STATE OF NEW YORK SURVEILLANCE COMPENDIUM OF LAW

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Surveillance and New York Law

I. General Discovery Rule

NY CPLR § 3101, which governs discovery in the State of New York, states in relevant part, "Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." NY CPLR § 3101(a). The New York Court of Appeals has held that the terms "materially and necessary" should be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968). The purpose of liberal disclosure is "to ascertain truth and to accelerate the disposition of suits." *Rios v Donovan*, 21 A.D.2d 409, 411 (1st Dept. 1964) (superseded by statute on other grounds).

II. Work Product and Surveillance

1. Work Product

New York law provides for a strict immunity from discovery for "materials prepared by an attorney, acting as an attorney, which contain his [or her] analysis and trial strategy." *Graf v. Aldrich*, 94 A.D.2d 823, 824 (3d Dept. 1983); *Central Buffalo Project Corp. v. Rainbow Salads, Inc.*, 140 A.D.2d 943 (4th Dept. 1988). NY CPLR § 3101(c) states that "[t]he work product of an attorney shall not be obtainable." As it is an absolute bar to discoverability, courts construe the statute as narrowly as possible. *Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's*, 263 A.D.2d 367 (1st Dept. 1999), appeal dismissed, 94 N.Y.2d 875 (2000); *Zimmerman v. Nassau Hosp.*, 76 A.D.2d 921 (2d Dept. 1980). The burden to show work product or other immunity is on the party asserting the privilege. *Civil Serv. Employees Ass'n v. Ontario County Health Facility*, 103 A.D.2d 1000, 1001 (4th Dept. 1984). "[T]he mere assertion that items constitute attorney's work product or material prepared for litigation will not suffice." *Id.*; *Graf*, 94 A.D.2d, at 824.

2. Surveillance

While surveillance is often prepared with an eye toward litigation, it is not prepared by an attorney as an attorney, and therefore, is not protected as attorney work product. *Marte v. W.O. Hickok Mfg. Co.*, 154 A.D.2d 173, 176 (1st Dept. 1990). As materials that could be prepared by a layman, surveillance does not receive attorney work product protection. *Bloss v. Ford Motor Co.*, 126 A.D.2d 804, 805 (3d Dept. 1987). Under cases such as *DiMichel v. South Buffalo Ry. Co.*, 80 N.Y.2d 184 (1992), surveillance was treated as privileged material in anticipation of litigation. However, the legislature enacted NY CPLR § 3101(i), making surveillance fully discoverable. *Zegarelli v. Hughes*, 3 N.Y.3d 64, 67-69 (N.Y. 2004).

III. Must Surveillance Be Disclosed in New York?

NY CPLR § 3101(i) states that "there shall be full disclosure of any films, photographs, [and/or] video tapes … involving a person referred to in paragraph one of subdivision (a) of this section." This section was passed and added to the statutory scheme overruling *DiMichel, supra* (holding that video surveillance is privileged and only discoverable with a factual showing of substantial need and undue hardship). The Court of Appeals held in *Tai Tran v. New Rochelle Hosp. Med. Ctr.*, 99 N.Y.2d 383 (2003) and *Zegarelli v. Hughes*, 3 N.Y.3d 64 (2004) that "the provision in NY CPLR 3101(i) for 'full disclosure' of surveillance tapes removed them from the protection of NY CPLR 3101(d)(2), and put them on the same footing with other material discoverable under NY CPLR 3101(a)." *Zegarelli*, 3 N.Y.3d 64 at 68. While courts require full disclosure of video surveillance "including out-takes, rather than only those portions a party intends to use," *id.*, a party's disclosure obligation is only as broad as the scope of the request it receives. *See Duluc v. AC&L Food Corp.*, 2014 NY Slip Op. 05243 (1st Dept. 2014) (refusing to sanction a defendant who produced an 84-second portion of tape responsive to a demand for footage of the slip and fall but had lost all other footage from the date of the accident by the time the plaintiff served a second, more expansive demand).

The obligation to produce such materials applies both to surveillance obtained through sub rosa investigation and footage recorded in the ordinary course of a party's business. *See, e.g., Savino v. Great Atlantic & Pacific Tea Co., Inc.*, 22 Misc.2d 792 (Sup. Ct. Queens County 2008) (a defendant was required to turn over an unredacted copy of a store's video surveillance that was crucial to determining whether the plaintiff feigned a slip and fall); *Huang v. Di Yuan Karaoke*, 28 Misc.2d 920 (Sup. Ct. Queens County 2010) (ordering pre-action discovery of a bar's surveillance tapes in a matter involving alleged battery by a bouncer).

IV. Required Timing of Disclosure in New York

The court in *Tai Tran*, *supra*, recognized that the new statutory language of 3101(i) does not articulate the timing of disclosure. The legislature explicitly overruled the *DiMichael* holding with regard to privilege, but not timing. The Court of Appeals, thus, believes the legislature did not intend to codify the timing aspect held in *DiMichael*. By overruling the *DiMichael* privilege, "the timing rule lost its statutory moorings." *Tai Tran* at 388. Had the legislature wanted to impose a timing rule they would have. *Id.* at 389. As such, the general rule in New York is that "defendants no longer enjoy a qualified exemption for disclosure of surveillance tapes. We conclude that the liberal disclosure policy of CPLR article 31 is best served by interpreting CPLR 3101(i) to require full disclosure of surveillance tapes upon demand." *Di Nardo v. Koronowski*, 252 A.D.2d 69, 72 (4th Dept. 1998); *see also Rotundi v. Massachusetts Mut. Life Ins. Co.*, 263 A.D.2d 84, 87 (3d Dept. 2000); *see also Falk v. Inzinna*, 299 A.D.2d 120, 126 (2d Dept. 2002). As such, any policy toward withholding such evidence until after the plaintiff has been deposed is abolished. There is no timing requirement for the disclosure of surveillance evidence in New York; however, surveillance must be disclosed upon demand.