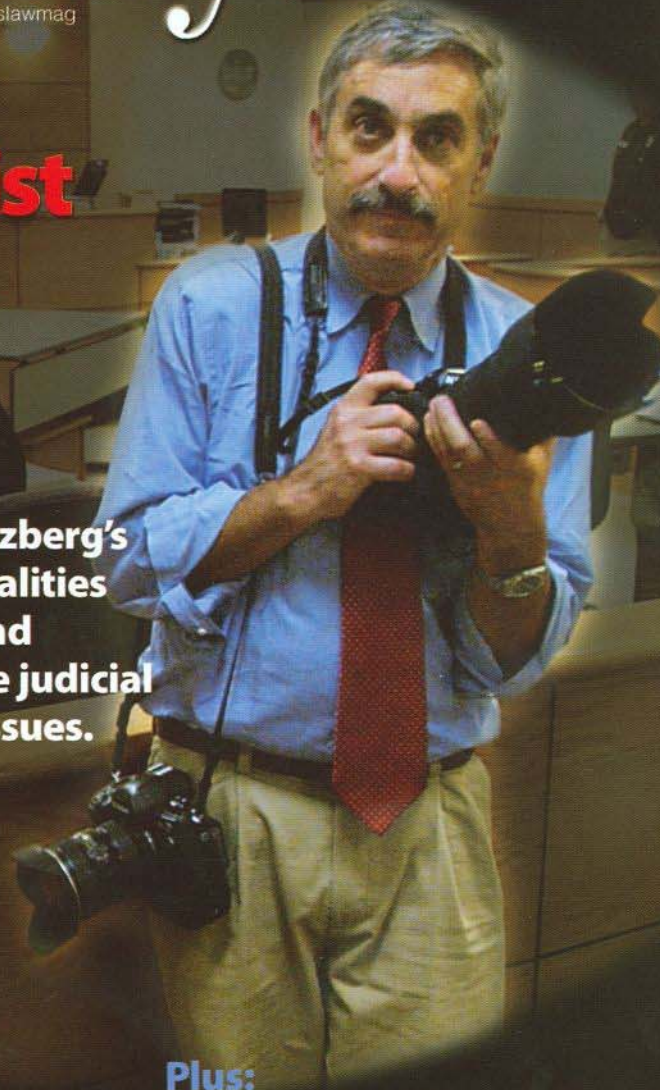


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DISCLOSING SURVEILLANCE EVIDENCE:

"I've got a secret"

by Russell M. Ware

Public surveillance programs are proliferating in America, especially since Homeland Security funds have been allocated to purchase or upgrade surveillance systems. Privacy advocates and law enforcement officials continue to debate the proper balance between the need to protect privacy and the need to ensure security.¹ When civil trial lawyers in Wisconsin discuss surveillance videotape, they usually are dis-

cussing quite a different type of surveillance. They are usually concerned with surveillance that is commissioned by a defense lawyer in a personal injury action and offered at trial to impeach the plaintiff's claim, sometimes with devastating effect.

Defense counsel may in some situations choose to voluntarily disclose the existence of such surveillance evidence or even display the tape itself to the plaintiff's counsel before trial to encourage settlement. In most situations, however, defense counsel will resist any attempts to force such premature disclosure, waiting instead to disclose the existence of the tape only





after the plaintiff's trial testimony is completed. In such situations, the plaintiff's counsel has little time to repair what may be substantial damage to the plaintiff's credibility.

Defense counsel may rightly fear that a plaintiff who is forewarned of the existence or contents of such videotape defense may be able to defuse the impact of the videotape at trial. Defense counsel may not even want to confirm the nonexistence of such surveillance evidence, believing that the plaintiff's concern that such evidence might exist will result in the plaintiff testifying more truthfully

The author discusses two Wisconsin Court of Appeals decisions that provide guidance on how to handle disclosure issues involving surveillance videotapes during discovery and at trial, and when the issues are likely to arise – when the plaintiff serves discovery requests, when the court enters a scheduling or pretrial order, and when defense counsel shares the videotape with a defense expert.



