiff has a substantial need to authenticate the videotape and depose the individual who prepared the tape because videotapes are easily manipulated and, "as [a] result of skillful editing or crafty camera work, [may] give a false depiction of a plaintiff's condition."[67] Third, the plaintiff's need is heightened if the defendant plans to use the videotape as evidence at trial. As one court noted, it would be unfair if the plaintiff were first confronted at trial with a distorted film which proves devastating to her entire case.[68]

b. Undue Hardship

The second showing that a party must make to overcome the work product doctrine as to ordinary work product is that the party seeking discovery cannot obtain the equivalent material without undue hardship.[69] A party's inability to obtain the equivalent of the materials sought is closely related to the requirement of undue hardship, and analysis of these two sub-issues is frequently conflated.[70] The "substantial equivalent" determination focuses on whether any other source of the material can perform the equivalent function of helping the plaintiff to prepare for trial.[71] The undue hardship determination focuses on the party's burden in

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PRACTICE § 26.70(5)(c), at 26-221 to 26-222 (3d ed. 1999)) (stating that the element of substantial need may be "demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party's prima facie case").

[63]*See* Hickman v. Taylor, 329 U.S. 495, 513 (1947).

[64]*See id.* at 511.

[65]*See* Hauger v. Chicago Rock Island & Pac. R.R. Co., 216 F.2d 501, 508 (7th Cir. 1954).

[66]*See* Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996).

[67]DiMichel v. South Buffalo Ry. Co., 604 N.E.2d 63, 64 (N.Y. 1992).

[68]*See* Kane v. Her-Pet Refrigeration, Inc., 587 N.Y.S.2d 339, 344 (App. Div. 1992).

[69]*See* FED. R. CIV. P. 26(b)(3).

[70]*See* 39 AM. JUR. PROOF OF FACTS 3D § 1 (1996).

[71]*See id.*

obtaining the information from an alternative source.[72] Courts generally take a case-by-case approach to these issues.[73]

One court determined that non-disclosure of a surveillance videotape prior to trial, in and of itself, creates an undue hardship that justifies an exception to the work product doctrine.[74] Other courts have focused on the unique nature of the videotapes and on the plaintiff's inability to obtain the tapes from any other source.[75] Still other courts have distinguished videotapes that the defendant intends to use at trial from videotapes the defendant does not intend to use at trial and found undue hardship with respect to the former, but not the latter.[76]

Even if, however, a party cannot show the lack of a substantial equivalent and undue hardship, there is a second exception to the work product doctrine that may permit it to obtain material covered by the work product doctrine. A party's own statement is discoverable without this showing.[77]

2. A Party's Own Statement

The second exception to the ordinary work product doctrine is the "party's own statement" exception. Found in the last paragraph of rule 26(b)(3), this exception was added to the Federal Rules as part of the 1970 amendments.

Before 1970, rule 34 of the Federal Rules required that a party show good cause as a prerequisite to obtaining discovery of a tangible thing which constituted evidence relating to the matters within the scope of rule 26(b).[78] Courts were divided over whether this good cause requirement extended to a party's own statement.[79] In 1970, the good cause showing was eliminated, and the language of rule 26(b)(3) makes it clear that a

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[72]*See* Fletcher v. Union Pac. R.R., Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000).

[73]*See* 39 AM. JUR. PROOF OF FACTS 3D § 1. For a general discussion of the disadvantages of case-by-case adjudication, see R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans With Disabilities Act*, 1993 DET. C.L. REV. 1163, 1165 (1993).

[74]*See* Habert, *supra* note 1, at 316 (citing Cabral v. Arruda, 556 A.2d 47, 50 (R.I. 1989)).

[75]*See, e.g.*, Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 584–85 (S.D. Tex. 1996).

[76]*See, e.g.*, Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 17 (Ind. Ct. App. 1996).

[77]*See* FED. R. CIV. P. 26(b)(3).

[78]*Id.* 34.

[79]*See* Anderson et al., *supra* note 16, at 811–12.

party may discover matters falling within the exception without first having to show good cause, substantial need, or undue hardship.[80]

Issues concerning the party's own statement most frequently arise in personal injury cases in which the eventual defendant, or her insurer, obtains a statement from the eventual plaintiff before the eventual plaintiff has retained counsel.[81] Even prior to the 1970 amendments, many courts treated the discoverability of a party's statement differently from the statements of other witnesses,[82] on the ground that while witness statements are hearsay, the statement of a party opponent may be used as substantive evidence.[83] This distinction made inapplicable the rationale of *Hickman v. Taylor*, which was that a party should not be able to take advantage of the work product of the other party's attorney so long as there are other means of obtaining the relevant evidence.[84] The attorney whose client has given a statement prior to retaining counsel cannot obtain this evidence without production.[85]

The 1970 amendments, as noted above, made discovery of a party's own statement a matter of right. The advisory committee notes state that discrepancies between a party's prior statement and later trial testimony "may result from lapse of memory or ordinary inaccuracy" and that such discrepancies may receive a prominence which is not deserved. [86] For this reason, it was thought advisable to give parties access to their own statements. [87]

Rule 26(b)(3) defines a statement as a written statement, or "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded."[88] Very few cases address the discoverability of a party's own statement. Fewer cases

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[80]FED. R. CIV. P. 26(b)(3); *see also* Cohn, *supra* note 16, at 935 (comparing Smith v. Central Linen Serv. Co., 39 F.R.D. 15, 18 (D. Md. 1966) with Safeway Stores v. Reynolds, 176 F.2d 476, 478 (D.C. Cir. 1949)); Habert, *supra* note 1, at 317.

