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37TH ANNUAL CONVENTION

SECTION 13

DIRECT & CROSS

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776 IN EMPLOYMENT CASES

By Martin I. Aarons

COURT DOCUMENTS

Submitted by Robert Morgenstern

776 IN EMPLOYMENT CASES

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Opening statements are over. "Judge: Plaintiff, you may call your first witness." Who do you call? The plaintiff? The harasser/discriminator/bad guy? The human resource professional? The decision maker? And then after the first witness, who goes next? In what order? The answer in an employment case is that your first witness, and most of your first witnesses, will be called under *Evidence Code* § 776.

In fact, an employment trial can be "won" before the plaintiff ever takes the stand. It can even be "won" without having the plaintiff testify at all – or without worrying at all about what your client will or won't say or how he/she will present.

This is because Plaintiff's counsel gets to determine the order of the witnesses and how the story will be told. The story of what the defendant employer failed to do and what they could have done, or should have done, can be told through current and former employees of the Defendant employer. You can frame your case and have the jury leaning your way before your client takes the stand. This is best accomplished through the use of "adverse witnesses" called under *Evidence Code* § 776.

What is Evidence Code § 776?

Evidence Code § 776 allows an adverse party to call as a witness any "party to the action or a person identified with such a party" as though they were on cross examination. *Evidence Code* § 776(a). Plaintiff's counsel can cross examine the defendant employer witnesses first.

Under 776, a person is "identified with a party" if they are a party or a "director, officer, superintendent, member, agent, employee, or managing agent of the party." § 776(c)(2). This applies not just to current employees, but also former employees. The witness is "identified with the party" if they were an employee, agent, etc. "at the time of the act or omission giving rise to the cause of action" or if they were in one of those positions at the time they "obtained knowledge of the matter concerning which he is sought to be examined."

There are really two types of 776 witnesses: unfavorable and favorable.

Favorable witnesses:

Many times you will have favorable testimony from a witness who was a former employee, agent, or director of a company. They too were fired or left the company and you've found them. Perhaps you had an investigator calling around to former employees asking about what they saw/heard, and you've stumbled across gold. Many times your client will have worked there for years and will have friends still employed at the company. There are other victims of harassment, discrimination, or retaliation that filed their own claims. Witnesses who have testimony that validates or confirms your client's complaints and story of what happened.

For example, in a sexual harassment case they too may have been a victim of harassment by the same person. Others may have witnessed or complained about the harasser's conduct. In a disability case, the person may have also been fired for needing an accommodation or after having taken a medical leave. In other situations, a witness may have overheard discriminatory or retaliatory comments by the decision maker as part of the reason for termination or other adverse employment action.

You can, and should, call this person under § 776. Though many company lawyers and some judges will see that this person is a favorable witness, the question to qualify under 776 is not who benefits from the testimony. Rather, the question is what was the relationship to the corporate employer defendant at the

time of the events. If the person was a former employee, agent, etc. then the law says you can call them as a 776 witness.

This is crucial because cross examination allows you to lead the witness. So, if the witness starts to waver in their testimony, or leaves out crucial facts, or has forgotten things, you can lead the witness and get the testimony out that way. When the witness has favorable things to say, this is an easy way to make sure all the good facts get out and are not forgotten.

Unfavorable witnesses:

By calling these witnesses under 776, it enables the plaintiff's counsel to attack the witnesses as though they were on cross examination. This lets you dictate the order the information comes out and to control all the "bad facts" and get them out first. It will help you gain credibility with the jurors by acknowledging your hurdles and being able to point out how they may not be such a big deal when looked at through the appropriate lens. You get to decide how this information is shared with the jury first. This is extremely powerful.

The human resource person/investigator. In most cases the plaintiff will have complained to human resources. Or, in a medical leave case/disability case, the human resource person made decisions about leaves, accommodations, or termination. By calling this witness under 776, you can lay out the whole case (or almost the whole case) and show where mistakes were made and how they should have done things differently. What "truths" can they agree to, and then point out how those "truths" were violated through documents, emails, and other testimony. Make them admit how all the harassing actions are harassment and violations of the company policy. Put all the key dates up on a timeline in front of the jury and move into evidence all the key pieces of evidence. Be the leader and person the jury looks to for information and make it so when you are done with your 776 cross, anything that comes out by defense counsel will have already been covered and in the manner in which is most favorable to your case.

