



STATE OF COLORADO SURVEILLANCE COMPENDIUM OF LAW

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Surveillance and Colorado Law

I. General Discovery Rule

Colorado Rules of Civil Procedure permit “discovery regarding any matter, not privileged, that is relevant to the claim or defense of any 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.” Colo. R. Civ. P. 26(b)(1). This limitation may be expanded when “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” Colo. R. Civ. P. 26(b)(1).

II. Work Product Privilege and Surveillance

1. *Work Product Doctrine*

The party claiming work product privilege must “make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Colo. R. Civ. P. 26(b)(5). The existence of protected materials must be disclosed.

Colorado permits discovery of materials prepared for trial “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.” Colo. R. Civ. P. 26(b)(3). Even when the requisite substantial need and undue hardship are shown, “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.” *Id.*

2. *Surveillance*

Surveillance materials are discoverable. See *Lascano v. Vowell*, 940 P.2d 977, 980 (Colo. App. 1996) (court held surveillance movies discrediting plaintiff’s injury claims were discoverable and “subject to production through pretrial procedure.”). Surveillance conducted in the normal course of business (e.g. insurance adjustment investigations) is not protected under the work product doctrine. *Hawkins v. District Court*, 638 P.2d 1372 (Colo. 1982). Investigative information can fall under the work product doctrine when it is prepared for specific litigation or there is a substantial probability of imminent litigation. *Id.* at 1378. However, if opposing counsel makes the requisite showing of substantial need and undue hardship, the protected materials may still be discoverable. See Colo. R. Civ. P. 26(b)(3).

In a bus accident case, the Colorado Supreme Court held that visual depictions of events do not reflect the mental process of counsel and are not absolutely protected from disclosure. *Watson v. Reg'l Transp. Dist.*, 762 P.2d 133, 142 (Colo. 1988). The defendant bus company filmed several reenactments of the accident and claimed the films were protected work product. *Id.* While the court agreed the film was work product, the plaintiffs demonstrated the substantial need and undue hardship necessary for discovery. Likewise, when surveillance does not reflect mental impressions, conclusions, opinions, or legal theories protected by Colo. R. Civ. P. 26(b)(3), it is discoverable.

III. Must Surveillance Be Disclosed in Colorado?

Surveillance must be disclosed during pretrial procedures. See *Crist v. Goody*, 507 P.2d 478 (Colo. App. 1972) (mistrial or continuance appropriate when defendant does not produce or reveal the existence of a surveillance video before trial); *Middleton v. Beckett*, 960 P.2d 1213 (Colo. App. 1998) (whether or not surveillance videos will be used at trial, their existence must be disclosed); *Lascano*, 940 P.2d at 977 (surveillance videos are subject to production through pretrial procedures).

Colorado Rules of Civil Procedure Form 20 (Pattern Interrogatories) permit questions regarding the existence and details of surveillance. Failure to disclose surveillance information may preclude its use at trial. See *Crist*, 507 P.2d 478.

IV. Required Timing of Disclosure in Colorado.

The timing of disclosure has not been directly addressed by Colorado's Supreme Court or Court of Appeals. In a case in the United States District Court for the District of Colorado, the court ordered surveillance information be produced, but only after the non-producing party is deposed. The court reasoned that because surveillance materials may be used as either substantive or impeaching evidence, it may be disclosed after the opposing party's deposition. The court noted that "[t]o preserve the . . . (producing party's) right to use the tapes as impeachment evidence. . . (the non-producing party's) deposition is to be completed before the tapes are produced." *Martino v. Baker*, 179 F.R.D. 588, 590 (D. Colo. 1998) (citation omitted).