



COMMONWEALTH OF PENNSYLVANIA SURVEILLANCE COMPENDIUM OF LAW

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Discovery of Surveillance and Pennsylvania Law

I. General Discovery Rule

Under Pennsylvania Rule of Civil Procedure 4003.1, a party may discover “any matter, not privileged, which is relevant to the subject matter involved in the pending action....” Pa. R.C.P. 4003.1(a). The scope of discovery in Pennsylvania is very broad. Discovery is permissible

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, content, 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.

Id. Permissible discovery needs to only be “reasonably calculated to lead to the discovery of admissible evidence;” it need not be admissible into evidence itself, it must only be reasonably calculated to *lead* to the discovery of admissible evidence. Pa. R.C.P. 4003.1(b).

The scope of discovery in Pennsylvania is further broken down into specific subject matters:

- Rule 4003.2—Scope of Discovery of Insurance
- Rule 4003.3—Scope of Discovery of Trial Preparation Material
- Rule 4003.4—Scope of Discovery of Statements
- Rule 4003.5—Discovery of Expert Testimony
- Rule 4003.6—Discovery if Treating Physicians
- Rule 4003.7—Discovery related to Imposition of Punitive Damages
- Rule 4003.8—Pre-Complaint Discovery

The discovery of surveillance information and video is governed by Pennsylvania Rule 4003.3—Scope of Discovery of Trial Preparation Material and its interpreting case law.

II. Work Product Doctrine

Pennsylvania’s interpretation of the work product doctrine differs from the Federal Rules of Discovery in two important respects: In Pennsylvania, you do not need to show a “substantial need” to obtain an opposing party’s trial preparation materials, and secondly, the “work product” protection afforded in Pennsylvania distinguishes between an attorney and a party’s representative. See, Pa. R.C.P. 4003.3 (1978 Explanatory Comment).

In Pennsylvania State Courts, pursuant to Rule 4003.3, “a party may obtain discovery of any matter...even though prepared in anticipation of litigation or trial by or for another party or by or for that other party’s representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent.” Pa. R.C.P. 4003.3. Discovery of mental impressions of an

attorney, his or her “conclusions, opinions, memoranda, notes or summaries, legal research or legal theories” is, however, *not* permitted. Id.

In regard to a party’s “representative,” (someone other than a party’s attorney) discovery shall not include “mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.” Id. Importantly, “[m]emoranda or notes made by the representative are *not* protected.” Pa. R.C.P. 4003.3 (1978 Explanatory Comment).

III. Surveillance

Surveillance video is clearly relevant and subject to discovery. The issue is when such information must be disclosed.

Under the Pennsylvania Rules of Civil Procedure, surveillance video of the Plaintiff *is* relevant and discoverable. See, Pa. R.C.P. 4003.1; Morganti v. Ace Tire & Parts, Inc., 70 Pa. D. & C. 4th 1, 9-10 (Ct. Cmm. P. 2004) (Allegheny Co.)(Wettick, J.) (quoting Dominick v. Hanson, 753 A.2d 824 (Pa. Super. 2000) (“Clearly a defendant’s videotaped surveillance of a plaintiff, who claims to have been injured as a result of the defendant’s negligence, is ‘relevant’ to the subject matter of the lawsuit.”). And, although, video surveillance can also be characterized as “work product” (it was only prepared in the anticipation of litigation, i.e. to obtain a visual demonstration of Plaintiff’s actual limitations, and in the hopes of obtaining some impeachment evidence for use at trial), under Rule 4003.3, only mental impressions, conclusions, or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics remain protected and not discoverable.

Pennsylvania Courts have recognized the competing interests at play when it comes to the issue of video surveillance—for Plaintiffs, it is securing a trial free from surprise, and for Defendants, it is the potential to expose fraud or exaggerated claims of injury. Pennsylvania Courts seek to strike a balance.

Under the law today, you do not need to disclose the existence of surveillance footage until (1) the Plaintiff requests video surveillance in discovery, and (2) the deposition of the surveilled individual is taken. Morganti v. Ace Tire & Parts, Inc., 70 Pa. D. & C. 4th 1 (Common Pleas 2004) (Wettick, J.). You may wait until after Plaintiff has been deposed to disclose the existence of the surveillance video to Plaintiff. This is true even if Plaintiff propounds discovery upon Defendant months before his or her deposition is taken and specifically requests Defendant to identify and produce any and all surveillance videos of Plaintiff. This Rule preserves the “impeachment value” of the surveillance, while giving the Plaintiff time to “test the integrity of the impeachment evidence.” Id. (internal citations omitted).

Pennsylvania's trial courts have based their rationale on previous Federal Court decisions such as Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148 (E.D. Pa. 1973), since the Pennsylvania Supreme Court has not had an opportunity to address the issue. See, Morganti v. Ace Tire & Parts, Inc., 70 Pa. D. & C. 4th 1 (Common Pleas 2004) (Wettick, J.), *supra*. In Snead, the Court was faced with a motion to compel Defendant's Answer to an Interrogatory inquiring into the existence of surveillance video and the details of the same. The Court, recognizing that Plaintiff had not yet been deposed, held that Defendant did not have to answer the interrogatories as to the existence of the surveillance video until after Plaintiff was deposed. The Court further held that Defendant would have to produce the video if he planned on using the same at trial.

Disclosure must be reasonable. One cannot wait until the eve of trial to disclose the existence of surveillance footage of the Plaintiff. See, Bindschusz v. Phillips, 771 A.2d 803 (Pa. Super. 2001) (surveillance video taken 6 days before trial, and not disclosed to Plaintiff in a supplemental discovery response, was excluded from use at trial); Duncan v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 813 A.2d 6 (Pa. Super. 2002) (previously undisclosed surveillance video excluded when first presented after close of Plaintiff's case); See also, Morganti v. Ace Tire & Parts, Inc., 70 Pa. D. & C. 4th 1 (Common Pleas 2004) (Wettick, J.) (concurring with the Superior Court's Opinion in Bindschusz, *supra*, that "[b]efore any disclosure [of surveillance video]..., the defense must be given an opportunity to depose the plaintiff fully as to his injuries, their effects and his present disabilities").

The above decisions demonstrate that once the Plaintiff has been deposed, disclosure of the surveillance information and video must be timely. Failure to do so jeopardizes its use at trial.