



STATE OF ARIZONA SURVEILLANCE COMPENDIUM OF LAW

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Surveillance and Arizona Law

I. General Discovery Rule

Rule 26(b) of the Arizona Rules of Civil Procedure allows for broad discovery of any matter, even if inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Specifically, it states in relevant part:

(A) 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, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

Ariz. R. Civ. P. 26(b)(1)(A). Furthermore, Arizona also requires the prompt disclosure of, among other things, the “existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial....” Ariz. R. Civ. P. 26.1(a)(8).

Similarly, Rule 15.1 of the Rules of Criminal Procedure requires the mandatory disclosure of any electronic surveillance by the Prosecutor. Ariz. R. Crim. P. 15.1(b)(9).

II. Work Product Privilege and Surveillance

1. Work Product Doctrine

Under Arizona law, materials prepared in anticipation of litigation are work product. Brown v. Superior Court In and For Maricopa County, 137 Ariz. 327 (1983). Wright & Miller § 2024, cited by the Brown Court, note that there are three requirements to qualify material as work product: (1) “documents and tangible things; (2) prepared in anticipation of litigation or for trial; (3) by or for another party or by or for that other party’s representative.” Wright & Miller, *Federal Practice and Procedure*, § 2024, at 197-99 (1970). However, materials prepared in the normal course of business do not fall within work product. Brown, 137 Ariz. at 333. “Memoranda, briefs and writings prepared by counsel, for his own use, as well as related writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories,” prepared for trial or in anticipation of trial are thus “work product” and immune from discovery. Dean v. Superior Court, 84 Ariz. 104 (1958). Demonstrative evidence prepared for trial, however, does not qualify as work product. State ex. Rel. Willey v. Whitman, 91 Ariz. 120 (1962).

2. Surveillance

Arizona Courts do not consider surveillance material, whether by statements of an observer or by film, work product; therefore they are not subject to the privilege. Zimmerman v. Superior Court In and For Maricopa County, 98 Ariz. 85 (1965). Zimmerman addressed the question of whether “a defendant will be compelled to answer interrogatories concerning any... surveillance conducted by defendant.” Id. at 88. The Court held that regardless of the stage or form of discovery, surveillance must be disclosed. Id.

III. Must Surveillance Be Disclosed In Arizona?

Films or statements used as surveillance are discoverable even if solely for impeachment evidence. Id.; see also Camelback Contractors, Inc. v. Industrial Commission, 125 Ariz. 205 (App. Ct. 1980)(holding that surveillance films, for impeachment purposes, are discoverable also under Industrial Commission Rules). The Zimmerman Court found:

Surveillance evidence and the like, although useful for impeachment purposes under certain circumstances, also contains substantive evidence related to the matters in litigation and should therefore be discoverable.

Zimmerman, 98 Ariz. at 93. Additionally, because Rule 26.1 requires the prompt disclosure of all tangible evidence, documents or electronically stored information, not only is surveillance discoverable, but it is required disclosure. Ariz. R. Civ. P. Rule 26.1(b)(1).

IV. Required Timing Of Disclosure in Arizona.

Rule 26.1 requires that parties make a full initial disclosure within forty days of a responsive pleading (absent stipulation to continue). Id. This includes all information that the parties know, at the time of filing that fulfill Rule 26.1(a). Surveillance, however, may likely be done after this forty day period. However, this duty to disclose is “a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed.” Ariz. R. Civ. P. Rule 26.1(b)(2). Information must be disclosed seasonably and no later than thirty days after receipt of the information, and a party wishing to use anything learned within sixty days of trial or sooner must “seek leave of court to extend time for disclosure.” Id.

A failure to adequately comply with disclosure requirements may result in exclusion of the evidence or sanctions. Ariz. R. Civ. P. Rule 37(c).