RUSSELL M. WARE, MARQUETTE 1971, PRACTICES AS A TRIAL LAWYER IN THE MILWAUKEE OFFICE OF SMITHAMUNDSEN LLC, FOCUSING IN THE DEFENSE OF PROFESSIONAL LIABILITY AND PERSONAL INJURY MATTERS. HE DEVOTES A SUBSTANTIAL PORTION OF HIS PRACTICE TO SERVICE AS A MEDIATOR AND ARBITRATOR IN CIVIL MATTERS.

about damages issues at trial.²

The plaintiff's counsel has a strong interest in learning of the existence or contents of such a videotape as far in advance of trial as possible. If the existence of a surveillance videotape is disclosed, a plaintiff's settlement demand can be modified to reflect the potential impact of such evidence. Further, early disclosure will give the plaintiff's counsel a chance to challenge a truly misleading or deceptive videotape and to present at trial a fair explanation of any special circumstances surrounding the events shown on the videotape.³

Although some important questions have yet to be the subject of any definitive Wisconsin Supreme Court ruling, two Wisconsin Court of Appeals decisions have given important guidance as to how disclosure issues involving surveillance videotapes are to be handled during discovery and at trial.

This article discusses three occasions during a lawsuit when disclosure issues will likely arise – when the plaintiff serves discovery requests, when the court enters a scheduling or pretrial order, or when defense counsel shares the surveillance videotape with a defense expert. It also discusses the special trial procedures crafted by Wisconsin courts to balance the legitimate rights of plaintiffs and defendants in such cases.

Plaintiffs' Discovery Requests

Plaintiffs frequently serve interrogatories seeking disclosure of the existence and contents of any pretrial depictions of the plaintiff, including videotaped surveillance materials. The Wisconsin Court of Appeals has held in two published decisions that a defendant may in response to such discovery requests

refuse to either confirm or deny the existence of or contents of surveillance videotapes by invoking the work-product privilege.⁴

In *Ranft v. Lyons*,⁵ the first reported Wisconsin decision on the discoverability of surveillance materials, the Wisconsin Court of Appeals held that surveillance materials are work product and are not discoverable. The court adopted what it acknowledged was the minority rule among American jurisdictions⁶ and held that to require defendants to disclose the existence of or contents of surveillance materials before trial would force such a revelation of a defense counsel's mental impressions and strategies as to impinge on the very core of the work-product privilege.⁷ This rule of nondiscoverability is the same whether a plaintiff seeks merely to learn if such surveillance materials exist or seeks an actual opportunity to view the videotape.⁸

The *Ranft* rule of nondiscoverability was repeated and applied again in *Martz v. Trecker*, a 1995 court of appeals decision.⁹

The rule of nondiscoverability applied in *Ranft* and *Martz* has a discretionary element and therefore is not automatic or immutable. Both *Ranft* and *Martz* involved the appellate review of a trial court's discretionary decision to enforce the work-product privilege. In *Ranft*, the appellate court reviewed a trial court denial of a motion to compel discovery; in *Martz* the appellate court reviewed a trial court's ruling that overruled the plaintiff's objection to the admission of the surveillance videotape into evidence. In both cases, the appellate court noted the trial court had discretion in ruling on such discoverability and admissibility questions.¹⁰

However, it is clear that when the interest in protecting work product is to be balanced with the interest advanced by disclosure, the trial court is not to start with the scales in equilibrium. On the contrary, the trial court can appropriately exercise its discretion so as to require disclosure of surveillance materials only if the record discloses a "strong showing" that disclosure is needed.¹¹

The trial court is to balance the interests protected by the work-product doctrine against the interests that would be advanced by disclosure. The work-product privilege is overcome if the plaintiff can demonstrate that "good cause" for discovery exists or that nondisclosure would "unnecessarily frustrate" the laudable objectives of discovery.¹²