[81]*See* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2027 (2d ed. 1994).

[82]*See, e.g.*, Monarch Ins. Co. v. Spach, 281 F.2d 401, 413 (5th Cir. 1960).

[83]*See* FED. R. EVID. 801(d)(2); *see also* WRIGHT ET AL., *supra* note 81.

[84]329 U.S. 495, 515 (1947) (Jackson, J., concurring) ("It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case.").

[85]*See* WRIGHT ET AL., *supra* note 81.

[86]FED. R. CIV. P. 26(b)(3) advisory committee's notes.

[87]*See In re* Convergent Tech. Second Half 1984 Sec. Litig., 122 F.R.D. 555, 561 (N.D. Cal. 1988).

[88]FED. R. CIV. P. 26(b)(3).

discuss the meaning of "statement,"[89] and no cases discuss whether a surveillance videotape qualifies as a party's own statement under the Federal Rules. While it is possible to interpret the 26(b)(3) definition to encompass only written and oral statements, it is equally possible to interpret the definition broadly enough to include a surveillance videotape.[90] Moreover, the same rationale for giving parties automatic access to their written or oral statements applies equally to surveillance videotapes: the videotapes constitute substantive evidence that the party cannot obtain except through discovery.

While rule 26(b)(3) makes a party's own statement discoverable as a matter of course, it does not explicitly address when the defendant must produce the statement. The advisory committee notes state, "In appropriate cases the court may order a party to be deposed before his statement is produced."[91] Rule 26(c)(2) gives courts the power to issue a protective order postponing production.[92] Several courts have ruled that the party from whom production is sought need not produce the opposing party's statement until the opposing party has been deposed.[93]

As noted in Part II.C.2, a party may obtain her own statement without first having to show substantial need or undue hardship.[94] Therefore, if a surveillance videotape qualifies as a party's own statement, she should be able to obtain the videotape through discovery as a matter of course, without first having to make any showing. If the videotape does not qualify as a party's own statement, however, the plaintiff will have to show substantial need and undue hardship as a prerequisite to obtaining production of the videotape. The next Part examines the strategic use of surveillance videotapes and how courts have treated the issue of their discoverability.

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[89]*See* Hayden v. Acadian Gas Pipeline Sys., 173 F.R.D. 429, 430 (E.D. La. 1997); Bohannon v. Honda Motor Co., 127 F.R.D. 536, 540 (D. Kan. 1989); Chipanno v. Champion Int'l Corp., 104 F.R.D. 395, 397 (D. Or. 1984).

[90]*See* Habert, *supra* note 1, at 318.

[91]FED R. CIV. P. 26(b)(3) advisory committee's notes.

[92]FED. R. CIV. P. 26(c)(2); *see also* Willard v. Constellation Fishing Corp., 136 F.R.D. 28, 30 (D. Mass. 1991); Straughan v. Barge MVL No. 802, 291 F. Supp. 282, 284 (S.D. Tex. 1968).

[93]*See* Torres-Paulett v. Tradition Mariner, Inc., 157 F.R.D. 487, 488 (S.D. Cal. 1994); Nelson v. Puerto Rico Marine Mgmt., Inc., 72 F.R.D. 637 (D. Md. 1976); Smith v. China Merchants Steam Navigation Co., 59 F.R.D. 178, 179 (E.D. Pa. 1972).

[94]*See* FED. R. CIV. P. 26(b)(3).

III. SURVEILLANCE VIDEOTAPES

Defendants most commonly use surveillance videotape when there is doubt as to the extent and nature of the plaintiff's injuries and the plaintiff is suing for a large amount of money, as in a personal injury case or a workers compensation claim.[95] A surveillance videotape showing the plaintiff engaged in activities contrary to claimed injuries can be potentially devastating if introduced at trial.[96] Consequently, both parties have a substantial interest in the discoverability of the tapes.

A. Utilization of Surveillance Videotapes

Defendants have five different reasons for taking a surveillance videotape of a personal injury plaintiff. The first is the prospect of using the videotape as substantive evidence that the plaintiff's injuries are not as bad as the plaintiff claims.[97] If a plaintiff claims that her back injury renders her unable even to stand up on her own, a videotape of her running a marathon will tend to undercut her substantive testimony.

The second reason defendants might make a surveillance videotape is the prospect of using the videotape as impeachment evidence.[98] If, for example, a videotape demonstrates conclusively that a plaintiff is feigning injury to her back, then the jury is less likely to believe her claim of abdominal injuries. A videotape of the plaintiff carrying a large television renders the plaintiff's claim that she cannot carry her groceries less believable.

