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Bradford J. Gower

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DISCOVERABILITY OF PRIVATE INVESTIGATOR SURVEILLANCE IN SOUTH CAROLINA: NAVIGATING THE WORK PRODUCT DOCTRINE UNDER SAMPLES V. MITCHELL

I. INTRODUCTION

Imagine the following scenario: A plaintiff sues a defendant claiming back and arm injuries related to a car accident. In preparing the defendant’s case for trial, the defendant’s attorney hires a private investigator to investigate the plaintiff and to conduct surveillance assessing the extent of her injuries. Unbeknownst to the plaintiff, the private investigator records video surveillance of the plaintiff lifting heavy objects, doing yard work, and hanging clothes—all of which are inconsistent with her alleged debilitating injuries. During pretrial discovery, plaintiff’s counsel requests the production of any surveillance conducted of the plaintiff. The defendant’s attorney knows this surveillance is his strongest impeachment tool and would likely help the defendant prevail at trial. The question of whether a defendant can protect the contents of surveillance from discovery by claiming it as privileged work product has not been clearly answered in South Carolina.

This Note provides an analysis of the scope of the work product doctrine, emphasizing the discoverability of private investigator surveillance in South Carolina. Part II of this Note explains the development of the work product doctrine in federal courts, focusing on its origin and its scope. Part III discusses the development of the doctrine in South Carolina and how it affects discovery practice. Part IV analyzes the discoverability of private investigator surveillance by exploring case law from South Carolina and from other jurisdictions that have addressed the issue. Part V provides possible solutions to the hypothetical facts above and concludes that a South Carolina court would likely find such surveillance to be work product but ultimately discoverable. Finally, Part VI briefly concludes by discussing the balance struck by a proposed equitable solution. While private investigator surveillance may be considered work product under the rules of civil procedure, the best way to balance the interests of all parties is to give the defendant an opportunity to depose the plaintiff before requiring full disclosure of the video surveillance. This balance encourages truthful litigation and allows for a more efficient system, while still upholding the policies of the discovery rules of promoting free and open discovery so as to prevent surprise at trial.

II. THE RISE OF THE WORK PRODUCT DOCTRINE

A. Background

"It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work." One such safeguard is the work product doctrine, which courts have developed to protect the adversarial nature of our judicial system and the role of the advocate that the attorney plays in our system. The doctrine helps to ensure effective client service and further upholds the cause of justice. Through this doctrine, the legal system protects an attorney's confidential work product and therefore preserves the important role of attorneys as advocates. Such protection encourages thorough preparation, truthful litigation, and judicial efficiency, all of which are foundational to our system.

Prior to the advent of the Federal Rules of Civil Procedure (Federal Rules), an attorney did not need a protective doctrine because "[the] discovery devices at [common] law were narrowly defined and of limited use, and the primary equitable discovery device, the bill of discovery, did not permit disclosure of an adversary's case." The work product doctrine has its origins in the attorney-client privilege, which evolved in England as a mechanism to "protect[] communication between attorney and client." As English courts embraced

3. See id. at 516 (Jackson, J., concurring) ("[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974) ("It seems clear from the whole tenor of the Hickman opinion that the court was concerned with protecting the thought processes of attorneys and thus the very adversary system.").
4. See Hickman, 329 U.S. at 511 ("Were such [work product] materials open to opposing counsel on mere demand, ... [the] effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.").
5. Id. at 510–11 ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.").
7. See Duplan Corp., 509 F.2d at 736 ("It is true that litigation also engages a larger game of hide and seek, and also true that justice is to a large extent equated with truth. But if attorneys may not freely and privately express and record mental impressions, opinions, conclusions, and legal theories, in writing, and clients may not freely seek them, then there is justice for no one...."); see also FED. R. CIV. P. 1 ("[T]hese rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").
8. Anderson et al., supra note 6, at 765 ("Because his client's case was largely immune from discovery in American courts prior to the Federal Rules, an attorney had no need for a protective doctrine either at law or in equity.").
9. Id. (footnote omitted).
10. Id. at 766.
liberal discovery procedures in the late 1800s, they expanded the privilege to materials prepared for trial. This privilege, combined with the adoption of the Federal Rules, evolved into the work product doctrine in United States courts.

B. Adoption of the Federal Rules of Civil Procedure

The adoption of the Federal Rules of Civil Procedure in 1937 significantly altered the existing approach to civil litigation by placing an emphasis upon pretrial discovery. Rather than using the pleadings process to develop issues and facts, the Federal Rules promote such development through discovery. However, the initial Federal Rules did not provide a clear mechanism to protect material that would be considered privileged today. That lack of protection often caused inconsistent courtroom results regarding compelled disclosure of trial preparation materials. While there was inconsistency regarding disclosure of preparation materials, the change emphasized by the Federal Rules was typically manifested by compelled production of trial preparation materials. Because of the inconsistent results and the lack of clarity regarding the level of protection given to trial preparation materials, the Civil Advisory Committee suggested several amendments to the applicable Federal Rules to clarify the protection granted. However, the proposed amendments were not adopted because the United States Supreme Court had granted certiorari in Hickman v.

11. See id. ("During the last half of the nineteenth century, when liberal discovery procedures were developing in England, the courts expanded professional privilege to include not only communications between attorney and client, but also materials prepared for trial . . .").

12. See id. ("The adoption in 1937 of the Federal Rules of Civil Procedure initiated a slow revolution in attitude toward pretrial discovery that led to the development of a work product doctrine in the United States." (footnote omitted)).

13. See Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) ("The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. . . . Thus civil trials in the federal courts no longer need be carried on in the dark.").

14. See Anderson et al., supra note 6, at 767.

15. See id. ("As complete as [the] discovery scheme was, however, it did not include a mechanism for resolving conflicts similar to those addressed by the attorney-client privilege in evidentiary matters.").

16. Id. at 768 ("With no clear directive in the Rules, the district courts rendered inconsistent results, deciding the cases under one of three general positions: (1) the Rules require production of trial preparation materials; (2) the Rules prohibit production of trial preparation materials; or (3) the Rules should be strictly interpreted to limit production of trial preparation materials even though the Rules do not absolutely prohibit their discovery." (footnote omitted)).

17. See id. ("The cases requiring production of trial preparation materials are the most consistent with the spirit of radical change that the Rules sought to engender." (footnote omitted)).

18. See generally id. at 771–72 (discussing the proposed amendments to the Federal Rules of Civil Procedure from 1944 to 1946).
Taylor\textsuperscript{19} and "chose to articulate the standard of protection for work product in its . . . decision."\textsuperscript{20}

C. Hickman v. Taylor

In Hickman, a tugboat sank while crossing the Delaware River, killing five crew members.\textsuperscript{21} The tug owners and underwriters employed a law firm to investigate and defend them against lawsuits brought by the deceased's estates.\textsuperscript{22} Fortenbaugh, a member of the law firm employed by the tug owners and underwriters, privately interviewed survivors, taking statements and notes in preparation for the anticipated litigation.\textsuperscript{23} During pretrial discovery, counsel for the victims' families sent interrogatories to Fortenbaugh's firm, one of which asked whether any statements of the crew members were taken and requested that defense counsel "[a]ttach . . . exact copies of all such statements if in writing, and if oral, [that counsel] set forth in detail the exact provisions of any such oral statements or reports."\textsuperscript{24} Fortenbaugh declined to answer the interrogatory, claiming that "answering the[] requests 'would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel.'"\textsuperscript{25} The district court held that the requested material was not privileged and ordered Fortenbaugh to provide the requested material.\textsuperscript{26} When he refused, the court held Fortenbaugh in contempt of court.\textsuperscript{27}

The United States Court of Appeals for the Third Circuit reversed the district court's judgment and "held that the information . . . sought was part of the 'work product of the lawyer' and hence privileged from discovery under the Federal Rules of Civil Procedure."\textsuperscript{28} The court concluded that, although the requested materials were not protected under the attorney-client privilege, "the policies supporting the attorney-client privilege, which were intended to encourage full disclosure by the client, required that the privilege protect work product from discovery."\textsuperscript{29}