Scheduling or Pretrial Orders

A trial court may require the disclosure of names of witnesses as part of its section 802.10(3) scheduling order or might require each side to list all potential trial exhibits during the final pretrial conference.¹³ Even if a court provides for disclosure in a scheduling order or pretrial order, the rule of nondisclosure should still apply. In *Martz*, the court of appeals (on the basis of the *Ranft* rule) upheld the trial court's decision to admit defense surveillance evidence over a plaintiff's objection even though the defense witness list (apparently submitted as part of the trial court's pretrial disclosure order) had made no reference to a surveillance witness.¹⁴ Therefore, it appears that a defendant may, on work-product grounds and without fear of losing the right to present surveillance evidence, omit a surveillance videographer from a court-required pretrial witness list and omit a videotape from the proposed exhibit list.

Legal and tactical issues concerning work-product privilege versus disclosure concerns also may arise during voir dire. This is because during voir dire the court often will require both parties to list for the jury the names of prospective witnesses so the jurors can disclose any acquaintance with or relationship to

any potential witnesses.¹⁵ Although the strong public policy choices made in favor of protecting work product in *Ranft* and *Martz* suggest that a court would find that the defense is not required to list surveillance witnesses during voir dire, defense counsel still may run some risk by relying on the work-product privilege and not disclosing the videographer's name during the jury selection process. A dilemma is presented to the court and counsel if a videographer whose name was not disclosed during voir dire is called to the stand and a juror *sua sponte* discloses an acquaintance with or other relationship with the witness. At a minimum, the court will be required to conduct a mid-trial voir dire of the juror to determine if the juror would have been subject to a strike for cause as being "not indifferent" if the acquaintance with the witness had come to light during the original voir dire.¹⁶

Sharing Surveillance Video with Defense Experts

If a defense expert who will perform a defense physical, mental, or vocational examination¹⁷ is shown the surveillance video along with other materials to prepare the expert to perform the examination and prepare a report, defense counsel will lose the ability to keep knowledge of the videotape's existence from opposing counsel. If the expert discloses the existence of the videotape in a written report as part of the typical listing of "materials reviewed," the plaintiff will no doubt immediately ask to view the videotape. If an expert who does not mention the videotape in a report is deposed, the videotape must be made available along with all other material on which the expert's opinion is based.¹⁸

A somewhat different situation may arise if the expert performs a defense section 804.10 examination and the expert's report is shared with the plaintiff's counsel¹⁹ before any surveillance is undertaken or if the expert is not told that a surveillance videotape already exists.²⁰ If the expert provides a report that lists the materials the expert has reviewed,

and if a surveillance videotape is later shown to the expert before trial, a duty to disclose the fact that the expert also reviewed the videotape may arise under Wis. Stat. section 804.01(5)(b). This is because providing an expert report that is generated as part of a defense expert examination of the plaintiff likely will be treated as a "response" to discovery that requires supplementation.²¹ While the plaintiff's counsel is properly deemed to be on notice that physical, mental, or vocational records generated after the defense expert examination has occurred are likely to be shown to that defense expert, the plaintiff's counsel has no way of knowing that a defense expert is receiving new factual information in the form of surveillance videotape that may affect the expert's opinions as set forth in the previously-shared examination report. A failure to disclose the addition of these materials to the expert's file after the expert report is prepared and shared may be seen as a sanctionable "knowing concealment."²²

Therefore, if defense counsel wants the expert to consider and comment on the contents of a surveillance videotape at trial, and does not want to risk pretrial disclosure of the evidence or risk losing the right to use the evidence or even losing the right to call the defense expert at trial, the best and safest practice is to show the videotape to the expert only after it has been disclosed to all parties and has been admitted into evidence at trial.