The harasser. Call the harasser under 776 and have them deny all the horrible things they did. Confront them with all the stories from the plaintiff and others who witnessed or were victimized. Point out all the inconsistencies with their story and how unbelievable their position is. Make them admit how all the harassing actions are harassment and violations of the company policy.

The decision maker. Confront the decision maker on 776 with how they made a bad decision. How they were not given all the information. Force them to answer the question about how they would have made a different decision if they had been given all the information. How they treated your client differently than others.

Preparing your 776 examination

First, identify all the various categories of cross examination there may be for each witness. Many witnesses will have the same categories.

Then, read over the deposition of the witness(es), find other locations where the witness is referenced or discussed in any other depositions or statements, review witness statements or interviews given by the witness, search through any and all emails written/received by the witness. Once you've pulled all these nuggets, place each email/quote/key statement into one of the categories.

Out of all your categories, decide what 2 or 3 nuggets the jury needs to take away from the witness.

Organize all the categories of cross examination in the order you think should be presented to the jury. Always start off strong with a key point. Jurors get bored. Fast. Write out your outline of questions/areas of questions and then cut it in half. Try to cut it in half again. Try to eliminate whole categories or cut a category down in half or more.

Create a folder for each witness and put your examination and all exhibits and demonstratives you will use in that folder.

Listen to what the witness says.

Don't be married to a script. Adjust as needed based on how the witness testifies and what other witnesses have said.

When it comes to an effective 776 examination, like with all aspects of trial, preparation is key. And with your effective 776 in hand, you are on your way to a successful result in trial!

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Attorneys for Defendant, [redacted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CENTRAL DISTRICT

[redacted]

Plaintiff,

v.

[redacted] and DOES 1 to 25, Inclusive

Defendants.

Case No. [redacted]
Complaint Filed: 5/24/18
Assigned to: Hon. Gregory H. Lewis, Dept. C-26

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER RESPONSES TO DEMAND FOR PRODUCTION OF DOCUMENTS, SET TWO

[*Filed Concurrently with Defendant* [redacted] *Separate Statement of Items in Dispute and Defendant's Appendix of Authorities Other Than California Cases in Support of Defendant's Opposition to Plaintiff's Motion to Compel*]

Date: June 17, 2019
Time: 10:30 a.m.
Dept: C26

Discovery Cut-Off: Per Code
Motion Cut-Off: Per Code
Trial Date: August 12, 2019

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

Defendants [redacted]., (hereinafter "Defendants") hereby respectfully submit the following Opposition to Plaintiff [redacted]' motion to compel Further Responses to Demand for Production of Documents, Set Two. Defendant respectfully requests this Court deny plaintiff's motion.

Dated: June , 2019

MARANGA * MORGENSTERN

By: _____
ROBERT A. MORGENSTERN
ALEXIS T. MORGENSTERN
Attorneys for Defendants,
[redacted]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The one issue before the Court is whether surveillance footage and reports taken in this personal injury case, at the direction of Defendants' counsel, should be produced in discovery. Respectfully, the answer to this question is "no."

Surveillance footage is considered attorney work product and therefore is protected from disclosure. Such surveillance materials are considered defense counsel's work product. Indeed, in the present case, the surveillance materials were taken at counsel's direction and the footage and reports reflect and contain counsel's "impressions, conclusions, opinions, or legal research or theories." *Code of Civil Procedure* § 2018.030. There are abundant persuasive case authorities that hold that surveillance footage is protected by the work product doctrine; even the California case relied upon by Plaintiff and cited by Plaintiff supports Defendants' position. See *Suezaki v. Superior Court* (1962) 58 Cal.2d 166.

It then becomes plaintiff's burden to demonstrate a special need to obtain the surveillance footage and corresponding reports. Here, plaintiff's claim of special need is not compelling. Essentially, plaintiff would like to review the surveillance footage ***of herself engaging in activities she knows she is capable of performing*** so that she can avoid "surprise at trial" (i.e., avoid impeaching herself at trial by either embellishing her injuries or perjuring herself). How plaintiff's own actions would cause her surprise is not explained. Notwithstanding the troubling nature of plaintiff's reasoning, it by no means presents any need, special or otherwise, to invade Defendants' work product. For the same reason, plaintiff has also failed to meet her burden to demonstrate "good cause" for production of the surveillance material. *Code of Civil Procedure* § 2031.010 *et seq.*

Additionally, surveillance footage is not required to be disclosed prior to Plaintiff resting at trial because it is impeachment evidence. Local Rule 317 of the Superior Court of California, County of Orange, provides in pertinent part, the following: "**At the issue conference the parties must exchange exhibits and inspect photos and diagrams (to be submitted on the date of trial), excluding those contemplated to be used for impeachment or rebuttal.)**

Therefore, plaintiff's motion lacks merit and should be denied.