The third reason that defendants often use videotape surveillance is to sway the jury. For example, assume that a plaintiff slipped and fell in a grocery store, breaking her arm. Further assume that there is strong evidence of the grocery store's negligence. The plaintiff sues, alleging not only her arm injury, but also that she hurt her back so severely that she can no longer walk without crutches. The defendant videotapes the plaintiff playing three hours of nonstop beach volleyball, *sans* crutches. At trial, the plaintiff testifies at length about the horrors of having to live life permanently on crutches. The defendant then plays the videotape. The jury is likely to be so angry at the plaintiff for lying about her back injury that it may return a "zero damages" verdict in favor of the defendant, even though the defendant's negligence actually caused injury to the plaintiff in that the defendant's negligence caused the plaintiff's arm injury.

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[95] *See* Minichello, *supra* note 1, at 22.

[96] *See* LaMarca, *supra* note 1, at 1.

[97] *See id.*

[98] *See* Ogden, *supra* note 1, at 446–47.

The fourth reason for defendants to make surveillance videotapes is to discourage precisely the kind of feigned or exaggerated injuries described above. If the plaintiff believes she may be videotaped in a particular case, or the defendant has a reputation for making surveillance videotapes, this may create a disincentive for the plaintiff to feign or exaggerate her injuries: the plaintiff will want to avoid the possibility that dishonesty with regard to her claimed back injury will be used to persuade a jury to deny her a deserved remedy for her arm injury. Absent the possibility of having a feigned or exaggerated injury exposed to the jury, there often is little practical check on a plaintiff's claim of injury. Thus, the fear of surveillance deters plaintiffs from making fraudulent or exaggerated claims of injury.

Fifth, a defendant may use the videotape to verify the plaintiff's injuries and to value the case for settlement purposes.[99] Though seldom by itself a reason to initiate video surveillance, videotapes are oftentimes used in settling cases. This is particularly true when the videotape is consistent with the plaintiff's claims of injuries. The defendant's law firm, for example, might show the video to the defendant to demonstrate that the plaintiff is likely to appear sympathetic to a jury and that it would be wise for the defendant to settle the case.

Furthermore, a defendant has some incentives to voluntarily provide the plaintiff with copies of the surveillance videotape. First, the videotape will usually significantly reduce the plaintiff's motivation to exaggerate or feign injuries at trial. Second, a videotape that is inconsistent with the plaintiff's claim of injuries is likely to significantly diminish the plaintiff's perception of the settlement value of her case. Under such circumstances, a favorable settlement for the defendant becomes much more likely.

Usually, however, defendants do not voluntarily provide the plaintiff with surveillance videotapes. This is so for several reasons. First, disclosure may obviate the videotape's value as an impeachment tool since the plaintiff can structure her testimony according to the evidence presented on the tape.[100] Second, and similarly, the plaintiff's ability to structure her testimony makes it unlikely that the defendant will be able to use the videotape to "anger the jury" into denying the plaintiff recovery for legitimate injuries. Third, the defendant may perceive a strategic advantage in keeping the plaintiff in the dark about the substantive content of the videotape. Fourth, if the videotape is consistent with the plaintiff's claim of injuries, the plaintiff might seek to use the videotape at trial to

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[99]*See* James W. Paulsen, *Civil Procedure*, 25 TEX. TECH L. REV. 509, 538 (1996).

[100]*See Surveillance Evidence—Work Product Production—Timing of Disclosure*, 12 NO. FED. LITIGATOR 48 (Feb. 1997).

establish her injuries. Fifth, if the videotape is consistent with the plaintiff's claim of injuries, the disclosure of the videotape is likely to raise significantly the plaintiff's perception of the settlement value of her case.

The honest plaintiff,[101] on the other hand, has a legitimate interest in obtaining the surveillance videotape to prepare for trial. One court pointed out,

> [T]he 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.[102]

There are several reasons why a videotape may not accurately reflect the plaintiff's true condition.[103] First, as suggested above, the videographer or editor may make a conscious attempt to manipulate the medium.[104] Second, the videotaping and editing processes may create unintended distortions. The videographer or editor, who generally knows when he is hired that his job is to videotape the plaintiff doing things inconsistent with her claim of injury, may see little value in taping, or including on the final videotape product, the plaintiff sitting, laying down, or resting. To the plaintiff, however, this inactivity may demonstrate the strain induced by the actions that appear on the videotape.[105] Put another way, a ten-minute videotape showing the plaintiff carrying in the groceries, taking out the trash, and sweeping her front porch may create the impression of frenetic activity, an impression that would be diminished significantly if the videotape also showed the forty-five minutes of bed rest between each activity.

Third, the videotape may not tell the complete story. For example, a rear shot of the plaintiff may show her carrying groceries into her house,

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[101]A dishonest plaintiff, of course, has obvious reasons for wanting to obtain a copy of the videotape. However, there is no value in protecting the interests that are unique to a dishonest plaintiff.