The Supreme Court affirmed the Third Circuit.\textsuperscript{30} Recognizing the inadequate procedures under the pleadings-based regime, the Court emphasized the

\begin{itemize}
\item \textsuperscript{19} 329 U.S. 495 (1947).
\item \textsuperscript{20} Anderson et al., supra note 6, at 773.
\item \textsuperscript{21} Hickman, 329 U.S. at 498.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id. at 498--99 (internal quotation marks omitted).
\item \textsuperscript{25} Id. at 499.
\item \textsuperscript{26} Id. at 499--500 (citing Hickman v. Taylor, 4 F.R.D. 479, 482 (E.D. Pa. 1945)).
\item \textsuperscript{27} Id. at 500.
\item \textsuperscript{28} Id. (citing Hickman v. Taylor, 153 F.2d 212, 222--23 (3d Cir. 1945)).
\item \textsuperscript{29} Anderson et al., supra note 6, at 775 (citing Hickman, 153 F.2d at 222--23).
\item \textsuperscript{30} Hickman, 329 U.S. at 514.
\end{itemize}
importance of discovery under the Federal Rules. The Court stated, "[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." While the Court recognized a broad application of the discovery rules, it also recognized necessary limits that such rules must have if they are to govern trial procedure effectively. The Court articulated these limits, stating that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." From a practical perspective based on the nature of the work of a lawyer, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."

D. The Meaning of Hickman

In Hickman, the Court recognized that the role of an attorney is necessarily adversarial and therefore that this role must be given some form of protection to allow the attorney to best represent a client and protect the client's interests. Without such work product protection, the effectiveness of an attorney and the cause of justice would be jeopardized. However, there may be circumstances in which an attorney's work product could in fact be discoverable.

31. Id. at 507 ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.").
33. Id. at 507 ("But discovery, like all matters of procedure, has ultimate and necessary boundaries.").
34. Id. at 510.
35. See id. at 511.
36. Id. at 510–11.
37. See id. ("Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.").
38. Id. at 511 ("Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing and the interests of the clients and the cause of justice would be poorly served.").
39. See id. ("We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had"); see, e.g., Ward v. CSX Transp., Inc., 161 F.R.D. 38, 40 (E.D.N.C. 1995) ("Surveillance materials are clearly within the definition of work product . . . . The surveillance materials are, however, entitled to only
One commentary has described the Hickman decision as a "milestone in the history of the Federal Rules." While it was a monumental decision in the development of much-needed protection, it provided little guidance to lower courts. Because of the unanswered questions, in 1953 and 1970, the Civil Advisory Committee proposed changes to the discovery rules "to clarify the effect of Hickman." In fact, the 1970 amendments added Rule 26(b)(3), which codified the Hickman holding, to the Federal Rules. While the proposed amendments took significant strides toward making the work product doctrine more understandable, the doctrine is often still the subject of litigation.

III. DISCOVERY IN SOUTH CAROLINA

A. Rules

The applicable rules governing discovery in South Carolina are substantially similar to those in the Federal Rules of Civil Procedure. The South Carolina Rules of Civil Procedure (South Carolina Rules) provide for discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." As in the Federal Rules, the work product doctrine is codified in Rule 26(b)(3) of the South Carolina Rules, and the Rule states that parties may obtain discovery of documents and tangible items otherwise discoverable that are "prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in a qualified immunity . . . . The qualified immunity can be overcome by a showing of substantial need.

40. Anderson et al., supra note 6, at 780.
41. See id. ("As a political decision, it helped the Rules gain further acceptance. As a declaration of principles, it decisively undercut attempts to narrowly construe the scope of discovery." (citing Edward H. Cooper, Work Product of the Rulesmakers, 53 MINN. L. REV. 1269, 1273 (1969))).
42. Id. ("[A]s an attempt to finally resolve the problem of the scope of work product immunity, [Hickman] proved to be a source of much confusion, offering little specific guidance to the district courts." (citing Comment, Attorney's Work Product Rule—An Area of Confusion, 31 FORDHAM L. REV. 530 (1963); John S. Holbrook, Jr., Comment, The Work Product Doctrine in the State Courts, 62 MICH. L. REV. 1199 (1964)); see also Duplan Corp. v. Moulingue et Retorderie de Chavanoz, 509 F.2d 730, 733 (4th Cir. 1974) ("In the federal courts from 1946 to 1970, the scope of Hickman and the work product doctrine was left to adjudication on a case by case basis. The decisions were often conflicting, and . . . [Hickman] opened a Pandora’s Box." (citing Viront v. Wheeling & Lake Erie Ry. Co., 10 F.R.D. 45, 47 (N.D. Ohio 1950))).
43. Anderson et al., supra note 6, at 782–84.
44. Id. at 783.
45. Id. at 762–63.
46. See S.C. R. CIV. P. 26 notes (noting that most of the language used in Rule 26 of the South Carolina Rules of Civil Procedure is the similar to or the same as the language used in Rule 26 of the Federal Rules).
47. S.C. R. CIV. P. 26(b)(1).
48. See FED. R. CIV. P. 26(b)(3).
the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

The work product doctrine constitutes a qualified immunity for work prepared in anticipation of litigation that a party may overcome if it makes an adequate showing under the South Carolina Rules. To determine whether work product at issue qualifies for protection as being prepared in anticipation of litigation, South Carolina courts look to whether the work product at issue was "prepared because of the prospect of litigation.” However, no South Carolina case has addressed the scope of the “substantial need,” “undue hardship,” or "substantial equivalent” language of Rule 26(b)(3). Indeed, other “[c]ourts have not taken a uniform approach in applying” this language under the Federal Rules. For instance, in interpreting Rule 26(b)(3), some courts use a three-prong test, while other courts use a two-prong test. The factual application of each test will be similar regardless of which test is used.

Courts following a three-prong analysis first consider whether there is a “substantial need” for the work product. A showing of substantial need requires more than mere relevancy under Rule 26(b)(1), and if the matter at issue does not contain information that is essential to an element of a party’s case, then the inquiry ends. Second, a court looks at “whether substantially equivalent information can be obtained from another source.” If substantially equivalent information cannot be obtained, then a party has satisfied the “substantial need” prong. Lastly, a court asks whether requiring a party to obtain the substantially equivalent information would create “an undue hardship.” The “undue hardship” created must be more than “mere[n] expense or inconvenience,” and the party must have at least attempted to obtain any substantial equivalent that is available.

49. S.C. R. CIV. P. 26(b)(3); see also Tobaccoinv USA, Inc. v. McMaster, No. 26799, 2010 WL 1439108, at *3 (S.C. Apr. 12, 2010) (“The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.”).

50. JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 219 (2d ed. 1996).

51. Tobaccoinv USA, 2010 WL 1439108, at *3.


53. Id.

54. Id. at 671. For a general discussion of the three-prong test, see Anderson et al., supra note 6, at 801–03.

55. See Fletcher, 194 F.R.D. at 671.

56. Id. (citing 6 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 26.70[5][c] (3d ed. 1999)).

57. Id.

58. See id. in Fletcher, the court noted that mere “[c]onclusory allegations do not establish that no substantially equivalent source of information exists.” Id. at 674.

59. Id. at 671.

60. Id.

61. See id. at 675.
The two-prong test is governed by a similar factual analysis, but it condenses the second and third elements of the three-prong test into one inquiry. Courts that use the two-prong test require a showing of “substantial need” and “undue hardship.” The substantial need inquiry asks “whether the information is an essential element” to the party’s claim or defense and whether the party “can obtain the [information] from an alternate source.” In addition, “[t]he undue hardship prong examines the burden [that] obtaining the information from an alternate source would impose on the party requesting discovery.” While no South Carolina court has directly followed the aforementioned tests or established a separate test, the fact-based inquiry would be similar, given that the same rules govern civil litigation in South Carolina.

