



STATE OF WEST VIRGINIA SURVEILLANCE COMPENDIUM OF LAW

Prepared by

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Surveillance and West Virginia Law

I. General Discovery Rule

Pursuant to West Virginia Rule of Civil Procedure 26(b), “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” The information sought need only appear “reasonably calculated to lead to the discovery of admissible evidence.” W. Va. R. Civ. P. 26(b).

Parties are only entitled to discover documents and tangible things “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative” only if the documents/things meet the relevancy description described above, “the party seeking discovery has substantial need of the materials in preparation of the party’s case,” and “the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” W. Va. R. Civ. P. 26(c)(3). “In ordering discovery of such materials when the required showing has been made, 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.*

II. Work Product Privilege and Surveillance

1. Work Product Doctrine

Under West Virginia law, materials protected under the work product doctrine are defined as “documents and tangible things prepared in anticipation of litigation or for trial.” W. Va. R. Civ. P. 26 (b)(3); *see also State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80 (W. Va. 2003)(stating the work product doctrine “historically protects against disclosure of the fruits of an attorney’s labor and is necessary to prevent one attorney from invading the files of another attorney.”). To determine if a material is protected under the work product doctrine, it must have been created by a party or its representative (including but not limited to a party’s attorney) with the “the primary motivating purpose” being to assist in pending or probable future litigation. *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 583 S.E.2d 80 (W. Va. 2003).

However, work product protections are not absolute. *Id.* Rather there is a distinction between factual and opinion work product. W. Va. R. Civ. P. 26(b)(3). Factual work product is “information or materials gathered or assembled by a lawyer in anticipation of litigation not falling under the category of opinion work product.” *State ex rel. Med. Assur. of W. Va., Inc.*, 583 S.E.2d at 90. While opinion work product “consists of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.*

A party asserting a privilege such as the work product doctrine to any of the specific documents requested must file a privilege log that identifies the document for which a privilege is claimed by name, date, custodian, source and the basis for the claim of privilege. *State ex rel. Nationwide Mut. Ins. Co. v. Kaufman* 658 S.E.2d 728, Syl. Pt. 2 (W. Va. 2008).

2. Surveillance

Although there is no blanket rule regarding the discoverability of surveillance footage under West Virginia law, the Supreme Court of Appeals of West Virginia has noted that “[a]lthough it is true that work product is essentially evidence prepared for trial, it is not such an elastic concept that video surveillance tapes suddenly, because of work product, become protected from discovery merely because an attorney decides to investigate and film a video tape.” *McDougal v. McCammon*, 455 S.E.2d 788, 796 (W. Va. 1995). Thus, although special circumstances may warrant a finding that surveillance footage is work product, such footage will most likely be discoverable under most circumstances.

III. Must Surveillance Be Disclosed In West Virginia?

Even if a party seeks to protect the disclosure of the actual surveillance footage based upon work product protection, the party must disclose the existence of such footage if it is requested through discovery. The failure to do so may result in “sanctions for failure of a party to supplement discovery as required by Rule 26(e) of the West Virginia Rules of Civil Procedure.” *Id.* at 797.

IV. Required Timing Of Disclosure in West Virginia.

If requested through discovery, surveillance videos must be disclosed during the normal course of the discovery process, as the purpose of discovery is to eliminate surprise. *Id.* at 796 (stating “the Rules of Civil Procedure do not contemplate trial by ambush.”). If the video is acquired after the close of discovery, the party in possession of the video must supplement the discovery request, as required by Rule 26(e) of the West Virginia Rules of Civil Procedure. *Id.* Failure to do so “is a violation of both the letter and spirit of one of the most important discovery rules.” *Id.*