



# **STATE OF NEW JERSEY SURVEILLANCE COMPENDIUM OF LAW**

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## **Surveillance and New Jersey Law**

### **I. General Discovery Rule**

New Jersey Court Rule 4:10-2(a) states in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...."

### **II. Work Product Privilege and Surveillance**

According to New Jersey Court Rule 4:10-2(c), "[a] party may obtain discovery of documents...prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative...only upon a showing that the party seeking discovery has substantial need of 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." R. 4:10-2(c). See also Jenkins v. Rainer, 69 N.J. 50, 55 (1976).

In Jenkins, the New Jersey Supreme Court held that video surveillance taken in anticipation of litigation was not rendered non-discoverable solely because of the work product doctrine of the attorney-client privilege if it was intended to be used at trial. Id. at 55. The Court also noted "that this policy is in keeping with the modern trend which recognized 'the need to make available to each party the widest possible sources of proof as early as may be so as to avoid surprise and facilitate preparation.'" Id. at 57.

### **III. Must Surveillance Be Disclosed? If so, what is the scope of disclosure?**

In Dong v. Alape, 361 N.J. Super. 106, 126 (App. Div. 2003), the Appellate Division concluded that surveillance videos are responsive to Form C Interrogatory number 9, which requests videotapes of "anything that is relevant to the subject matter of the complaint." This request arguably requires production of all videotapes, not just the portions of the videos the party intends to use at trial.

In Jenkins, the Court recognized that nondiscoverable "work product" had been "stripped of its absolute protection . . . [s]o that now one is hard put to conceive of any non-privileged relevant material which enjoys an unqualified protection against discovery, that favored status of absolute immunity being reserved for 'mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.'" Jenkins, 69 N.J. at 54-55. The Jenkins Court ordered that surveillance videos be produced, and also determined that the defendant's investigator was required to submit to a deposition and respond to questions regarding the surveillance, including how long the surveillance continued, what plaintiff was doing, who was present, how much film was generated, etc. Id. at 59. Although the Jenkins Court did not address whether a report prepared by an investigator is discoverable, its requirement that defendant produce the videos and directing defendant's investigator to answer questions regarding the surveillance suggests that it is possible that a court would compel disclosure of such reports.

Even so, those portions of a surveillance report containing mental impressions of counsel, conclusions, opinions or legal theories should be redacted. See Halbach v. Boyman, 377 N.J. Super. 202, 208 (App.Div. 2005). See also, New Jersey Court Rule 4:10-2(c) (“the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.”)

#### **IV. Required Timing of Disclosure: Before or After Plaintiff’s Deposition?**

The Jenkins Court held that “any demand [by plaintiff] for surveillance motion pictures should be accompanied by a consent to be deposed after the movies have been taken and before the films must be presented for the adversary’s examination.” Jenkins, 69 N.J. at 60. The Court noted that, “both simple fairness and full discovery for both sides require the opportunity be afforded to fill in that gap by interrogation directed to the specific activities filmed. In this case, then, the defendants, in consideration of their making the films available to plaintiff, should be allowed first to take plaintiff’s deposition again, limited to the issue of damages and on such terms as the trial judge may impose to reflect whatever inconvenience may be sustained by plaintiff being recalled.” Id.

A recent unpublished decision by the United States District Court for the District of New Jersey, Gardner v. Norfolk Southern Corporation, rejected the Jenkins idea of staggered production of discoverable surveillance and held that, “because the surveillance evidence directly relates to Plaintiffs’ physical conditions, it constitutes evidence relevant to the subject matter of this action, and discoverable pursuant to the standards set forth in Federal Rule of Civil Procedure 26.” Gardner v. Norfolk Southern Corp., CIV. 13-6912 JEI/AMD, 2014 WL 1515525 (D.N.J. Apr. 17, 2014). The Gardner Court further noted that, “permitting parties to delay production of this relevant evidence requested in the context of the parties’ discovery requests would nullify the discovery process.” Id. at 4. As a result, while the decision of the Gardner Court is non-binding on New Jersey state courts, it reflects a divergence from the Jenkins holding. Gardner would seemingly nullify the impeachment value of the surveillance by compelling its disclosure in advance of plaintiff’s first deposition.