II. STATEMENT OF FACTS

The subject case arises out a vehicle accident that occurred on June 3, 2016. Plaintiff filed a personal injury complaint against Defendants on May 24, 2018.

Plaintiff served discovery requests for Defendants to produce surveillance videos and related documents on March 4, 2019. Defendants served objections to Plaintiff's discovery requests on April 3, 2019, on the grounds that the requested documents are attorney work product.

On April 10, 2019, counsel for Plaintiff contacted defense counsel in an attempt to meet and confer on the requested surveillance and related documents. Plaintiff's counsel contends that Defense counsel stated we would "wait until the eve of trial" to provide the requested documents to Plaintiff. (See Pltf's Motion P. 5, L. 3-5) This is simply untrue. Defense counsel did not state we would wait until the "eve of trial" to produce the requested surveillance. Rather, Defense counsel communicated the requested surveillance and related documents would be produced prior to trial, only if Defense counsel intended to ***use*** the requested surveillance at trial.

Another misstatement outlined in Plaintiff's motion is that "Defense counsel initially agreed to produce the requested documents." (See Pltf's Motion P. 4, L. 8-9) Rather, Defense counsel said the surveillance footage we have identified is not required to be produced at this time based on work product. (See Decl. of Morgenstern, ¶ 6, Exhibit 3).

III. THE SURVEILLANCE MATERIALS ARE WORK PRODUCT PROTECTED FROM DISCOVERY

The California *Code of Civil Procedure* protects two types of attorney work product from discovery – (a) absolute work produce and (b) qualified work product. *Code of Civil Procedure* § 2018.030(a) states, "(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances." And Section 2018.030(b) states, "The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will

results in an injustice." "In *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), the Court recognized a qualified immunity from discovery for the 'work product of the lawyer;' such material could only be discovered upon a substantial showing of 'necessity or justification.'" *F.T.C. v. Groiler Inc.*, 462 U.S. 19, 24 (1983).

The question of what constitutes work product subject to the qualified immunity is left to case law. Qualified work product under *Code of Civil Procedure* § 2018.010, *et seq.* includes "material that is of a derivative or interpretive nature such as diagrams, charts, audit reports…and findings, opinions, and reports of experts employed by an attorney to analyze evidentiary material." *Fellows v. Superior Court* (1980) 108 Cal.App.3d 55, 68. In short, the work of counsel or of a consultant or expert retained by counsel to analyze evidentiary materials is protected by the work product doctrine. *Id.* The protections of *Code of Civil Procedure* § 2018.030 extends to work product generated by an attorney's investigators, researchers, and other employees and agents. *Rodriguez v. McDonnel Douglas Corp.* (1978) 87 Cal.App.3d 626, 647-648 (disapproved on other grounds). Moreover, the work product doctrine is not strictly limited to protection of documents generated in anticipation of a lawsuit. It extends to documents prepared by or at the behest of counsel acting even in a non-litigation capacity. *County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 833 ("The protection afforded by the [work product] privilege is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a non-litigation capacity.")

There is a surprising scarcity of California authority on whether surveillance evidence constitutes work product. However, a vast number of other jurisdictions that have addressed this issue have overwhelmingly found that surveillance evidence is subject to a qualified work product protection. As proclaimed by one court: "Numerous courts have held that surveillance films constitute work product and are subject to qualified immunity." *Fletcher v. Union Pacific R.R. Co.,* 194 F.R.D. 666, 670 (S.D. Cal. 2000), citing *Forbes v. Hawaiian Tug and Barge Corp.,* 125 F.R.D. 505, 507-508 (D. Haw. 1989); *Ford v. CSX Transportation, Inc.,* 162 F.R.D. 108, 111 (E.D.N.C. 1995); *Fisher v. National Railroad Passenger Corp.,* 152 F.R.D. 145, 150-151 (S.D. Ind. 1993). Surveillance materials enjoy this qualified protection as attorney work product

because such information is "gathered in anticipation of litigation by a party or the party's representative." *Gibson v. Nat'l Railroad Passenger Corp.,* 170 F.R.D. 408 (E.D. Pa. 1997).