The South Carolina Rules also provide for a protective order, which allows for the exclusion of certain items from discovery. A court may make any such order that “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense.” If the court finds that justice requires protecting something from discovery, the court may issue an order that the item may not be discovered or that it may be discovered only on specified terms. In addition, “[t]he rules of civil procedure allow the trial judge broad latitude in limiting the scope of discovery when the discovery process threatens to become abusive.”

In South Carolina, courts have recognized the work product doctrine. While there is little case law on the doctrine in South Carolina, one trial court held that the work product doctrine prevented discovery of investigative reports in the possession of an expert witness prepared by an insurance adjuster in a medical malpractice suit. This case demonstrates that South Carolina recognizes the work product doctrine developed in Hickman, and the state’s

62. Id. at 670–71 (internal quotation marks omitted).
63. Id. at 671.
64. Id.
65. See, e.g., FLANAGAN, supra note 50, at 219 (“[T]here is no hardship [to obtain the substantial equivalent] if the requested information can be obtained another way. . . . Likewise, information in the exclusive control of one party or unique materials like accident photos may satisfy the rule.”).
66. S.C. R. CIV. P. 26(c).
67. Id.
68. Id.
70. FLANAGAN, supra note 50, at 218 (citing S.C. State Highway Dep’t v. Booker, 260 S.C. 245, 195 S.E.2d 615 (1973) (per curiam)); see also Tobacoville USA, Inc. v. McMaster, No. 26799, 2010 WL 1439108, at *3 (S.C. Apr. 12, 2010) (recognizing the work product doctrine but declining to apply it).
adoption of the language codifying that doctrine in the Federal Rules further substantiates that proposition.

B. Court Interpretation

The South Carolina judicial system’s “scope of discovery is very broad and ‘an objection on relevance grounds is likely to limit only the most excessive discovery request.’”72 Indeed, “[t]he entire thrust of the discovery rules involves full and fair disclosure, ‘to prevent a trial from becoming a guessing game or one of surprise for either party.’”73 Because discovery provides the means for an attorney to prepare for trial, any denial of discovery rights results in a presumption of prejudice.74 It is the burden of a party who failed to comply with a discovery request to show a lack of prejudice to overcome this presumption.75 Given the broad interpretation of relevance, the most practical way to attempt to avoid disclosing an item through discovery in South Carolina is not by claiming it as irrelevant under Rule 26(b)(1) but by claiming it as work product. However, even though an item at issue may be deemed work product, it may nonetheless be discoverable.76

IV. DISCOVERABILITY OF PRIVATE INVESTIGATOR SURVEILLANCE

A. Background

In personal injury litigation, parties usually disagree over the extent of a plaintiff’s injuries.77 A defendant will often conduct surveillance of an allegedly injured plaintiff to shed light on this issue and to gain an advantage in litigation.78 If such surveillance captures a plaintiff exhibiting behavior contrary to the claimed injury, the video would have significant impeachment value and could be disastrous for the plaintiff’s case.79 For this reason, “both parties have a
substantial interest in the discoverability of the surveillance video\textsuperscript{80} and will often disagree about its discoverability. No South Carolina court has ruled directly on whether such surveillance could be protected from discovery as work product or whether a defendant would have to disclose the contents of a video prior to trial.\textsuperscript{81} While private investigator surveillance could be considered work product and therefore protected from discovery, a plaintiff can likely make a sufficient showing of “substantial need” for the materials and “undue hardship” in preparing the plaintiff’s case without them\textsuperscript{82} such that a South Carolina court may still require disclosure. However, in balancing the interests of all parties, a South Carolina court should allow a defendant to protect the contents of surveillance from discovery at least until the defendant has been given the opportunity to depose the plaintiff.

The discoverability of surveillance is a controversial issue. Plaintiffs argue that failing to disclose surveillance video is deceptive and that a court failing to compel the video’s discovery deprives them of their ability to fully prepare a case.\textsuperscript{83} On the other hand, defendants argue that not disclosing surveillance footage allows them to impeach the plaintiff and to discredit the integrity of the underlying claim.\textsuperscript{84} In addition, defendants argue that a plaintiff’s uncertainty as to whether the plaintiff has been the subject of surveillance may be the best way to ensure legitimate claims.\textsuperscript{85} The threat of its use in court may ensure truthful testimony.\textsuperscript{86}

The issue of whether to disclose surveillance videos arises either in pretrial discovery, when plaintiffs request the surveillance videos, or during trial, when

\textsuperscript{80} Id.

\textsuperscript{81} But cf. Samples v. Mitchell, 329 S.C. 105, 110–11, 495 S.E.2d 213, 216 (Ct. App. 1997) (holding that the failure to disclose the existence of video surveillance prior to trial was sanctionable as an inaccurate response to an interrogatory).

\textsuperscript{82} See supra text accompanying notes 50–65.

\textsuperscript{83} Siemens, supra note 78, at 872 (“[P]laintiffs argue that ‘the camera may be an instrument of deception.’ . . . [U]nless they can view the film and investigate the photographer’s credentials and techniques and methods used, they are deprived of the opportunity to develop rebuttal evidence and to fully prepare their cross-examination.” (quoting Snead v. Am. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973))).

\textsuperscript{84} See id. (“Defendants argue . . . that the main purpose of surveillance is to impeach the plaintiff’s credibility and to maintain the plaintiff’s honesty concerning injuries.” (citing Snead, 59 F.R.D. at 150)).

\textsuperscript{85} Id. at 873 (“Defendants contend a plaintiff’s uncertainty as to the existence and contents of surveillance ‘is the best way to promote truthfulness, and the showing of such films in court [is] a proper way to penalize a plaintiff who has been dishonest.’” (alteration in original) (quoting Snead, 59 F.R.D. at 150); see also Snead, 59 F.R.D. at 150 (“The possibility that [surveillance video] exist[s] will often cause the most blatant liar to consider carefully the testimony he plans to give under oath.”); Denham & Bales, supra note 79, at 778–79 (“[D]efendants 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 . . . from informing the plaintiff that surveillance has been conducted. This would give the plaintiff an incentive to be truthful at deposition.”).

\textsuperscript{86} Denham & Bales, supra note 79, at 778–79.
defendants attempt to introduce videos as evidence. 87 Defendants argue against producing the video because it is work product prepared in anticipation of litigation. 88 Plaintiffs assert that not producing the video would place undue hardship upon the preparation of their case and that there is no substantial equivalent available. 89 To rebut that argument, a defendant would note that because the plaintiff was the person engaged in the activity captured on video, the plaintiff knows precisely the activity that is the subject of the surveillance and therefore should be able to prepare adequately for trial. 90

B. Discovery of Surveillance in South Carolina

No South Carolina court has ruled directly on the issue of whether the work product doctrine could protect a surveillance video from discovery. However, in Samples v. Mitchell, 91 the South Carolina Court of Appeals sanctioned an attorney under Rule 11 of the South Carolina Rules of Civil Procedure for providing an inaccurate response to an interrogatory when she failed to disclose the existence of a surveillance video. 92 The defendant in that case did not claim work product protection and instead answered the interrogatory and willfully failed to disclose the existence of the video. 93 Even though the attorney did not assert protection from discovery based on work product, the case seemingly invited such an argument in the future 94 and consequently presented a need for clarifying the issue.

The court did not rule on the discoverability of the contents of the surveillance video, 95 but it did hold that the existence of a defendant’s videotape surveillance of a plaintiff claiming a personal injury was relevant and

87. Id. at 770. This Note focuses on the pretrial discoverability of evidentiary surveillance rather than evidence not intended to be offered at trial. The former is more likely to be a point of contention in litigation. See Fletcher v. Union Pac. R.R. Co., 194 F.R.D. 666, 671 (S.D. Cal. 2000) (“Although several courts discuss surveillance, few courts have considered the discoverability of ‘non-identititser’ films.”).