[102]Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973).

[103]*See* DiMichael v. South Buffalo Ry. Co., 604 N.E.2d 63, 64 (N.Y. 1992).

[104]*See id.*; *see also* MARSHALL MCLUHAN & QUINCY FIORE, THE MEDIUM IS THE MESSAGE (1967) (discussing the personal and social consequences of the media's influence on the modern world).

[105]*See* LaMarca, *supra* note 1, at 16.

but may not show either the expression of pain on her face[106] or the fact that, once inside, she had to sit down for a half hour to recover from the ordeal. [107] Fourth, the videotape may show a non-malingering plaintiff who may have misjudged her abilities, who may be attempting to overcome her disabilities, or who simply may be trying to return to as normal a life as possible.[108] Frustration at not being able to work, a sense of depression from not being able to support one's family, or boredom, are all legitimate reasons why a plaintiff may attempt activities that appear inconsistent with her claims of injury. In addition, there are some activities, such as light housecleaning, that a plaintiff may not be able to avoid in everyday life.

These considerations give rise to the three basic reasons plaintiffs want pretrial discovery of surveillance videotapes. First, plaintiffs want to authenticate the videotapes.[109] This likely will include deposing the videographer and editor of the videotapes.

Second, plaintiffs want an opportunity to prepare for cross examination and a rebuttal at trial. As one court pointed out, "The surprise which [can] result[] 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."[110]

Third, when the videotapes are consistent with plaintiffs' claims for damages, plaintiffs want the videotapes for use as substantive evidence. As one plaintiff's brief argued:

> There is likely no better source from which to prove an injury than a videotape, taken by an adverse party, while the subject did not know the surveillance was being conducted. The defendants could hardly claim that the videotape was altered or that the plaintiff was "playing to camera" in response to what is memorialized on the videotape. Simply put, the defendants have evidence that may prove, like no other evidence can, the nature and extent of the plaintiff's injuries.[111]

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[106]*See* Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996).

[107]*See* LaMarca, *supra* note 1, at 16.

[108]*See id.*

[109]*See, e.g.*, Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973).

[110]Jenkins v. Rainner, 350 A.2d 473, 477 (N.J. 1976).

[111]Pioneer Lumber, Inc. v. Bartels, 673 N.E.2d 12, 17 (Ind. Ct. App. 1996) (quoting Appellee's Brief at 12–13, *Pioneer Lumber, Inc.* (No. 64A05-9604-CV-138)). Rejecting this

Surveillance videotapes can be a powerful tool for exposing dishonest plaintiffs. As Beth Thornburg pointed out, however, surprise confrontation can also discredit truthful witnesses.[112] This is why the discoverability issue is so important. Because it is impossible to know *ex ante* whether a particular plaintiff is honest or dishonest, the goal of any rule governing discoverability should be to give plaintiffs the opportunity to prepare for trial while at the same time preserving the impeachment value of the videotapes.

The discoverability issue usually arises either when the defendant objects to a discovery request for videotapes from the plaintiff, or when the defendant seeks to introduce as evidence at trial a videotape that was not previously produced in discovery. The defendant's legal argument against production is that the videotape is work product because it was made in anticipation of litigation. The plaintiff counters that the undue hardship/lack of substantial equivalent exception applies because the defendant has exclusive possession of the videotape.[113] The defendant replies that the exception is not applicable because the plaintiff knows exactly what activity he had engaged in and therefore has ample opportunity to obtain its equivalent.[114] The defendant may also argue that the plaintiff has no substantial need of the videotape, especially if the defendant does not plan to use the videotape at trial. As discussed below, the courts have differed in their resolution of the discoverability issue.

B. Classifications of Surveillance Videotapes

Lower courts typically find that the videotapes are ordinary work product and that discoverability turns on the substantial need/undue hardship exception.[115] The cases are as inconsistent today as they were when Patricia Ogden surveyed them five years ago.[116] As Ogden pointed out, judicial decisions on the discovery of surveillance videotape can be divided into the following four categories: (1) cases in which the judge

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argument, the court instead found that because the plaintiff could effectively prove the extent of her injuries without the videotapes, the plaintiff had no "substantial need" of videotapes that the defendant did not intend to use at trial. *See id.*; *see also* Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 517 (5th Cir. 1993) (finding that a surveillance tape is, at least in part, substantive evidence tending to prove the extent of the plaintiff's injuries).

[112]*See* Thornburg, *Rethinking Work Product*, *supra* note 16, at 1535.

[113]*See, e.g.*, *Pioneer Lumber, Inc.*, 673 N.E.2d at 17.

[114]*See* Cohn, *supra* note 16, at 932.

[115]*See* Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996) ("Obviously, surveillance evidence is gathered in anticipation of litigation and thus is generally protected as work product.").

[116]*See* Ogden, *supra* note 1, at 454.

orders blanket discovery of *all* surveillance videotapes, (2) cases in which the judge orders the discovery of only those videotapes that the defendant plans to introduce as evidence at trial, (3) cases in which the judge orders discovery of videotapes only after the plaintiff's deposition, and (4) cases in which the judge refuses to order the discovery of any videotapes.