Special Procedure at Trial

Before evidence of a surveillance videotape can be presented to the jury, the defense must disclose the videotape's existence outside the jury's presence under circumstances that allow the court to conduct a hearing out of the jury's presence to determine admissibility. Before ruling on the admissibility of surveillance evidence, the trial court will provide the plaintiff a reasonable opportunity to argue against admissibility and to prepare a response to the evidence.²³ The court may provide the plaintiff with an opportunity to question

the videographer out of the jury's presence and in some cases an opportunity to more carefully examine the videotape out of the presence of the court or opposing counsel.²⁴ If the court rules favorably to the defense on any admissibility issue and if the tape is admitted for the purpose of demonstrating that the plaintiff exaggerated the disability in deposition testimony or statements at trial, the plaintiff may cross examine the videographer or offer rebuttal evidence to show that the images captured on the videotape are themselves misleading. For example, a plaintiff or a plaintiff's rebuttal witness may testify that the plaintiff was having an unusually good day when the images were captured, or that the plaintiff's heavy use of medication on the day the surveillance videotape was made temporarily masked the plaintiff's symptoms. The videographer also could be cross examined regarding any editing of the tape, the amount of time spent on surveillance, and what limitations the videographer may have observed in the plaintiff's actions that were *not* captured on videotape.

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Conclusion

In giving surveillance materials work-product protection, Wisconsin appellate courts have balanced competing interests. Dishonest plaintiffs are more likely to be exposed at trial if work-product privilege concepts are applied to surveillance materials throughout the course of the litigation. However, settlements may be encouraged, judicial economy may be promoted, and deserving plaintiffs will be protected if plaintiffs are told well in advance of trial that they have been the subject of potentially embarrassing surveillance.²⁵

The Wisconsin Supreme Court has not stated whether the holdings in the *Ranft* and *Martz* cases that extend work-product privilege to surveillance materials will continue to be the rule in Wisconsin. The best rule clearly is one that continues to shield surveillance materials from pretrial discovery but also continues to give the plaintiff a full and fair opportunity during trial to evaluate, respond to, and rebut any misleading surveillance evidence. An abandonment of the present rule extending work-product privilege to surveillance materials likely would frustrate the search for truth and reward only the truly overreaching plaintiff.

Endnotes

¹See *Spotlight on Surveillance*, Electronic Privacy Information Center (December 2005) <[www.epic.org/privacy/surveillance/spot-](http://www.epic.org/privacy/surveillance/spotlight/1205/default.html)

[light/1205/default.html](http://www.epic.org/privacy/surveillance/spotlight/1205/default.html)> (discussion of pervasiveness of surveillance cameras in American cities and concerns raised by privacy groups).

²See H.L. Mencken, *A Mencken Chrestomathy* 617 (1956), quoted approvingly in *Ranft v. Lyons*, 163 Wis. 2d 282, 302-03, 471 N.W.2d 254 (Ct. App. 1991), as follows: "Conscience is the inner voice which warns us that someone may be looking." (citation omitted)

³See *Ranft*, 163 Wis. 2d at 300 (citing *Marte v. W.O. Hickok Mfg. Co.*, 552 N.Y.S.2d 297, 299 (N.Y. App. Div. 1990), and *Snead v. American Expert-Isbrandtsen Lines Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973)).

⁴The work-product privilege was recognized in Wisconsin in *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967). The rule is codified in part in Wis. Stat. section 804.01(2)(c)1., which governs the discoverability of an opponent's trial preparation materials.

⁵*Ranft v. Lyons*, 163 Wis. 2d 282, 471 N.W.2d 254 (Ct. App. 1991).

⁶*Id.* at 300 (citing Wanda Wakefield, Annotation, *Discovery of Surveillance Photographs*, 19 A.L.R. 4th 1236 (1983)).

⁷*Id.* at 301 (citing *Dudek*, 34 Wis. 2d at 589). The court of appeals noted that the decision of a defense lawyer to invest in surveillance, and the lawyer's instructions to the surveillance investigator, revealed the lawyer's evaluation of his opponent's case.