88. Denham & Bales, supra note 79, at 770.

89. Id.

90. Id.; see, e.g., Dodson v. Persell, 390 So. 2d 704, 706 (Fla. 1980) (“Respondents . . . contend that discovery of surveillance films is not necessary to eliminate surprise because the surveillance film involves facts more readily known by the plaintiff than the defendant and consequently there is no surprise.”).


92. Id. at 110–11, 495 S.E.2d at 216.

93. See id. (noting that the attorney never actually claimed work product protection but instead answered interrogatories and failed to disclose the video even though she clearly thought the video relevant and “useful in drafting her questions”).

94. The court suggested that surveillance could be treated as work product in some situations. See id. at 111, 495 S.E.2d at 216 (“Some states have discussed whether or not surveillance tapes which will not be introduced at trial constitute work product. The tape in this case, however, was admitted into evidence, and Mitchell has never claimed protection under the work product rule.” (citing MOORE, supra note 56, § 26.41[4][b])).

95. Id. at 111 n.4, 495 S.E.2d at 216 n.4.
Consequently, the failure to disclose the videotape was equivalent to an inaccurate response to an interrogatory and therefore warranted a Rule 11 sanction.  

The situation arose after the defendant, Mitchell, rear-ended the plaintiff, Samples, and “Mitchell admitted negligence, but contested proximate cause and damages.” Mitchell’s private investigator videotaped Samples. The private investigator supplied defense counsel with video of Samples “removing laundry from a clothesline, watching a [child’s] ball game, and using her left hand to open a gate,” all of which were inconsistent with her alleged injuries. Samples sent interrogatories to Mitchell, and Mitchell answered but did not disclose the surveillance video. Mitchell then deposed Samples’s mother and “specifically questioned [her] about Samples’ ability to hang out clothes, to attend her children’s sporting events, and to use the left side of her body.” After the deposition, Mitchell’s lawyer provided Samples’s counsel with a copy of the surveillance video, which provided videotape evidence contradicting the deposition testimony. At trial, Samples offered the mother’s deposition into evidence, and Mitchell offered the videotape. The trial judge admitted both pieces of evidence “but refused to allow the investigator to interpret the [video].”

On appeal, the court recognized that the question of the discoverability of private investigator surveillance had not been raised in South Carolina but had been addressed in other jurisdictions. Looking to Moore’s Federal Practice and to case law from other jurisdictions, the court held that the failure to disclose the existence of the video amounted to an inaccurate response to an interrogatory. In addition, although the defendant did not claim protection from discovery under the work product doctrine, the court noted, in dicta, that “the work product rule would not excuse the failure to disclose the existence of

96. See id. at 113, 495 S.E.2d at 217 (“At a minimum, the existence of the tape should have been disclosed in the original answers to Samples’ interrogatories, as the tape obviously related to Samples’ personal injury claim.”).
97. Id. at 110–11, 495 S.E.2d at 216.
98. Id. at 108, 495 S.E.2d at 214.
99. Id.
100. Id.
101. See id.
102. Id.
103. Id.
104. Id.
105. See id. at 111 n.4, 495 S.E.2d at 216 n.4.
106. Id. at 108, 495 S.E.2d at 214.
107. Id.
108. Id. at 110, 495 S.E.2d at 215.
109. Id. at 110, 495 S.E.2d at 215–16 (citing Dodson v. Persell, 390 So. 2d 704 (Fla. 1980); McDougal v. McCammon, 455 S.E.2d 788, 796 n.9 (W. Va. 1995); MOORE, supra note 56, § 26.41[4][b]). While Mitchell later disclosed the video before trial, the Rule 11 sanction was based on his inaccurate response to an interrogatory. See id. at 108–10 & n.3, 495 S.E.2d at 214–16 & n.3.
110. Id. at 111, 495 S.E.2d at 216.
the video tape here." However, the court left open the possibility that the work product doctrine could protect the video's contents, stating that “[i]f Mitchell’s attorney believed Samples had no right to this evidence . . . because of the work product rule, she should have either objected to the interrogatory or disclosed the existence, but not the content, of the evidence and moved for a protective order.”

In a footnote, the court noted that Mitchell had argued that “admitting the video into evidence was necessary to avoid allowing the statements of [the plaintiff’s mother] to go uncontradicted” and that “this promoted discovery’s goal of reaching the truth.” However, the court refused to address this argument. Drawing an important distinction between the existence of the video and the video’s contents, the court noted that the basis of this argument was “whether . . . the contents of a surveillance video should be protected from discovery until the witness has been deposed in order to safeguard the defendant’s ability to impeach the witness on cross examination.” However, because “Mitchell’s attorney failed to disclose the video’s existence and move for a protective order covering its contents . . ., the trial judge was never afforded an opportunity to rule on that issue.”

The court also referenced a 1996 amendment to the South Carolina Rules of Civil Procedure, which requires “the disclosure of the nature of evidence prior to any claim of privilege so other parties may assess the applicability of the privilege or protection.” Therefore, even if the contents of the surveillance were privileged, “the rules never permitted an attorney to deny the existence of evidence deemed privileged.” However, because the court did not reach Mitchell’s claim for protection of the video’s contents and the comments on work product were dicta, the opinion does not definitively resolve this issue.

C. Meaning of Samples v. Mitchell

The South Carolina Court of Appeals in Samples made it clear that video surveillance is relevant to a personal injury claim, but the opinion recognized that there is at least an argument that such surveillance can be claimed as work product. Because the defendant did not object to the interrogatory and claim

111. Id. (emphasis added).
112. Id. (citing S.C. R. Civ. P. 26(c); S.C. R. Civ. P. 33(a)).
113. Id. at 111 n.4, 495 S.E.2d at 216 n.4.
114. Id.
115. Id.
116. Id. (citing Townsend v. City of Dillon, 326 S.C. 244, 247, 486 S.E.2d 95, 97 (1997)).
117. Id. at 111 n.5, 495 S.E.2d at 216 n.5 (citing S.C. R. Civ. P. 26(b)(5)). Although this rule was not in effect at the time of trial, the court stated, “[R]eading rules 26, 33 and 11 together as they were at the time of this trial, this court is convinced the rules never permitted an attorney to deny the existence of evidence deemed privileged.” Id.
118. Id.
119. See supra notes 91–112 and accompanying text.
work product protection, the court did not rule on the issue.\textsuperscript{120} The court acknowledged the important distinction between a video’s existence and its contents, and it stated that, even if it had found the surveillance to be work product, a defendant would still have to disclose its existence.\textsuperscript{121} Therefore, after the \textit{Samples} decision, a defendant attempting to protect a video from discovery in South Carolina should disclose its existence to the court and to the opposing party.\textsuperscript{122} However, whether its contents are protected remains an unresolved issue.\textsuperscript{123} While the court did note in dicta that “[d]iscovery of [this type of] evidence is generally permitted,”\textsuperscript{124} the opinion does not fully answer the question. No South Carolina opinion has addressed the issue since \textit{Samples}, and some jurisdictions have interpreted \textit{Samples} to stand for the complete discoverability of such surveillance,\textsuperscript{125} even though the court’s opinion does not clearly support that proposition.

