



# STATE OF MARYLAND SURVEILLANCE COMPENDIUM OF LAW

**Prepared by**

Albert B. Randall, Jr.  
Franklin & Prokopik, P.C.  
Two North Charles Street, Suite 600  
Baltimore, MD 21201  
Phone: 410-230-3622  
arandall@fandpnet.com  
[www.fandpnet.com](http://www.fandpnet.com)

## Surveillance and Maryland Law

### I. General Discovery Rule

Pursuant to Maryland Rule 2-402(a), a party may obtain discovery regarding any matter that is not privileged and is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or any other party.

### II. Work Product Privilege and Surveillance

#### 1. Work Product Doctrine

While the attorney-client privilege protects only communications between an attorney and his or her client, Maryland's work product doctrine provides broad protection from discovery for materials prepared in anticipation of litigation by or for a party or its representative. A party representative includes not only an attorney but also a consultant, surety, indemnitor, insurer, or agent. Md. Rule 2-402(d).

Maryland has adopted the approach set forth in the seminal case, *Hickman v. Taylor*, 329 U.S. 495 (1947), distinguishing fact from opinion work product. Under Md. Rule 2-402(d), a party may obtain discovery of “documents, electronically stored information, and tangible things prepared in anticipation of litigation or for trial” if such materials are generally discoverable under subsection (a) and if the party seeking discovery has “substantial need for the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”

Under subsection (d), however, opinion work product such as the “mental impressions, conclusions, opinions or legal theories of a party representative concerning the litigation,” is protected from discovery. Md. Rule 2-402(d). *See also E.I. du Pont de Nemours & Co. v. Formapack, Inc.*, 351 Md. 396, 407-08, 718 A.2d 1129, 1134-35 (1998).

Md. Rule 2-402(e)(2) provides that, within a “reasonable time,” a producing party may claim work product protection after production of electronically stored information because advance review of such materials is increasingly time-consuming and costly. *See Elkton Care Center Associates v. Quality Care Management, Inc.*, 145 Md. App. 532 (2002).

#### 2. Surveillance

Maryland courts have found surveillance films are not protected under the work product doctrine and are discoverable if a party intends to use them as substantive evidence. *See Shenk v. Berger*, 86 Md. App. 498, 506, 587 A.2d 551, 556 (1991).

### III. Surveillance Disclosure in Maryland

In determining the discoverability of surveillance, the *Shenk* Court was guided by an examination of the intended objectives of discovery. Namely, it considered that pretrial discovery of documents functions “(i) to acquire accurate and useful information with respect to testimony which is likely to be presented by an opponent, (ii) to obtain information which appears reasonably calculated to lead to the discovery of admissible evidence, and (iii) to use as an aid in cross examining the opponent's witnesses.” *Shenk*, 86 Md. App. 505, 587 A.2d 555 (quoting *Kelch v. Mass Transit Adm.*, 287 Md. 223, 231, 411 A.2d 449, 454 (1980)).

The *Shenk* Court also considered the necessity to weigh the interests of each party while furthering discovery objectives. *Id.* at 506, 587 A.2d at 555, quoting *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D.Pa.1973) (“Any rule to be formulated, therefore, 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.”).

Ultimately, the *Shenk* Court followed *Snead*, holding that a party must disclose the existence of surveillance films but requiring that, prior to disclosure, the producing party must be given the opportunity to depose the non-producing party for impeachment purposes. *Id.* at 506-07, 587 A.2d at 556. The Court reasoned that memorializing such testimony would allow the producing party to impeach the credibility of his opponent should he attempt to conform his testimony to the surveillance evidence. Similarly, the Court felt the requirement of disclosure would empower the non-producing party to prepare for cross-examination at trial. *Id.*

While *Shenk* remains authoritative Maryland law regarding surveillance disclosure, it should be noted that its deposition requirement does not apply when a party to an administrative proceeding seeks surveillance videos under a proper Maryland Public Information Act request. See *Hammen v. Baltimore Cnty. Police Dep't*, 373 Md. 440, 454, 818 A.2d 1125, 1133 (2003).

### IV. Required Timing Of Disclosure in Maryland

While there is no authority specifically addressing the timing for disclosure of surveillance, Maryland law is clear that when a party demands discovery, the producing party, despite resistance, should “be required to specifically answer whether it has in its possession or under its control such an item or items.” *Kelch*, 287 Md. 228, 411 A.2d 453. As made clear by *Shenk*, however, such disclosure must only be made after the producing party has opportunity to depose his opponent.