The first category of cases consists of cases in which the judge orders blanket discovery of all surveillance videotapes, regardless of whether the tapes will be used at trial or not. An example is *Daniels v. National Railroad Passenger Corp.*, in which the court ordered the defendant to produce "not only those portions of film or tape which it intend[ed] to introduce at trial, but all films or tapes of the plaintiff in its possession."[117] The court's rationale was based on the liberal discovery philosophy underlying the Federal Rules.[118]

The second category of cases consists of cases in which the judge orders the discovery of only those videotapes that the defendant plans to introduce as evidence at trial. An example is *Pioneer Lumber, Inc. v. Bartels*, in which the personal injury plaintiff sought discovery of all videotapes, regardless of whether the tapes would be used at trial.[119] The court agreed that the plaintiff had a substantial need for the production of any videotapes that would be used at trial: "If the surveillance tape is not discoverable and the defense offers the tape as evidence, then [the plaintiff] is deprived of the proper means to conduct effective cross-examination or seek rebuttal testimony regarding the accuracy and authenticity of the tape."[120] As to the videotapes that would not be used at trial, the plaintiff argued that they contained substantive evidence favorable to her case and therefore should be produced.[121] However, the court disagreed, finding that the plaintiff could adequately prove the extent of her injuries without the videotapes and that she therefore had not shown a substantial need for their production.[122] On this basis, the court required the defendant to produce only those videotapes that it intended to use at trial.[123]

The third category of cases consists of cases in which the judge orders discovery of videotapes only after the plaintiff's deposition.[124] An

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[117]110 F.R.D. 160, 161 (S.D.N.Y. 1986).

[118]*See id.*

[119]673 N.E.2d 12, 17 (Ind. Ct. App. 1996).

[120]*Id.*

[121]*See id.*

[122]*See id.*

[123]*See id.* at 17–18.

[124]*See* Ogden, *supra* note 1, at 454. A variation on this theme was suggested by a prominent Houston defense attorney, but has not been adopted by any courts. Under this approach, if the defendant will use any surveillance evidence at trial, then the defendant must produce all the

example is *Smith v. Diamond Offshore Drilling, Inc.*, a case authored by Judge Samuel Kent of the Southern District of Texas.[125] Judge Kent reasoned that this procedure "preserves the impeachment value of the surveillance by requiring the plaintiff to commit by deposition to a description of the scope of his injuries, but allows the plaintiff sufficient time before trial to evaluate the surveillance evidence to determine its authenticity and accuracy."[126]

This third category of cases can be further divided. Many courts have held that, not only may the defendant delay production of the videotapes until after the plaintiff's deposition, but also that the defendant need not disclose the existence of the videotapes until after the deposition.[127] This approach maximizes the videotapes' impeachment value. In *Smith*, however, Judge Kent ruled that the defendant must disclose to the plaintiff, before plaintiff's deposition, the existence of any surveillance evidence and the date on which such evidence was obtained.[128] Otherwise, Judge Kent reasoned, "plaintiffs will be forced to choose between mitigating their damages by attempting to work and go on with their lives in spite of their injuries, or being ambushed at trial by creatively-edited or otherwise manipulated surveillance evidence . . . ."[129]

The fourth category of cases consists of cases in which the judge refuses to order the discovery of any videotapes, even if the videotapes will be used at trial for impeachment purposes. *MacIvor v. Southern Pacific Transportation Co.* illustrates this line of cases.[130] In *MacIvor*, the court reasoned that the impeachment value of surveillance videotapes would be lost by the production, or even the disclosure of the existence, of the

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surveillance material in its possession. If, however, the defendant does not intend to use the surveillance material at trial, the defendant need not produce any of it. This approach creates a bright-line rule, preserves the deterrence and impeachment value of surveillance videotape, gives plaintiffs the ability to prepare a rebuttal for trial, and removes any disincentive for defendants to engage in surveillance. *See* Electronic Mail Correspondence from Kenneth A. Scott to Richard Bales (Aug. 14, 2000) (on file with author). However, if the surveillance videotapes are consistent with the plaintiff's claims of injuries and the defendant elects not to use them at trial, the plaintiff would not obtain discovery of this substantive evidence.

[125]168 F.R.D. 582 (S.D. Tex. 1996).

[126]*Id.* at 586.

[127]*See, e.g.*, Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40–41 (E.D.N.C. 1995); Smith v. CSX Transp., Inc., 29 Fed. R. Serv. 3d 1439, 1442 (E.D.N.C. 1994); Martin v. Long Island R.R. Co., 63 F.R.D. 53, 55 (E.D.N.Y. 1974); Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973).

[128]*See Smith*, 168 F.R.D. at 587.

[129]*Id.* at 586.