Likewise, the Court in *Smith v. Diamond Offshore Drilling, Inc.* 168 F.R.D. 582 (D. Tx. 1996) commented: "In a personal injury case, surveillance of the plaintiff can be a very important aspect of the defendant's case, if the surveillance tends to discredit the plaintiff's description of the extent and effect of his injuries. Obviously, surveillance evidence is gathered in anticipation of litigation and thus is generally protected as work product." *Smith,* at 586.

Certain Courts have even gone so far as to apply the work product privilege to interrogatories seeking information as to the *existence* of surveillance materials. Indeed, the Missouri Supreme Court held that the personal injury plaintiff was not entitled, on interrogatories, to information whether defendant street car had engaged in surveillance. *State of Missouri Ex Rel St. Louis Public Service Co. v. McMilillian,* 351 S.W.2d 22 (Mo. 1961).

> "Certainly plaintiff. . . knows all the material facts concerning her own injuries, any existing disability, and her activities, at least the primary, if not sole, function of any such photographs would be to impeach her testimony..." *Id.* at 26.

In each of the cases cited above, the courts have elected to protect the defendant from disclosure at any state of discovery. Indeed, some of the cases above protect a defendant from disclosing even the *existence* of the surveillance. In the present case, and as admitted by plaintiff, Defendants disclosed early on the existence of the surveillance and corresponding reports in their response to the 13-series questions in the form interrogatories. (See Decl. of Morgenstern, ¶ 4, Exhibit 1). However, Defendants maintain that the actual surveillance is protected, at the very least, by the qualified work product privilege and the corresponding reports ar protected by the absolute privilege. The surveillance taken was a part of counsel's own discovery plan, which should be afforded work product protection and status. Further, the surveillance was conducted specifically at the direction of defense counsel, with counsel's guidance, at the expense of Defendants, and the strategies and information used to capture the surveillance resulted from the impressions, conclusions, opinions, or legal research or theories of defense counsel. The corresponding *written* reports reflect counsel's "Impressions, conclusions, opinions, or legal

theories" and are therefore considered absolute work product.

Plaintiff's Motion states it is difficult to fathom how videos of Plaintiff taken by a third party investigator can constitute attorney-work product. (See Pltf's Motion P. 6, L. 26-27). Indeed, it is well established under California law that investigators hired by attorneys during the course of litigation are agents of the attorney who share the same protections under the work-product doctrine. "One of those realities is that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself." *People v. Collie* (1981), 30 Cal.3d 43, 54, *See Rodriquez v. McDonald Douglas* (1978), 87 Cal.App.3d 626, 647-48. Further, work product necessarily "includes the results of [the attorney's] own work, and the work of those employed by him or for him by his clients, in investigating both the favorable and unfavorable aspects of the case, the information assembled, and the legal theories and plan of strategy developed by the attorney." *BP Alaska Exploration, Inc. v. Superior Court*, (1988) 199 Cal.App.3d, 1240, 1253, fn. 4, quoting *McCoy, California Civil Discovery: Work Product of Attorneys* (1966), 18 Stan.L.Rev. 783, 797. If Defense counsel hired and retained an investigative service, it was in preparation for trial. This work would have been at the behest and direction of defense counsel.

Plaintiff's reliance on *Suezaki v. Superior Court* (1962) 58 Cal.2d 166 works against her position for two reasons. First and foremost, it should be noted that the *Suezaki* ruling was issued well before the implementation and operation of *Code of Civil Procedure* § 2018.030 (which became operative in 2005). Second, and even more compelling, the court in *Suezaki* did not specifically hold that surveillance materials are not considered work product. **Indeed, the court acknowledged that such evidence *is* work product**. The court in *Suezaki* specifically held that the surveillance materials are not protected by the *attorney-client privilege*. *Id.* at 176-177. Defendants in the present case are not making this contention. With regard to the issue of work product, and without the guidance offered by Section 2018.030, the *Suezaki* court stated, "[Defendants] urge that undoubtedly the films were the result of the work product of the attorney, ***which is correct,*** and contend that for that reason alone they are privileged as a matter of law,

which is incorrect." *Id.* at 177. (Emphasis added). Nevertheless, the *Suezaki* court recognized that ultimately, the decision to invade the work product doctrine rested in the discretion of the trial court. The Court stated, "The trial court must consider all the relevant factors involved and then determine whether, under all the circumstances, discovery would or would not be fair and equitable." *Id.* at 178. Significantly, the *Suezaki* court did not compel production of the surveillance materials. This Court should afford the work product protections to the surveillance conducted in the present case. Plaintiff has failed to articulate any special need for the disclosure.