\textbf{D. Other Jurisdictions}

While there is no clear consensus among courts that have considered whether surveillance evidence is discoverable, most jurisdictions require the disclosure of video surveillance at some point prior to trial.\textsuperscript{126} Although a majority of jurisdictions have held that such surveillance is relevant and discoverable,\textsuperscript{127} an equitable approach exists that allows for both pretrial discovery as well as preservation of impeachment. The courts that have addressed this issue can be grouped into five general categories: (1) those courts that protect surveillance as work product material; (2) those courts that reject the work product argument and allow discovery of surveillance material; (3) those

\begin{itemize}
  \item \textsuperscript{120} See supra note 116 and accompanying text.
  \item \textsuperscript{121} \textit{Samples}, 329 S.C. at 113, 495 S.E.2d at 217 ("At a minimum, the existence of the tape should have been disclosed in the original answers to Samples’ interrogatories . . . "); see also \textsc{Justin S. Kahn, South Carolina Rules of Procedure Annotated} 135 (2009) ("If the tape related to the claim, the party in possession had a duty to at least disclose the existence of it." (citing \textit{Samples}, 329 S.C. 105, 495 S.E.2d 213)).
  \item \textsuperscript{122} However, the opinion is unclear as to when the existence of surveillance must be disclosed. For an argument that the existence should not be disclosed until after the deposition, see Denham & Bales, supra note 79, at 778–79.
  \item \textsuperscript{123} The court suggested using a protective order under Rule 26(c) to disclose the existence of surveillance while protecting its contents. See \textit{Samples}, 329 S.C. at 111 n.5, 495 S.E.2d at 216 n.5.
  \item \textsuperscript{124} \textit{Id.} at 110, 495 S.E.2d at 215 (quoting Moore, supra note 56, \S 26.41[4][b]) (internal quotation marks omitted).
  \item \textsuperscript{125} See, e.g., Roundy v. Staley, 984 P.2d 404, 407–08 (Utah Ct. App. 1999) (providing \textit{Samples} as an example of a court holding that a party must disclose a videotape to the opposing party before trial); see also Lagge v. Corsica Co-Op, 677 N.W.2d 569, 574 (S.D. 2004) ("[M]ost jurisdictions hold both the existence and contents of surveillance tapes to be freely discoverable."").
  \item \textsuperscript{126} See Ranft v. Lyons, 471 N.W.2d 254, 261 (Wis. Ct. App. 1991) ("The majority rule . . . is that a party is entitled not only to know before trial whether he or she has been subjected to photographic or video surveillance but to have pre-trial access to the surveillance materials as well.").
  \item \textsuperscript{127} \textit{Id.}
\end{itemize}
courts that find surveillance to be work product but nonetheless require
discovery based on a plaintiff’s showing of substantial need and undue hardship;
(4) those courts that allow the defendant to depose the plaintiff before disclosing
the video surveillance whether it is work product or not; and (5) those courts that
allow for protection from discovery when the defendant stipulates to limited use
of such surveillance.

1. Protected from Discovery as Work Product

A minority of jurisdictions have protected surveillance as work product.128
In Ranft v. Lyons,129 the Wisconsin Court of Appeals held that a plaintiff was not
entitled to pretrial discovery of whether she had been subjected to post-accident
surveillance.130 The court held that the work product doctrine protected post-
accident surveillance and therefore it was not discoverable.131 The court
recognized that “[t]he majority rule . . . is that a party is entitled not only to know
before trial whether he or she has been subjected to photographic or video
surveillance but to have pre-trial access to the surveillance materials as well.”132
However, the court rejected that majority rule and stated that the decision to
conduct surveillance was itself protected as work product.133 In the court’s
opinion, that “decision not only reflects the lawyer’s evaluation of the strengths
or weaknesses of the opponent’s case but the lawyer’s instructions to the person
. . . conducting the surveillance also reveals the lawyer’s analysis of potentially
fruitful areas of investigation.”134 The court further noted that “[d]isclosure of
the fact of surveillance and a description of the materials recorded would . . .
impinge on the very core of the work-product doctrine.”135 Because the record
“[d]id] not indicate that [the plaintiff was] not aware of her physical limitations or
that she [did] not know what she did or did not do since the accident,”136 the
court held that there were insufficient reasons to compel discovery.137 However,
the court concluded by stating that “[a]s long as [the plaintiff has] an opportunity
to seasonably challenge any surveillance material prior to the defendants’ use of
the material at trial, neither the [plaintiff] nor the trial’s truth-finding function
will be prejudiced.”138

128. Siemens, supra note 78, at 901.
130. Id. at 255.
131. Id.
132. Id. at 261.
133. Id.
134. Id.
135. Id. at 262.
136. Id.
137. Id. at 261.
138. Id. at 262.
2. Discoverable After Rejecting Work Product Argument

In contrast to the approach adopted in Wisconsin, the Utah Court of Appeals in *Roundy v. Staley* held that video surveillance is relevant and discoverable and that it is not protected as attorney work product. The defendant never disclosed a surveillance video in his answers to the plaintiff's discovery requests relating to the extent of the injuries that the plaintiff suffered in an automobile accident. The defendant then presented a physician witness at trial who testified that, based on the surveillance video, he doubted the truth of the plaintiff's claimed injuries. Upon learning of the video, the plaintiff requested that the trial court order the defendant to disclose it, but the trial court denied her request. The trial court allowed the defendant to present the videotape, which showed the plaintiff "engaging in activities that she had testified she was unable to perform," to the jury. Upon review, the Utah Court of Appeals noted that "the 'purpose [of Utah's discovery rules] is to make procedure as simple and efficient as possible . . . and to remove elements of surprise or trickery so the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible." The court also stated the general rule that most courts require disclosure. To support this general rule, the court cited the *Samples* dicta, stating that "[d]iscovery of [this type of] evidence is generally permitted." The court also discussed the purpose of the discovery rules in Utah. It found that "the trial court clearly erred in refusing to order [the defendant] to reveal . . . the surveillance video" and further stated that its "holding is consistent with the purpose of Utah's discovery rules, facilitating fair trials with full disclosure of all relevant testimony and evidence." The court rejected the defendant's argument that the videotape was not discoverable because it was protected as attorney work product, stating that "[e]vidence

140. See id. at 408–09.
141. Id. at 406.
142. Id.
143. Id.
144. Id.
145. Id. at 407 (quoting Ellis v. Gilbert, 429 P.2d 39, 40 (Utah 1967)).
146. Id. ("Most courts addressing this issue have held that a party in possession of a surveillance video tape must disclose it to the opposing party prior to trial."). The court cited a Missouri Court of Appeals case, explaining in a citation parenthetical that the "majority rule [is] that although surveillance information is work product, such evidence is not protected if it will be used by the defendant at trial because [the] 'plaintiff needs an opportunity to examine the material to guard against mistaken identity, possible exaggeration, distortion, and even fraud by the defendant.'" Id. at 409 (citing State ex rel. Mo. Pac. R.R. Co. v. Koehr, No. 62252, 1992 WL 230232, at *3 (Mo. Ct. App. Sept. 22, 1992), rev'd, 853 S.W.2d 925 (Mo. 1993)).
147. Id. at 407 (citing Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997)).
148. See id. (citing Ellis, 429 P.2d at 40).
149. Id. at 408.
prepared in anticipation of introduction at trial is clearly discoverable under Utah Rule of Civil Procedure 26(b)(1). Based on the purpose of the discovery rules as articulated by the Utah Court of Appeals, a defendant who refuses to disclose this type of surveillance undermines the entire purpose of those rules.

3. **Work Product but Nonetheless Discoverable**

The third category finds that surveillance constitutes work product but requires discovery based on substantial need and undue hardship. In *Gutshall v. New Prime, Inc.*, a Virginia district court held that surveillance in personal injury litigation is work product. However, because the court found “that a plaintiff alleging claims for personal injury has a substantial need for surveillance evidence in preparing his case for trial, due to the relevance and importance of such evidence, and the substantial impact it may have at trial,” the court held such surveillance to be nonetheless discoverable.

In *Gutshall*, the plaintiff was operating a tractor-trailer and was rear-ended by a tractor-trailer owned by the defendant corporation. The plaintiff served the defendant with interrogatories asking whether the plaintiff had been subject to surveillance. At the time the defendant answered the interrogatories, he had not conducted any surveillance and therefore responded in the negative. The defendant then arranged for surveillance to be conducted, and the plaintiff subsequently noticed such surveillance and notified his attorney, who filed a motion to compel and a motion to exclude.

The court rejected the defendant’s first claim that such evidence was protected from discovery because it was prepared “solely for impeachment.”

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150. *Id.*
151. *See id.* at 409.
153. *Id.* at 46.
154. *Id.*
155. *Id.* at 44.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 44–45.
The court noted that Rule 26(a) of the Federal Rules did not govern the scope of discovery at issue and therefore was not applicable.