[130]No. 87-6424-E, 1988 WL 156743 (D. Or. June 9, 1988).

videotapes.[131] The court therefore held that the defendant did not have to produce any videotapes that it intended to use at trial as impeachment evidence.[132] However, the court did require the defendant to produce any videotapes that it intended to use at trial as substantive evidence.[133]

C. The Balancing Approach

Some courts adopt across-the-board rules for the discovery of surveillance videotapes. Judge Kent's *Smith* opinion, for example, indicates that he will follow the same procedure—the defendant must disclose the fact of surveillance, but not the surveillance tapes, prior to plaintiff's deposition—in future cases.[134]

Other courts engage in a case-by-case balancing approach.[135] For example, in *Fisher v. National Railroad Passenger Corp.*, the plaintiffs sued their employer for injuries allegedly sustained during employment.[136] The employer secretly videotaped the employees to obtain impeachment evidence.[137] In response to the plaintiff's discovery requests, the employer produced the one videotape that it intended to use at trial, but refused to produce the other videotapes it had made.[138] At issue, therefore, was the discoverability of surveillance videotapes that the defendant did not intend to use at trial.

The United States District Court for the Southern District of Indiana balanced the plaintiff's interest in discovering the videotapes against the employer's need to protect its trial preparation materials.[139] The plaintiffs argued that they needed the videotapes for use as substantive evidence, to protect against the improper use of the videotapes by the defendant—showing the videotapes to fact witnesses in an attempt to "taint" their testimony—and to impeach the video editor.[140] Judge John Tinder held that none of these sufficed to show "substantial need," and therefore rejected the plaintiff's request for production.[141]

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[131] *Id.* at *2.

[132] *See id.*

[133] *See id.*

[134] 168 F.R.D. at 587.

[135] *See, e.g.*, DiMichel v. South Buffalo Ry. Co., 604 N.E.2d 63 (N.Y. 1992); Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); Spencer v. Beverly, 307 So. 2d 461 (Fla. Dist. Ct. App. 1975).

[136] 152 F.R.D. 145, 147 (S.D. Ind. 1993).

[137] *See id.*

[138] *See id.*

[139] *See id.* at 151.

[140] *See id.* at 151–54.

[141] *See id.*

Patricia Ogden advocates that courts use this balancing test every time they are called upon to determine the discoverability of surveillance videotapes.[142] However, she adds a twist to this balancing test. She argues that when the defendant intends to use the videotape at trial as substantive or impeachment evidence, the plaintiff has a strong argument for production because the plaintiff needs the videotape for purposes of authentication and cross examination.[143] When, however, the defendant does not intend to use the videotape at trial, these arguments do not apply.[144] Therefore, she proposes that courts adopt what she calls a bifurcated balancing test, which amounts to a presumption[145] that surveillance videotapes the defendant will use at trial are discoverable, while videotapes the defendant will not use at trial are not.[146]

This approach, while an improvement on the *ad hoc* approach currently in use, has several drawbacks. First, as with any case-by-case approach, it lacks predictability, invites conflict between the parties, and requires the use of scarce judicial resources for resolution. Second, it does not take into account the substantive evidentiary value to the plaintiff of surveillance videotapes that are consistent with the plaintiff's claims of injuries, but which the defendant does not intend to use at trial.

Third, the bifurcated approach gives the defendant nearly absolute control over the content of the videotape evidence that gets presented at trial, and makes it almost impossible for the plaintiff to rebut distortions created by the editing process. Assume, for example, that the defendant's videographer takes twenty hours of video footage of the plaintiff. A video editor edits that down to a fifteen minute video clip of the plaintiff engaging in physical activity. Under the bifurcated approach, the clip, if it is to be used at trial, gets produced, but the nineteen hours and forty-five minutes that the plaintiff may have spent recovering from the fifteen

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[142]*See* Ogden, *supra* note 1, at 466.

[143]*See id.* at 460; *see also* Spencer v. Beverly, 307 So. 2d 461, 462 (Fla. Dist. Ct. App. 1975) (stating that, "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.").

[144]*See* Ogden, *supra* note 1, at 466.

[145]For general discussions of presumptions and inferences, see Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 281–83; Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 430–31 (1993); Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 929–30 (1931); Note, *Presumptions in the Law of Iowa*, 20 IOWA L. REV. 147, 147 (1934).

[146]*See* Ogden, *supra* note 1, at 466 ("The plaintiff should be required to meet a higher burden to access [non-evidentiary videotape].").

minutes of activity does not. To the plaintiff, and ultimately to the finder of fact, the videotape discarded on the editing room floor may be just as important to a determination of the extent of plaintiff's purported injuries as is the videotape that the defendant intends to use at trial.

The fourth shortcoming of the bifurcated balancing approach is that it does not consider whether surveillance videotapes are discoverable as a matter of course as a party's own statement. This is the subject of the next Part.