A. Plaintiff has utterly failed to meet her burden to demonstrate any special need to obtain the surveillance materials

Plaintiff has failed to meet her burden to show that the denial of the surveillance will unfairly prejudice her in preparing her claim or will result in an injustice. *Code of Civil Procedure* § 2018.030(b). As a result, plaintiff should not be permitted to invade Defendants' work-product, and plaintiff's motion should therefore be denied. When determining if a qualified work product privilege should be invaded, the Court must weigh the policy considerations advanced by recognition of a claimed privilege against unfair prejudice that will be caused to the party opposing the privilege. *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599. Discovery of qualified work product is *only* permitted if the need for discovery outweighs the principles underlying the work product doctrine. *Nat'l Steel Products Co v. Superior Court* (1985) 164 Cal.App.3d 476, 490.

The work product privilege is so significant, that its policy is embedded into the Civil Discovery Act. *Code of Civil Procedure* § 2018.020 states,

"It is the policy of the state to do both of the following:

(a) Preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases.

(b) Prevent attorneys from taking undue advantage of their adversary's industry and efforts."

As one Court of Appeal bluntly stated, "Section 2018's stated purpose and the underlying

reasons for its creation emphasize the need to 'limit[ ] discovery so that the stupid or lazy practitioner may not take undue advantage of his adversary's efforts..." *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133 [citing Pruitt, *Lawyers' Work Product* (1962) 37 State Bar J. 228, 240-241].

Here, Plaintiff's claimed special need is not compelling. At its core, plaintiff's reason for special need is to "prevent unfair surprise at trial." (Pltf's Motion P. 5, L. 1-2). How Plaintiff's own actions and behavior could possibly "surprise" her is not explained. The subject in the requested footage is plaintiff herself. Plaintiff knows what actions she is capable of performing and not performing. There is no possibility of surprise. Essentially, plaintiff wants the surveillance footage in order to prevent impeaching herself at trial. There is a far simpler and less intrusive method to achieve this goal – that is, to provide truthful testimony regarding her claims for damages as a result of the subject incident. Plaintiff's ability or inability to resist impeachment lies entirely in her own hands. Defendants' work product privilege should not be invaded for such a reason.

Plaintiff is making serious allegations of damages and claims she suffered a substantial amount of loss as a result of Defendants' conduct. In light of her allegations, defense counsel has been diligently evaluating them to properly assess the merits of Plaintiff's claims. The surveillance that was conducted and had its existence disclosed is a part of defense counsel's confidential discovery plan and directly a derivative of the work product in this case. Plaintiff's proffered claim for prejudice does not outweigh the principles of the work product privilege. Plaintiff bears the burden of proving the nature and extent of her injuries. Plaintiff should not be permitted to make use of Defendants' privileged work product in order to meet her burden. Plaintiff is already in possession of the most compelling form of evidence to support her claims and allegations – her own truthful testimony regarding her experiences resulting from her claimed injuries. The requested surveillance captured nothing that is not already within plaintiff's knowledge. Only Plaintiff has first-hand knowledge of activities she can and cannot perform. Accordingly, there is no special need at this time to discover what activities Defendants have seen her performing.

Requiring Defendants to provide surveillance materials would chill its "willingness to investigate not only the favorable but the unfavorable aspects" of its cases. *City of Long Beach v. Superior Court* (1976) 64 Cal.App.3d 65, 73. To order production of the work product surveillance footage and reports in this case would mean that any evidence, whether material or not, relevant or not, to be used at trial or not, must always be produced. If the Court requires disclosure, it is difficult to imagine any set of facts in which surveillance footage would be protected. Thus, every time a defendant undertook surveillance, it would be creating evidence for the plaintiff. The diligent efforts to find the truth would be chilled. The result would be exactly the opposite of what is sought by both the Code and the policy of law. Ultimately Plaintiff has failed to meet her burden, and therefore, her motion should be denied.

IV. SURVEILLANCE FOOTAGE DOES NOT HAVE TO BE DISCLOSED PRIOR TO PLAINTIFF RESTING AT TRIAL BECAUSE IT IS IMPEACHMENT EVIDENCE

Introducing evidence of inconsistent conduct during trial is well settled and clearly recognized in case law. *Pierce v. J.C. Penney Co.* (1959) 167 Cal.App.2d 3, 8; See generally, *Inyo Chemical Co v. City of Los Angeles,* (1936) 5 Cal.2d 525. *California Evidence Code* § 769 provides that "in examining a witness concerning a statement *or other conduct* by him that is inconsistent with any part of his testimony at the hearing, ***it is not necessary to disclose to him any information concerning the statement or other conduct.*** *Evidence Code* § 769 (emphasis added). See also *Evidence Code* § 780 (g). *Evidence Code* § 768 states that "In examining a witness concerning a writing, it is not necessary to show, read or disclose to him any part of the writing." In other words, impeachment evidence does not have to be disclosed prior to its use.