⁸See *Ranft*, 163 Wis. 2d at 297 n.6, where the court, in approving a defendant's refusal to confirm or deny the existence of surveillance materials, implied the result would be the same — that is, a refusal to require disclosure in the face of the discovery request — even if a request under Wis. Stat. section 804.09 for actual inspection had been made.

⁹*Martz v. Trecker*, 193 Wis. 2d 588, 595, 435 N.W.2d 57 (Ct. App. 1995).

¹⁰*Ranft*, 163 Wis. 2d at 300-01; *Martz*, 193 Wis. 2d at 595. Note that *Ranft* involved the appellate review of a nonfinal order. Note also that in *Martz* (unlike in *Ranft*) the plaintiff had never sought disclosure of surveillance materials during discovery.

¹¹*Ranft*, 163 Wis. 2d at 302.

¹²*Id.* at 301 (citing *Dudek*, 34 Wis. 2d at 592, and *Meunier v. Ogurek*, 140 Wis. 2d 782, 790, 412 N.W.2d 155 (Ct. App. 1987)). Note that the

Meunier case dealt with the discoverability of witness statements.

¹³Wis. Stat. section 802.10(3)(f) authorizes the court to include in its scheduling order a provision concerning exchanging the names of expert witnesses. Some circuit courts also provide for exchanging names of lay witnesses, a requirement apparently authorized by section 802.10(3)(k) as one of the "other matters" that may be required in the scheduling order. See *Carlson Heating Inc. v. Onchuck*, 104 Wis. 2d 175, 180, 311 N.W.2d 673 (Ct. App. 1981), for the proposition that the trial court may order the exchange of names of lay witnesses. The court also is authorized to require a pretrial listing of witnesses and exhibits at the final pretrial conference. Wis. Stat. § 802.10(5)(e). It is not uncommon for a trial court to order parties to bring trial exhibits to the final pretrial conference for marking.

¹⁴The *Martz* decision does not refer to any pre-trial requirement for exchanging the names of lay witnesses. It simply says the surveillance videotape was not on the defendant's "witness list," and implies that the plaintiff's objection to receiving the investigator's testimony into evidence had been based at least in part on the failure to so list the videographer. *Martz*, 193 Wis. 2d at 593.

¹⁵A juror's acquaintance with a witness could be the basis for a strike for cause if the juror expresses bias or prejudice or is "not indifferent" in the case. See Wis. Stat. § 805.08(1). Further, in *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), it was noted that a juror's relationship to a witness might hinder significant credibility determinations during jury deliberations.

¹⁶See *Nyberg v. State*, 75 Wis. 2d 400, 405, 249 N.W.2d 524 (1977) (a juror's acquaintance or even friendship with a potential witness did not by itself evidence bias or prejudice and did not render the juror "not indifferent").

¹⁷Wis. Stat. § 804.10(1).

¹⁸An expert's opinion and any facts known by the expert are discoverable. Wis. Stat. § 804.01(2)(d).

¹⁹Defense counsel must deliver a copy of the report to the plaintiff's counsel within 10 days of its receipt by the defense. Wis. Stat. § 804.10(3)(a).

²⁰Note that in *Martz*, the surveillance was done 12 days before trial. *Martz*, 193 Wis. 2d at 594.

²¹In *Martz*, the court seemed to imply that if surveillance materials were to be held discoverable, and if surveillance materials were generated after discovery responses were served, a duty to supplement under Wis. Stat. section 801.05 would arise. *Martz*, 193 Wis. 2d at 595.

²²Wis. Stat. section 804.12(4) provides for sanctions for a failure to timely supplement a response.

²³*Ranft*, 163 Wis. 2d at 302.

²⁴See *id.* at 302 (plaintiff given opportunity to reasonably challenge material before its use at trial). See also *Martz*, 193 Wis. 2d at 595 (plaintiff allowed to review tape overnight)

²⁵See *Martz*, 193 Wis. 2d at 599 (Brown, J., concurring) (promotion of settlements through authorizing discovery of surveillance materials is advocated). ☐

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