IV. SURVEILLANCE VIDEOTAPES AS A PARTY'S OWN STATEMENT

The final paragraph of rule 26(b)(3) provides that a party may discover, without having to show substantial need or undue hardship, a statement she previously has made.[147] The rule defines "statement" with sufficient breadth to encompass surveillance videotapes.[148] As a result, a plaintiff who has been the subject of videotape surveillance should be entitled to the production of all videotapes, regardless of whether the defendant intends to use them at trial. Courts nonetheless may, and should, preserve the impeachment value of surveillance videotapes by not requiring defendants to produce, or even acknowledge the existence of, these videotapes until after the defendant has had an opportunity to depose the plaintiff.

A. Videotapes as Statements

Rule 26(b)(3) defines a "statement" as "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded."[149] As noted above, the definition of a statement is broad enough to encompass surveillance videotapes.[150]

Rule 26(b)(3) entitles a party to obtain the production of any statement that she previously has made.[151] There is no requirement, under this exception to the work product doctrine, that the party show substantial need or undue hardship.[152] Moreover, this provision makes no distinction between statements that the opposing party intends to use at trial and statements that the party does not. Therefore, classifying surveillance

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[147]FED. R. CIV. P. 26(b)(3).

[148]*See supra* notes 88–90 and accompanying text.

[149]FED. R. CIV. P. 26(b)(3).

[150]*See supra* notes 88–90 and accompanying text.

[151]*See* Koch v. Koch Indus., Inc., No. 85-1636-C, 1992 WL 223816, at *11 (D. Kan. Aug. 24, 1992) (citing Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1351 (5th Cir. 1985)).

[152]*See supra* note 80 and accompanying text.

videotapes as a party's own statement results in the automatic discoverability of those videotapes, regardless of whether the defendant intends to use them at trial.

B. Proposal

Videotaped surveillance constitutes a party's own statement within the meaning of rule 26(b)(3). Under this approach, as discussed above, videotapes created as a product of surveillance would always be discoverable, regardless of whether the defendant intends to use them at trial. This is consistent with the plain language and intent of rule 26(b)(3). It is consistent with the policies behind the work product doctrine, which are to encourage attorney diligence without compromising the just substantive outcome of cases. As discussed below, broad discoverability of videotaped surveillance is the best policy choice.

C. Evaluation

There are four advantages to classifying surveillance videotapes made by a defendant to refute a plaintiff's claims of injury as a party's own statement. First, it creates a bright-line rule. Second, it promotes the values of liberal discovery. Third, it promotes settlement. Fourth, it encourages the abandonment of fraudulent claims.

The first advantage is that it creates a bright-line rule: surveillance videotapes are always discoverable. Litigants would no longer need to brief the issue, and judges would no longer need to rule on a case-by-case basis.

Second, it promotes the values of liberal discovery. As noted in Part II, liberal discovery enables the parties to "avoid trial by ambush"[153] and to make a trial "a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[154] Discovery of all surveillance videotapes, including the material discarded on the editing room floor, gives the plaintiff all information that may be relevant to the case. This enables her to evaluate both the favorable and the unfavorable evidence, to plan a trial strategy, and perhaps to use the videotape as substantive evidence of her injuries. This, in turn, may create a more just substantive outcome of the case.

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[153]Martino v. Baker, 179 F.R.D. 588, 589 (D. Colo. 1998).

[154]Daniels v. National R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986).

Third, a rule favoring broad discovery of surveillance videotapes promotes settlement.[155] Settlement is unlikely when the parties value the case differently. Broad discovery tends to neutralize the information gap between the parties. For example, if a plaintiff discovers that the defendant has videotaped her engaging in activity that is inconsistent with her claimed injuries, she is likely to modify her settlement demand downward. On the other hand, if the defendant conducts surveillance which results in a videotape consistent with the plaintiff's claimed injuries, and the defendant knows that the plaintiff is entitled to discover this videotape, the defendant is likely to modify its settlement demand upward.[156]

Fourth, and for similar reasons, broad discovery of surveillance videotapes is likely to encourage plaintiffs to abandon less-than-meritorious or fraudulent claims.[157]

There are, however, several disadvantages to a rule mandating the broad discovery of both evidentiary and non-evidentiary videotapes. First, it is likely to result in less overall surveillance. The current approach to the discoverability of surveillance videotapes gives defendants every incentive to engage in video surveillance. If the results show a malingering plaintiff, the defendant uses the videotape at trial; if the results tend to confirm the plaintiff's claim of injury, the defendant throws the tape away. However, if defendants know beforehand that the product of video surveillance may be used against them, they likely will be much more hesitant to engage in surveillance. This is a disadvantage insofar as it will result in the exposure of fewer fraudulent claims.[158] However, it is an advantage insofar as it promotes personal privacy interests. On balance, it does not seem like such a bad idea to force defendants to think twice before conducting a secret videotape surveillance. A rule favoring broad discovery of surveillance videotapes would ensure that defendants engage in surveillance only when they are reasonably certain the plaintiff's claim of injury is fraudulent or exaggerated.