The court held that, although the surveillance video was work product prepared in anticipation of trial, it was still discoverable. The court noted that "it is impossible to procure the substantial equivalent of such evidence without undue hardship, as videotape 'fixes information available at a particular time and a particular place under particular circumstances, and therefore cannot be duplicated.'" Consequently, although the surveillance evidence was work product, it was nonetheless discoverable.

4. Defendants Allowed to Depose Plaintiffs Before Disclosing Surveillance

Some courts have reached an equitable compromise by allowing defendants to depose a plaintiff prior to requiring disclosure of surveillance. In Snead v.

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160. The language of Rule 26(a) in the Federal Rules is different from the language of Rule 26(a) in the South Carolina Rules. Compare Fed. R. Civ. P. 26(a)(i) ("A party must . . . provide to the other parties . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment . . . "), with S.C. R. Civ. P. 26(a) ("The frequency or intent of use of discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative . . . ; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive . . . ").

161. See Gutshall, 196 F.R.D. at 44-45 ("[F]ederal Rule 26(a)(3) does not describe the scope of discovery or exclude impeachment evidence therefrom; it describes the scope of automatic initial disclosure requirements. . . . Therefore, [the defendant's] reliance on [that rule] is misplaced."). But see Denty v. CSX Transp., Inc., 168 F.R.D. 549, 550 (E.D.N.C. 1996) (holding that where a defendant stipulates that any surveillance evidence used will be offered solely for impeachment, such evidence is excluded from pretrial discovery).


163. Id. (quoting Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996)).

164. Id.

165. See, e.g., Tripp v. Severe, No. CIV.A.L-99-1478, 2000 WL 708807, at *1 (D. Md. Feb. 8, 2000) ("[T]he various conflicting interests presented are best reconciled by requiring a defendant to disclose the existence of the surveillance materials . . . and requiring the production of the materials prior to trial, but permitting defendant to defer production of the materials until after plaintiff's deposition has been taken. This approach prevents unfair surprise while serving the truth-seeking interests of the litigation process."); Martino v. Baker, 179 F.R.D. 588, 590 (D. Colo. 1998) ("To preserve the defendant's right to use the tapes as impeachment evidence, however, plaintiff's deposition is to be completed before the tapes are produced." (citing Ford v. CSX Transp., Inc., 162 F.R.D. 108, 110 (E.D.N.C. 1995))); Ward v. CSX Transp., Inc., 161 F.R.D. 38, 41 (E.D.N.C. 1995) ("[A]llowing discovery of surveillance materials after the deposition of the plaintiff, but before trial, best meets the ends of justice and the spirit of the discovery rules to avoid surprise at trial. . . . Inconsistencies between that deposition and the surveillance materials can be used to impeach the plaintiff at trial."); Daniels v. Nat'l R.R. Passenger Corp., 110 F.R.D. 160, 161 (S.D.N.Y. 1986) ("Before the disclosure, . . . defendant must be afforded the opportunity to take the depositions of
American Export-Isbrandtsen Lines, Inc., a Pennsylvania district court held that if a defendant wants to use at trial surveillance films of a personal-injury plaintiff, the defendant must disclose to the plaintiff the existence and contents of surveillance.\textsuperscript{167} However, the court stated, "Any rule to be formulated . . . must balance the conflicting interests of the plaintiff against the conflicting interests of the defendant and protect both insofar as it is possible to do so."\textsuperscript{168} Therefore, the court held that before the defendant was required to disclose the surveillance videos, "the [defendant] must be given an opportunity to depose the plaintiff."\textsuperscript{169}

In that case, a merchant seaman brought an action to recover damages suffered while on the defendant's ship.\textsuperscript{170} The defendant refused to answer interrogatories regarding the "secret motion pictures taken to reveal the true nature and extent of [the] plaintiff's injuries."\textsuperscript{171} The court acknowledged the arguments on both sides before ultimately holding that such surveillance was discoverable.\textsuperscript{172} It recognized that "most defense lawyers contend that if a plaintiff knows surveillance films exist, he will tailor what he has to say accordingly."\textsuperscript{173} In response, the court stated, "Defendants contend that uncertainty as to the existence of surveillance pictures is the best way to promote truthfulness and the showing of such films in court, a proper way to penalize a plaintiff who has been dishonest."\textsuperscript{174} The court observed that "plaintiffs, on the other hand, argue that unless they can check the integrity of the photographer, the accuracy of his methods, and review the pictures he has taken, they are deprived of the proper means to cross-examine or seek rebuttal testimony."\textsuperscript{175} Plaintiffs argue that "to prevent possible abuse by defense investigators requires full disclosure as to the films in advance of trial and an opportunity for them to be seen."\textsuperscript{176} After assessing both sides' arguments, the court noted that the

the plaintiff and any other affected persons, so that the prior recording of their sworn testimony will avoid any temptation to alter that testimony in light of what the films or tapes show.\textsuperscript{177}""); Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980) ("[F]airness requires that we allow the use of surveillance materials to establish any inconsistency in a claim by allowing the surveilling party to depose the party surveilled after the movies have been taken or evidence acquired but before their contents are presented for the adversary's pretrial examination."); Fender v. Norfolk S. Ry. Co., No. L00-2840, 2001 WL 34037318, at *2 (Va. Cir. Ct. June 28, 2001) ("[B]efore Defendant is required to provide the surveillance videotapes . . . , the deposition of the Plaintiff and responses to all interrogatories and other discovery materials . . . will have been provided by Plaintiff to Defendant.").

\textsuperscript{167} Id. at 151.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} See id. at 149.
\textsuperscript{171} Id.
\textsuperscript{172} See id. at 150-51.
\textsuperscript{173} Id. at 150.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
surveillance was "highly relevant."\textsuperscript{177} Analyzing the language of Rule 26(b)(3), the court noted that the surveillance videos were "unavailable by other means" and that the plaintiff had a "substantial need" for the surveillance in preparation for trial.\textsuperscript{178} The court stated the following:

A man may know he cannot bend over without pain and therefore feel he is telling the truth when he says he never reaches down to touch the floor. Nonetheless, under some particular circumstances he may have done so and this may be the very incident which the camera has recorded.\textsuperscript{179}

While the court recognized that such surveillance is ultimately discoverable, the court noted that "[e]very need to provide information must be balanced against the need to withhold it."\textsuperscript{180} After balancing the interests of both parties, the existence and contents were discoverable to the plaintiff.\textsuperscript{181} However, before disclosing even the existence of the surveillance, "the defense must be given an opportunity to depose the plaintiff fully as to his injuries, their effects, and his present disabilities."\textsuperscript{182} Allowing deposition before disclosure preserves the defendant's ability to impeach,\textsuperscript{183} while adequately providing the plaintiff with evidence necessary to prepare his case.\textsuperscript{184}

5. Excluded from Discovery Where Defendant Stipulates to Limited Use

Another approach adopted by some courts allows for protection of surveillance from discovery when a party stipulates to its limited use. In Denty v. CSX Transportation, Inc.,\textsuperscript{185} a federal district court in North Carolina denied a plaintiff's motion to compel surveillance evidence where the defendant stipulated that the surveillance evidence would be used solely for impeachment purposes.\textsuperscript{186} Thus, the court excluded the surveillance from discovery.\textsuperscript{187} In Denty, the plaintiff was injured while working within the scope of his

\textsuperscript{177} Id.
\textsuperscript{178} Id. at 150–51.
\textsuperscript{179} Id. at 151.
\textsuperscript{180} Id.
\textsuperscript{181} See id.
\textsuperscript{182} Id.
\textsuperscript{183} See id. ("Once [a plaintiff's] testimony is memorialized in deposition, any variation he may make at trial to conform to the surveillance films can be used to impeach his credibility, and his knowledge at deposition that the films may exist should have a salutary effect on any tendency to be expansive.").
\textsuperscript{184} See id. ("If the plaintiff believes that the films seem to give a false impression, he can then obtain the necessary data to serve as a basis for cross-examination.").
\textsuperscript{185} 168 F.R.D. 549 (E.D.N.C. 1996).
\textsuperscript{186} See id. at 549–50.
\textsuperscript{187} See id. at 550.
employment as a trainman and sued his employer. The defendant’s argument in opposition to the motion to compel was that “Federal Rule of Civil Procedure 26(a)(3) precludes discovery of surveillance materials because they will be used solely for impeachment purposes.” The court accepted this argument, stating that Rule 26(a)(3) “clearly excludes from pretrial discovery material which will be used solely for impeachment purposes.” Because the defendant stipulated that it would use the surveillance for only impeachment purposes, the court held that the surveillance was not discoverable. The court further noted that “[t]he obvious rationale for excluding impeachment materials from discovery is that their disclosure would substantially impair their impeachment value.”