The potential use of any surveillance footage would be used for impeachment purposes. Impeachment evidence does not need to be exchanged until it is ready to be used. Orange County Superior Court Local Rule 317 as abundantly clear about this as it requires the parties to **"exchange exhibits and inspect photos and diagrams (to be submitted on the date of trial), excluding those contemplated to be used for impeachment or rebuttal."** (Emphasis added).

It would be prejudicial to Defendants' due process right to confront witnesses to force

premature disclosure of impeachment evidence. Allowing Plaintiff to have access to these materials prior to the time of impeachment at trial would obliterate the impeachment value by allowing Plaintiff to tailor her testimony.

Moreover, Defendants may *not* even choose to utilize the impeachment evidence based on what happens in Plaintiff's case in chief. Impeachment is codified as part of the California Evidence Code for a purpose. Here, Plaintiff seeks to circumvent the law and have the court force a premature disclosure that is simply unwarranted. Defendants have a right to put on a defense with alternative theories of causation. If the court allows the discovery of impeachment evidence, it could destroy the Defendants' right to put on a viable defense.

Plaintiff's argument that she will suffer "surprise" is precisely the point of impeachment. If Plaintiff is dishonest in her direct testimony at trial, and she is impeached through a surveillance video, this is only 'prejudicial' to Plaintiff in the sense that it would look bad for her case.

Plaintiff's argument that Defendants might edit or manipulate the video is exactly why the video is turned over, but at the close of Plaintiff's case-in-chief. At that point, Plaintiff can make a determination as to whether they believe any video has been altered. The trial judge can also have an opportunity to make the same determination. The trial judge can hold an *Evidence Code* § 402 hearing on the issue. Any turning over of video at this point is premature.

V. CONCLUSION

Based on the foregoing, Defendants respectfully request this Court to deny Plaintiff's motion to compel production of surveillance materials.

Dated: June , 2019

MARANGA * MORGENSTERN

By: _____
ROBERT A. MORGENSTERN
ALEXIS T. MORGENSTERN
Attorneys for Defendants,
[redacted]

DECLARATION OF ALEXIS T. MORGENSTERN

1. I am an attorney at law licensed to practice before all the courts of California, and I am an associate in the law firm of Maranga * Morgenstern, attorneys of record for defendants [redacted] in this matter.

2. I have reviewed the file in this matter and am familiar with its contents. I have personal knowledge of each of the facts set forth in this declaration, and can competently testify thereto.

3. This is a personal injury case, in which plaintiff alleges [redacted] negligently operated a semi-truck, causing an accident to occur. Plaintiff is making a significant claim for personal injuries. Surveillance of plaintiff was taken in March of 2018 and April of 2018 in anticipation of litigation. The private investigators were given very specific instructions and information. Both instances of surveillance produced corresponding written reports. Both the surveillance videos and the reports contain and reflect an attorney's impressions, conclusions, opinions, or legal research or theories. Accordingly, the surveillance materials are considered work produced and should not be produced in discovery at this time. I respectfully request the Court deny plaintiff's motion.

4. On August 24, 2018, Defendants served their responses to plaintiff's Form Interrogatories which identified the surveillance obtained. A true and correct copy is attached hereto as **Exhibit 1.**

5. On April 3, 2019, Defendants served their objections and responses to plaintiff's Requests for Production of Documents, Set 3 (which contained request nos. 22 and 23). A true and correct copy is attached hereto as **Exhibit 2.**

6. On April 10, 2019, counsel for both parties engaged in meet and confer efforts. I sent an e-mail to plaintiff's counsel stating the surveillance footage identified is not required to be produced at this time as it is attorney work product and was completed in anticipation of litigation. A true and correct copy of the e-mail correspondence is attached hereto as **Exhibit 3.**

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7. On April 10, 2019, during my telephone meet and confer with plaintiff's counsel, I explained that I would check to see whether the incident report completed on the date of the subject incident was still in existence.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of June 2019, at Woodland Hills, California.

ALEXIS T. MORGENSTERN