The second disadvantage is that much of the editing process is likely to be transferred from the editing room to the scene of the videotaping. The defendant's videographer is unlikely to hit the "record" button on her video camera until she is relatively certain the plaintiff is engaging in activity inconsistent with her claimed injuries. As a result, a wealth of videotape

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[155]*See* Johnson v. Archdioecese of New Orleans, 649 So. 2d 12, 13 (La. Ct. App. 1994) (quoting Moak v. Illinois Cent. Ry. Co., 631 S.W.2d 401, 405 (La. 1994)); Minichello, *supra* note 1, at 24.

[156]*See* Minichello, *supra* note 1, at 24.

[157]*See Johnson*, 649 So. 2d at 13.

[158]*See* LaMarca, *supra* note 1, at 2.

showing the plaintiff engaging in activity consistent with her claimed injuries is not likely. Even so, from a plaintiff's perspective, this is still better than the status quo, which generally results in the plaintiff having access to *none* of the videotape favorable to her case.

Third, the broad discovery of surveillance videotapes will decrease the impeachment value of the videotapes because the plaintiff, after reviewing the tapes, can tailor her testimony to the videotape evidence.[159] However, as discussed in the next section, this disadvantage can largely be overcome by not requiring defendants to produce or to reveal the existence of surveillance videotapes until after the defendant has had an opportunity to depose the plaintiff.

D. Timing

Rule 26(c)(2) gives courts the discretion to delay disclosure of a party's own statement.[160] More generally, rule 26(d) gives courts discretion in ordering the sequence of the various discovery methods used.[161] Courts therefore have the authority to delay the production of surveillance videotapes until after the defendant has had an opportunity to depose the plaintiff. Courts should do so, both to preserve the impeachment value of surveillance videotape and to make plaintiffs think twice before exaggerating or faking injuries.

If videotape surveillance must be produced prior to the plaintiff's deposition, the plaintiff can tailor her testimony to correspond with her actions on the videotape.[162] As a result, she has little incentive not to exaggerate her injuries because she can do so relatively secure in the knowledge that the defendant cannot disprove her claims. If, however, she must give her deposition before she has seen the videotape, she has every incentive to be absolutely truthful, for fear that any lie will be exposed as such by a videotape. A lie exposed in deposition later can be used to impeach her credibility at trial.

Moreover, defendants should not be required to disclose even the existence of videotape surveillance until after the plaintiff's deposition. When a defendant has conducted video surveillance prior to the plaintiff's deposition, some advantage might result, both to the defendant and to the judicial system generally, from informing the plaintiff that surveillance has

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[159]*See* Minichello, *supra* note 1, at 61.

[160]*See* Miles v. M/V Mississippi Queen, 753 F.2d 1349, 1351 (5th Cir. 1985); McDaniel v. Freightliner Corp., No. 99 CIV. 4292, 2000 WL 303293, at *8 (S.D.N.Y. Mar. 23, 2000).

[161]*See Ex parte* Doster Constr. Co., No. 1990203, 2000 WL 641104, at *3 (Ala. May 19, 2000).

[162]*See* Wolford v. JoEllen Smith Psych. Hosp., 693 So. 2d 1164, 1167 (La. 1997).

been conducted. This would give the plaintiff an incentive to be truthful at deposition. However, if the rule was that the defendant must notify the plaintiff that she has been the subject of videotaped surveillance, then, in cases in which the defendant has not conducted surveillance, the plaintiff would not be notified, and would know from this non-notification that no surveillance had been conducted. She therefore would feel free to lie, secure in the knowledge that she will not be exposed.

Thus, to create the incentive for honesty in all cases, even those in which the plaintiff has not been videotaped, it is necessary to preserve the plaintiff's uncertainty about whether or not she has been the subject of video surveillance. Of course, the defendant may decide in a particular case that he would prefer to disclose the fact of surveillance prior to the plaintiff's deposition with the intention of eliciting more honest testimony in that particular case. But a defendant should not be required to do so. The fear of being caught in a lie is a powerful motivator of honesty. Requiring defendants to notify plaintiffs of video surveillance prior to deposition would remove this fear from plaintiffs that have not been the subject of video surveillance; therefore, defendants should not be required to give such notice.

V. CONCLUSION

Defendants conduct videotape surveillance of personal injury plaintiffs to expose and deter fraudulent and exaggerated claims of injury. Plaintiffs seek discovery of the videotaped product of such surveillance because of the ease with which defendants can manipulate the medium to make a real injury seem fraudulent or exaggerated. Courts uniformly have assumed that the videotapes constitute work product and have asked whether the plaintiff can meet the substantial need/undue hardship exception to the ordinary work product doctrine. This approach has resulted in judicial inconsistency regarding the discoverability of surveillance videotapes.

This article advocates a different approach. Surveillance videotapes should be classified as a party's own statement pursuant to the last paragraph of rule 26(b)(3). The result of this classification is that the videotapes would be automatically discoverable. This approach creates a bright-line rule for courts to follow, promotes the value of liberal discovery, promotes settlement, and encourages the abandonment of fraudulent claims. To preserve the deterrent and impeachment values of surveillance videotapes, the courts should not require defendants to produce the videotapes or to notify the plaintiff that she has been the subject of videotape surveillance until after the plaintiff has been deposed.