Finally, another district court has held that if the defendant stipulates that any video surveillance conducted will not be admitted as evidence, the plaintiff is not entitled to pretrial disclosure of the video surveillance because the plaintiff did not establish a substantial need for it.

V. GUIDANCE FOR SOUTH CAROLINA PRACTITIONERS

In assessing the various arguments regarding discovery of surveillance videos, a court will be sensitive to the established rules of procedure, the policies behind the rules, and the interests of the parties involved. One court has recognized that a plaintiff’s involvement in a personal injury lawsuit lessens the plaintiff’s expectation of privacy, and a plaintiff should “expect reasonable inquiry and investigation” into a claim. Without such investigation into the legitimacy of plaintiffs’ claims, the system would fall short of the efficiency ideals of Rule 1 of the South Carolina Rules. Recognizing the social utility gained from investigation of claims, one court has stated, “It is in the best interests of society that valid claims be ascertained and fabricated claims be exposed.” Furthermore, when the activities conducted by the plaintiff are in

188. Id. at 549.
189. Id. at 549–50.
190. Id. at 550 (quoting FED. R. CIV. P. 26(a)(3)).
191. Id. But see Gutshall v. New Prime, Inc., 196 F.R.D. 43, 44–45 (W.D. Va. 2000) (“Rule 26(a)(3) does not describe the scope of discovery or exclude impeachment evidence therefrom; it describes the scope of automatic initial disclosure requirements. . . . Therefore, [the defendant’s] reliance on Rule 26(a)(3) [to argue for exclusion of surveillance evidence] is misplaced.”).
194. See, e.g., Martino v. Baker, 179 F.R.D. 588, 590 (D. Colo. 1998) (“Any rule formulated . . . must balance the conflicting interests of the plaintiff against the conflicting interests of the defendant and protect both insofar as it is possible to do so.” (quoting Ford v. CSX Transp., Inc., 162 F.R.D. 108, 110 (E.D.N.C. 1995)) (internal quotation marks omitted)).
196. See S.C. R. CIV. P. 1 (“[T]he Rules shall be construed to secure the just, speedy, and inexpensive determination of every action.”).
197. Furman, 744 A.2d at 586 (quoting Forster, 189 A.2d at 150).
public and observed by passers-by, a plaintiff "has exposed herself to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home." 198

Advocates for protecting surveillance from discovery emphasize the value of exposing fraudulent claims at trial and thus encouraging more truthful litigation. 199 However, the judicial system as a whole may benefit more if such surveillance is disclosed prior to trial because such evidence may convince a party not to "dissemble" based on the strength of the evidence against it. 200 Given the fact that investigation into a personal injury claim is reasonable and likely expected, a South Carolina practitioner should consider several issues when assessing the discoverability of such surveillance.

A. Private Investigator Surveillance Is Work Product

A court in South Carolina would likely consider private investigator surveillance to be attorney work product and thus protected from discovery. The work product doctrine applies to work product of attorneys as well as to the work of an attorney's agent. 201 Because an investigator is an attorney’s agent and produces the surveillance video in anticipation of litigation, such surveillance is technically work product under the South Carolina Rules. In fact, one South Carolina commentator states, "Courts typically afford work product protection to an investigator’s statement, surveillance tape or other document because the investigator is considered to be an agent of the attorney, who in turn is a representative of the client." 202 Because it is work product, it should be entitled to qualified immunity from discovery and should not be discoverable unless the party seeking disclosure meets the requirements of Rule 26(b)(3). 203

While no South Carolina court has directly answered the question of whether surveillance can be protected as work product, the case law that does exist suggests that a defendant faced with this question initially has two choices: (1)

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198. Id. (quoting Forster, 189 A.2d at 150).
199. See, e.g., Denham & Bales, supra note 79, at 766, 778–79 (noting that surveillance videos can be used by defendants to impeach a plaintiff's testimony and thus can discourage a plaintiff "from feigning or exaggerating injuries").
200. See Runions v. Norfolk & W. Ry. Co., No. CL97001086, 2000 WL 1186265, at *3 (Va. Cir. Ct. Feb. 22, 2000) (noting that if contents of surveillance convince a party not to craft testimony, then "truth, justice, and our system of civil adjudication are better served" than if a party lied and then was impeached in court).
201. United States v. Nobles, 422 U.S. 225, 238–39 (1975) ("[T]he [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system... It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.").
203. See supra text accompanying notes 50–65; see also FLANAGAN, supra note 50, at 219 ("The work product is a qualified immunity and when applied to materials obtained through the efforts of counsel may be overcome...").
object to the interrogatory or (2) disclose the existence of the surveillance and move for a protective order to preclude discovery of the contents.\textsuperscript{204} If the defendant objects to the interrogatory, this would presumably postpone the analysis that follows below. Under the second option, a defendant must first clearly claim work product protection and disclose the nature of the evidence without revealing its contents.\textsuperscript{205}

The next step would be a factual analysis under Rule 26(b)(5), where a plaintiff would challenge the protection asserted based on the limiting language of 26(b)(3).\textsuperscript{206} In response, the defendant would argue that the plaintiff does not satisfy the language of Rule 26(b)(3). This fact-intensive inquiry will differ in every case. However, based on the policy and purpose of the discovery rules as well as the case law that has addressed the issue in other jurisdictions, a South Carolina court would likely find that a plaintiff has sufficient need for the evidence in preparing its case and that the plaintiff has no substantial equivalent of the surveillance;\textsuperscript{207} therefore, the surveillance would be discoverable. Under the discovery policies asserted in 

\textit{Hickman}\textsuperscript{208} and reinforced in \textit{Samples},\textsuperscript{209} a South Carolina court would likely find that allowing a plaintiff to prepare a case and prevent surprise at trial outweighs the defendant’s desire to impeach in the courtroom. Furthermore, given the potential for deception caused by surveillance

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\textsuperscript{204} See \textit{Samples} v. Mitchell, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct. App. 1997) (citing S.C. R. Civ. P. 26(c); S.C. R. Civ. P. 33(a)).

\textsuperscript{205} See \textit{id}. at 111 & n.5, 495 S.E.2d at 216 & n.5 (citing S.C. R. Civ. P. 26(b)(5)). While Rule 26(b)(5) was not in effect when the trial court in \textit{Samples} handed down its decision, \textit{id}. at 111 n.5, 495 S.E.2d at 216 n.5, this request for a protective order would be accompanied by the defendant “claim[ing] work product protection] expressly and . . . describ[ing] the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” S.C. R. Civ. P. 26(b)(5).

\textsuperscript{206} S.C. R. Civ. P. 26(b)(5) (“When a party withholds information otherwise discoverable under [the South Carolina Rules of Civil Procedure] by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the . . . things not produced . . . in a manner that . . . will enable other parties to assess the applicability of the privilege or protection.”).

