



DISTRICT OF COLUMBIA SURVEILLANCE COMPENDIUM OF LAW

Prepared by

Tamara B. Goorevitz
Franklin & Prokopik, P.C.
Two North Charles Street, Suite 600
Baltimore, MD 21201
Phone: 410-752-8700
tgoorevitz@fandpnet.com
www.fandpnet.com

Surveillance and D.C Law

I. General Discovery Rule

Pursuant to Superior Court Rules of Civil Procedure Rule 26, parties may obtain discovery regarding any matter that is not privileged, and is relevant to the claim or defense of either party. This information may include “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.”

II. Work-Product Doctrine

The District of Columbia courts recognize that materials prepared in anticipation of litigation are generally protected under the work-product doctrine. However, under Civil Rule 26(b)(3), if a party seeking discovery demonstrates it has “substantial need of the materials” in preparation of its case and that it is “unable without undue hardship to obtain the substantial equivalent of the materials by other means,” the materials may not be protected.

Following the approach to the work-product doctrine set forth by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), the District of Columbia courts distinguish fact from opinion work-product. While facts prepared in anticipation of litigation may be discoverable subsequent to a showing of substantial need, there is a greater protection afforded to “the mental impressions, conclusions, opinions, or legal theories of an attorney or other party representative concerning the litigation.”

If the material sought is opinion work-product, the party seeking discovery may only overcome the work-product privilege with “a showing of extreme necessity.” See *Parks v. United States*, 451 A.2d 591, 608 (D.C. 1982). If the material sought is a combination of both fact and opinion work product, the court is instructed to view the materials *in camera*. The court should then apply the appropriate standard, either substantial need or extreme necessity, to each part of the material. *Parks*, 451 A.2d 591, 608.

III. Surveillance Disclosure in D.C.

While there are no District of Columbia cases directly addressing surveillance disclosure in civil litigation, the issue has arisen in a criminal context. In *Hicks v. United States*, the District of Columbia Court of Appeals considered whether the government has a qualified privilege to withhold the location of a secret surveillance post. The Court, finding that there was such a privilege, held the trial court had properly exercised its discretion in refusing to allow cross-examination as to the precise location of a police surveillance post. *Hicks v. U. S.*, 431 A.2d 18, 19-20 (D.C. 1981).

In order to overcome the government's qualified privilege to withhold the disclosure of the location of police surveillance post, a criminal defendant must demonstrate that this evidence is required to conduct his defense and that there are no adequate alternative means to do so. The Court must balance the defendant's interests in disclosure with the government's interest in continued secrecy. See Thompson v. United States, 472 A.2d 899, 900-01 (D.C. 1984).

In *Myers v. United States*, Myers, convicted of assault argued that the government's failure to provide her with a video recording from the bus on which the alleged assault took place was a discovery violation. According to the Myers, because the bus was owned by a government agency, the video was in the possession of the government and the government was required to preserve and protect it. Myers v. United States, 15 A.3d 688, 688 (D.C. 2011).

In evaluating Myers' argument, the District of Columbia Court of Appeals examined D.C. Superior Court Criminal Rule 16, which provides that upon the request of the defendant, the government must "permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the government, and which are material to the preparation of the defendant's defense." Myers, 15 A.3d 688, 690. The Court held, because the government agency was not involved in the investigation or prosecution of the case, the video was never in the "possession" of the government as contemplated under Rule 16 and therefore there had been no discovery violation. Myers, 15 A.3d 688, 692.

IV. Required Timing of Disclosure in D.C.

Generally, under criminal rules, the prosecution is required before trial to provide the defendant with adequate discovery to permit defendant to investigate and prepare his or her defense. This is not only a court rule, but also an issue of due process. In re Taylor, 73 A.3d 85, 102 (D.C. 2013). Under Criminal Rule 16, disclosure of certain tangible materials relevant to defendant's case is required upon the request of the defendant.

There are situations in which there may be additional requirements to be met before a defendant may compel disclosure of surveillance. As demonstrated in *Hicks*, the government must disclose the location of a surveillance post only after the defendant demonstrates his interests are sufficient to overcome the government's qualified privilege to withhold this information.