\textsuperscript{207} See \textit{Gutshall} v. New Prime, Inc., 196 F.R.D. 43, 46 (W.D. Va. 2000) (“[I]t is impossible to procure the substantial equivalent of such evidence without undue hardship, as videotape ‘fixes information available at a particular time and a particular place under particular circumstances, and therefore cannot be duplicated.’” (quoting Smith v. Diamond Offshore Drilling, Inc., 168 F.R.D. 582, 586 (S.D. Tex. 1996))); see also \textit{FLANAGAN, supra} note 50, at 219 (“[I]nformation in the exclusive control of one party or unique materials like accident photos may satisfy [Rule 26(b)(3)].”).

\textsuperscript{208} See \textit{Hickman} v. Taylor, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”).

\textsuperscript{209} See \textit{Samples}, 329 S.C. at 113, 495 S.E.2d at 217 (“The entire thrust of the discovery rules involves full and fair disclosure, ‘to prevent a trial from becoming a guessing game or one of surprise for either party.’” (quoting S.C. State Highway Dep’t v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (per curiam))).
\end{flushright}
evidence, a South Carolina court would likely not give absolute protection to such surveillance and would probably require its disclosure.

B. Depose Then Disclose

Having established the discoverability of the existence of surveillance, the unresolved issue in South Carolina is whether, how, and when a defendant can protect a video’s contents. In balancing the interests of all parties, a South Carolina court should follow the lead of other jurisdictions that allow protection of the contents of surveillance video until after the defendant is allowed to depose the plaintiff. This equitable solution, which requires disclosure of video contents only after deposing the plaintiff, balances the interests of the parties while upholding the purpose of the discovery rules. If South Carolina adopted such an approach, the court would not be forced to choose between truth and fairness. While these two ideals are not mutually exclusive, the arguments on each side suggest they could, at times, be at odds. In addition, such a rule would be consistent with the dicta in Samples. If instead the contents were wholly protected from discovery, the defendant’s desire for courtroom impeachment would be given undue weight over the plaintiff’s need for preparation. Allowing deposition before requiring disclosure preserves the defendant’s ability to impeach while still providing the plaintiff an opportunity to prepare her case adequately and assess the integrity of the video itself. Without pretrial disclosure of the video, a plaintiff would be required to clarify and explain any inconsistencies at trial without warning. Furthermore, the plaintiff would be unable to assess the circumstances surrounding the video’s filming, the photographer’s credentials, and other details to ensure the accuracy of the evidence. While the defendant loses his ability to fully utilize the shock of courtroom impeachment, such surprise impeachment is inconsistent with the policy and purpose underlying the

210. See Snead v. Am. Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 150 (E.D. Pa. 1973) ("[T]he camera may be an instrument of deception. It can be misused. . . . Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false.").

211. A defendant and our system of justice also benefit from waiting to disclose the existence of video surveillance until after the plaintiff has been deposed. See Denham & Bales, supra note 79, at 778–79 ("[D]efendants should not be required to disclose even the existence of videotape surveillance until after the plaintiff’s deposition. . . . This would give the plaintiff an incentive to be truthful at deposition.").

212. See supra text accompanying note 124.

213. See Snead, 59 F.R.D. at 151 ("Once [the plaintiff’s] testimony is memorialized in deposition, any variation he may make at trial to conform to the surveillance films can be used to impeach his credibility . . . .")

214. See id. at 150 ("[T]o prevent possible abuse by defense investigators requires full disclosure as to the films in advance of trial and an opportunity for them to be seen.").
rules of discovery anyway\textsuperscript{215} and in fact may hurt the system overall.\textsuperscript{216} A defendant cannot expect a court to endorse an absolute work product protection that would so contradict the underlying policies of the rules.

\textbf{C. Excluded Solely as Impeachment}

A South Carolina court would also likely reject any argument that a court should protect surveillance video from discovery based on its use "solely for impeachment." While defendants in other jurisdictions have made this argument,\textsuperscript{217} the South Carolina Rules do not contain the same exception as the Federal Rules under which such an argument is crafted.\textsuperscript{218} Because South Carolina has not adopted that language from the Federal Rules, such an argument would unlikely hold any water with a court.

In addition, while such an argument could be made in other jurisdictions whose rules do contain such an exception, some courts have held that Rule 26(a)(3) of the Federal Rules is not even the appropriate rule for this situation because it does not address the scope of discovery but instead discusses the scope of automatic disclosure under the Federal Rules.\textsuperscript{219}

\textbf{D. Appealability}

Discovery issues are reviewed on an abuse of discretion standard; therefore, the trial court's decision is practically the final one.\textsuperscript{220} In addition, "[d]iscovery

\textsuperscript{215} See Ward v. CSX Transp., Inc., 161 F.R.D. 38, 41 (E.D.N.C. 1995) ("[A]llowing discovery of surveillance materials after the deposition of the plaintiff, but before trial, best meets the ends of justice and the spirit of the discovery rules to avoid surprise at trial.").

\textsuperscript{216} See Runions v. Norfolk & W. Ry. Co., No. CL97001086, 2000 WL 1186265, at *3 (Va. Cir. Ct. Feb. 22, 2000) (noting that if contents of surveillance convince a party not to craft testimony, then "truth, justice, and our system of civil adjudication are better served than they would have been if the party had lied, and the lie had been exposed in open court").

\textsuperscript{217} See, e.g., Gutshall v. New Prime, Inc., 196 F.R.D. 43, 44–45 (W.D. Va. 2000) (rejecting the defendant's argument that "because Rule 26(a)(3) excludes information that will be used solely for impeachment purposes, . . . [the defendant] was not required to produce that evidence pursuant to the document requests").

\textsuperscript{218} Compare FED. R. CIV. P. 26(a)(1)(A)(i) (requiring initial disclosure of certain information "unless the use would be solely for impeachment"), with S.C. R. CIV. P. 26(a) (containing no comparable language).

\textsuperscript{219} See Gutshall, 196 F.R.D. at 44–45; see also Ward, 161 F.R.D. at 39 ("Rule 26(a) is concerned with automatic disclosure of materials, not the scope of discovery. . . . While [Rule 26(a)(3)] exempts impeachment materials, [Rule 26(b)] does not."). But see Deny v. CSX Transp., Inc., 168 F.R.D. 549, 550 (E.D.N.C. 1996) (protecting video surveillance from compelled disclosure where defendant stipulates that he will offer surveillance evidence only for impeachment).


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orders . . . are interlocutory and are not immediately appealable.\textsuperscript{221} For these reasons, a defendant arguing against disclosure must do so aggressively at the trial level because any ruling will likely not be overturned on appeal, and once the contents of the video are revealed, a defendant cannot unring the bell. When the plaintiff sees the contents of a video, any value of impeachment disintegrates with that viewing. The value is in the contradiction itself, and if that is destroyed, so is the value of the evidence. However, adequate preparation and a calculated plan will ensure that no defense attorney is forced into the position of the attorney in \textit{Hickman}, allowing oneself to be placed in contempt of court for the sole purpose of effectuating an immediate appeal.

VI. CONCLUSION

The work product doctrine is an irreplaceable asset to the role of a litigating attorney, but it rightly has its limits. The qualified immunity of the work product doctrine is a way to enforce the purposes and policies of the discovery rules so as to prevent trial by ambush. The question of discoverability of surveillance in civil litigation is a perfect example of the doctrine striking a balance between the interests of the parties, the rules of civil procedure, and the policies behind those rules. While such surveillance is technically deemed work product, the majority of courts hold that it does not survive the scrutiny in the limiting language of Rule 26(b)(3) and is therefore ultimately discoverable. This Note provides a cross-sectional analysis of the issue in South Carolina and highlights the gaps and ambiguities in one aspect of South Carolina discovery practice. The rules of discovery and the work product doctrine should strike a balance between advocacy for a client and contest between adversaries in working towards the common goal of justice. The equitable solution proposed in this Note—and adopted by other jurisdictions—allows attorneys to work together as “officer[s] of the court” to further the goals of service and justice.\textsuperscript{222}

\textit{Bradford J. Gower}


\textsuperscript{222} Hickman v. Taylor, 329 U.S. 495, 510 (1947).